2017 IL App (1st) 160809-U

No. 1-16-0809

Order filed August 11, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DONNA STROUP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	Nos. 15 L 11254 &
	)	11 L 00064
DIOVONNE KEEL, DARNELL KEEL and THE CITY	)	
OF HARVEY, an Illinois municipal corporation,	)	Honorable
	)	Kathy M. Flanagan,
Defendants	)	Judge, presiding.
	)	
(Darnell Keel and The City of Harvey, an Illinois	)	
municipal corporation,	)	
	)	
Defendants-Appellees).	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: This court affirmed the orders of the circuit court. The police officer's affidavit constituted affirmative matter refuting the conclusions of law critical to the cause of action. In the absence of a counteraffidavit, dismissal of counts III and IV of the second amended complaint against the officer was proper. Summary judgment

for the City on counts III and IV of the third amended complaint was proper. The City's liability was based on *respondeat superior* and negated where the dismissal of those counts against the officer was proper.

¶ 2 The plaintiff, Donna Stroup, appeals from orders of the circuit court of Cook County dismissing with prejudice counts III and IV of her second amended complaint against the defendant, Darnell Keel (Darnell), and granting summary judgment to the defendant, the City of Harvey (City), on counts III and IV of her third amended complaint. On appeal, the plaintiff contends that: (1) the circuit court erred in granting Darnell's section 2-619(a)(9) motion to dismiss because Darnell's affidavit did not constitute affirmative matter, and (2) the court erred in granting summary judgment to the City because Darnell's dismissal was error.[1] For reasons stated below, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 I. Facts[2]

¶ 5 This is the second appeal in this case resulting from the January 2, 2011, automobile collision between a police vehicle, driven by Diovonne Keel (Diovonne) and a vehicle driven by the plaintiff. The police vehicle was owned by the City and was assigned to Darnell, Diovonne's father. The plaintiff sustained injuries as a result of the collision. Diovonne was arrested and charged with reckless driving.

¶ 6 II. Circuit Court Proceedings

[1] The plaintiff concedes that this court lacks jurisdiction to consider the issues she argued in her appellant's brief regarding the grant of summary judgment to the City on counts V and VI of the third amended complaint.

[2] A detailed statement of facts is contained in our Rule 23 Order disposing of the first appeal, and it is unnecessary to restate them here. See *Stroup v. Keel*, 2015 IL App (1st) 142858-U.

¶ 7 On April 30, 2012, the plaintiff filed a 12-count second amended complaint against Darnell and the City.[3] Relevant to this appeal, in count III of the second amended complaint, the plaintiff alleged negligent entrustment of a police vehicle to Diovonne against Darnell, individually and as an agent of the City. In count IV, the plaintiff alleged willful and wanton entrustment of a police vehicle to Diovonne against Darnell, individually and as an agent of the City.[4]

¶ 8 Darnell filed a motion to dismiss all claims against him pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). In support of his motion to dismiss, Darnell attached his affidavit. In his affidavit, Darnell averred that Diovonne did not have permission to use the police vehicle on the date of the accident; that Diovonne had never driven the police vehicle prior to the date of the accident; that Diovonne had never asked to drive the police vehicle on a prior occasion; that Diovonne had never indicated an intent to drive the police vehicle; and he had no reason to believe that Diovonne would drive the police vehicle.

¶ 9 On August 20, 2012, the circuit court granted Darnell's motion and dismissed counts III and IV of the second amended complaint with prejudice and dismissed counts VII, VIII, IX and X against him with leave to replead. The court granted the plaintiff leave to file a third amended complaint. On November 16, 2012, the court denied the plaintiff's motion for reconsideration.

¶ 10 Following the filing of the third amended complaint, Darnell and the City filed motions for summary judgment. On August 18, 2014, the circuit court granted summary judgment to Darnell and the City on all counts remaining against them in the third amended complaint. The

[3] The court entered a default judgment against Diovonne on counts I and III of the first amended complaint.

[4] Counts V through XII are not at issue in this appeal.

court made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no reason to delay enforcement or appeal of the August 18, 2014, order.

¶ 11 III. First Appeal

¶ 12 This court determined that the plaintiff's appeal of the dismissal with prejudice of counts III and IV of the second amended complaint against Darnell must be dismissed. Neither the August 20, 2012, order of dismissal nor the November 16, 2012, order denying the plaintiff's motion for reconsideration contained a Rule 304(a) finding making final orders as to less than all parties or claims appealable. Therefore, this court lacked jurisdiction to consider the plaintiff's contentions related to those counts. *Stroup*, 2015 IL App (1st) 142858-U, ¶ 30. This court also found the circuit court had abused its discretion in making a Rule 304(a) finding in its order granting summary judgment to the City on counts III and IV. In the absence of jurisdiction to review the dismissal of counts III and IV against Darnell, we determined it would be unfair to review the causes of action related to City on the *respondeat superior* grounds. See *Stroup*, 2015 IL App (1st) 142858-U, ¶ 38. Finally, this court affirmed summary judgment on the remaining counts of the third amended complaint. *Stroup*, 2015 IL App (1st) 142858-U, ¶ 66.

¶ 13 IV. Circuit Court Proceedings on Remand

¶ 14 On February 25, 2016, the circuit court entered an order finding no just reason to delay enforcement or appeal of its orders of August 12, 2012, dismissing counts III and IV (alleging negligent and willful and wanton entrustment of a police vehicle) of the second amended complaint against Darnell and August 18, 2014, granting summary judgment on counts III and IV of the third amended complaint to the City.

¶ 15 The plaintiff filed a timely notice of appeal from the order of February 25, 2016.

