2017 IL App (3d) 150331-U

Order filed January 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

GERALD GROHN,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois.
	)	
	)	
v.	)	Appeal No. 3-15-0331
	)	Circuit No. 12 L 859
	)	
CENTRAL SQUARE COMMITTEE,	)	
a Voluntary Unincorporated Association,	)	The Honorable
	)	Michael J. Powers,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Trial Court properly granted summary judgment on negligence and willful conduct counts to public entity owner of premises used for recreational purposes and did not abuse its discretion in denying plaintiff's motion to amend willful conduct count.

¶ 2 The plaintiff, Gerald Grohn (Grohn), filed a two count third amended complaint against the defendant, Central Square Committee (Central), a voluntary unincorporated association, seeking damages for injuries he allegedly sustained at the Central Square Building (CSB) in

Lockport, Illinois, on April 13, 2012. Count I alleged the defendant was negligent in the maintenance of the CSB and count II alleged the defendant's conduct in failing to properly maintain the premises was willful and wanton. The circuit court of Will County granted the defendant's motion for summary judgment as to both counts. After the entry of summary judgment for the defendants, the plaintiff sought leave to amend count II. The trial court denied the motion to amend the complaint. Following the denial of his motion to reconsider, the plaintiff brought this timely appeal.

¶ 3 On appeal, the plaintiff contends the trial court erred in granting summary judgment where (1) the property on which the plaintiff sustained his injury is not "recreational property" within the meaning of section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-106 (West 2012); and (2) the pleadings, depositions and affidavits raise a genuine issue of material fact regarding whether the defendant engaged in willful and wanton misconduct. The plaintiff also contends the trial court abused its discretion in denying his motion to amend the complaint regarding the willful and wanton count. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 On April 13, 2012, Grohn was entering the CSB when he fell in near proximity to a rubber mat that was immediately adjacent to the entrance to the building. The incident occurred at approximately 12:05 p.m. as he was taking his grandson to preschool facility on the first floor of the building. The evidence established that Grohn was entering through "door 3" on west side of the building when he fell, struck his head, and was injured. Grohn described the mat as "a big heavy snow mat" approximately one-inch thick and positioned approximately six inches to a foot in front of the entrance and extending three to four feet out toward the parking lot. Grohn

testified that the mat was visible as he approached the building and there was no obstruction to his view of the mat. He testified that he noticed a left front corner of the mat appeared to be turned up. As he approached the door, he turned toward that corner of the mat and directed his gaze toward the door. He testified that, as he approached the door, he "must have tripped or something" and the next thing he remembered was extreme pain from his face hitting the ground.

¶ 6 In his complaint, Grohn alleged that on several occasions prior to April 13, 2012, children and other persons would play and use skateboards or other toys in such a manner as to move, relocate, displace, and fold the mat. He further alleged that the mat was intended as a snow mat for use during the winter and its presence in April served no useful purpose. He maintained that the condition of the mat was such as to cause a hazard to individuals entering and exiting the building. Grohn also alleged that he and members of his family had complained to maintenance employees that the mat was a hazard that need to be corrected, but no such action had been taken prior to the incident.

¶ 7 The defendant moved for summary judgment, asserting that they were immune from liability for negligence under section 3-106 of the Tort Immunity Act, which provides as follows:

> "Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106 (West 2010