¶ 16 ANALYSIS

¶ 17 I. Counts III and IV of the Second Amended Complaint

(Darnell)

¶ 18 The plaintiff contends that the circuit court erred when it dismissed with prejudice counts III and IV of the second amended complaint alleging negligent and willful and wanton entrustment of a police vehicle against Darnell. She maintains that Darnell's affidavit did not constitute "affirmative matter" for dismissal pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)).

¶ 19 A. Standard of Review

¶ 20 The dismissal of a complaint under section 2-619 of the Code is reviewed *de novo*. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 35.

¶ 21 B. Discussion

¶ 22 A section 2-619 motion to dismiss admits that the complaint's allegations are true, and the complaint states a cause of action, but a defense exists that defeats the claim. *Doe*, 2015 IL App (1st) 133735, ¶ 40. A proper section 2-619 motion is described as a "yes but" motion whereas an improper section 2-619 motion is a "not true" motion. In other words, if the motion merely attempts to refute a well-pleaded the allegation in the complaint, dismissal is inappropriate. *Doe*, 2015 IL App (1st) 133735, ¶¶ 40-41.

¶ 23 Section 2-619(a)(9) permits dismissal where " 'the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim.' " *Doe*, 2015 IL App (1st) 133735, ¶ 37(quoting 735 ILCS 5/2-619(a)(9) (West 2012)). The "affirmative matter" has been described as:

> "[A] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact contained or inferred from the complaint ***[not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint. [Citation.]' (Internal quotation marks omitted.)" *Doe*, 2015 IL App (1st) 133735, ¶ 38 (quoting *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008)).

¶ 24 The defendant has the initial burden of establishing that the affirmative matter defeats the plaintiff's claim. Once the defendant satisfies the burden of putting forward his affirmative matter, the burden shifts to the plaintiff to demonstrate that the defense is unfounded or requires the resolution of a material fact. If the plaintiff fails to carry the shifted burden of proof, the complaint will be dismissed. *Doe*, 2015 IL App (1st) 133735, ¶ 37.

¶ 25 To determine if the dismissal of counts III and IV of the second amended complaint against Darnell was proper, we must determine whether Darnell's affidavit constituted affirmative matter that would defeat the plaintiff's claims of negligent and willful and wanton entrustment against him. If the affidavit constituted affirmative matter, shifting the burden of proof to the plaintiff, we must determine whether the plaintiff properly countered that evidence.

¶ 26 Count III alleged that Darnell negligently entrusted a police vehicle to Diovonne where: on occasions prior to January 2, 2011, and on January 2, 2011, Diovonne, with the express or implied knowledge of Darnell, accessed the keys to the police vehicle assigned to Darnell and operated the vehicle. Count IV contained the same allegations with the addition that Darnell's conduct was reckless and willful and wanton. See *Oelze v. Score Sports Venture, LLC*, 401 Ill.

App. 3d 110, 122 (2010) (a nonintentional willful or wanton act is committed under circumstances showing a reckless disregard for the safety of others).

¶ 27 The plaintiff argues that the well-pleaded facts in her second amended complaint establish that Darnell knew or should have known that Diovonne would drive the police vehicle. While this court must take the plaintiff's well-pleaded facts as true, conclusions of law and conclusory factual allegations not supported by allegations of specific fact are not deemed admitted. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 720 (2004). Counts III and IV do not allege specific facts or from which an inference could be made in support of the conclusory factual allegation that Darnell gave expressly or by implication Diovonne permission to operate the police vehicle prior to and on January 2, 2011.

¶ 28 For the defendant to be liable under a negligent-entrustment theory, the individual driving the vehicle must have been given express or implied permission by the defendant to be driving the vehicle at the time of the accident. *Evans v. Shannon*, 201 Ill. 2d 424, 439 (2002). The averments in Darnell's affidavit refute the plaintiff's conclusory factual allegation that the Darnell had given express or implied permission to Diovonne to drive the police vehicle prior to or on January 2, 2011, the date of the accident. Therefore, Darnell's affidavit constitutes affirmative matter for purposes of dismissal pursuant to section 2-619(a)(9) of the Code.

¶ 29 Since Darnell's affidavit constituted affirmative matter, the burden of proof shifted to the plaintiff to show that the defense was unfounded or required the resolution of an essential element of material fact before it is proven. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 353 (2010). The plaintiff may not rely simply on the allegations of the complaint to refute a section 2-619 affidavit. *Piser*, 405 Ill. App. 3d at 352-53. In order to refute

evidentiary facts contained in a defendant's supporting affidavit, the plaintiff must file a counteraffidavit. *Piser*, 405 Ill. App. 3d at 353.

¶ 30 "The failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the facts stated therein." *Piser*, 405 Ill. App. 3d at 352. Since the plaintiff did not file a counteraffidavit, the facts in Darnell's affidavit are therefore deemed admitted. See *Piser*, 405 Ill. App. 3d at 352. Moreover, even assuming, *arguendo*, a question of fact existed, the failure to properly contest the affidavit by submitting a counteraffidavit is fatal to the cause of action. *Piser*, 405 Ill. App. 3d at 352.

¶ 31 We conclude that the circuit court did not err when it granted Darnell's section 2-619(a)(9) motion to dismiss counts III and IV of the second amended complaint.

¶ 32 II. Counts III and IV of the Third Amended Complaint

(City)

¶ 33 The plaintiff contends that because the dismissal of counts III and IV of the second amended complaint against Darnell was error, the court erred in granting summary judgment to the City on counts III and IV of the third amended complaint.

¶ 34 In light of our determination that dismissal of counts III and IV against Darnell was proper, summary judgment to the City on counts III and IV, alleged on *respondeat superior* grounds, was also proper.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court is affirmed.

¶ 37 Affirmed.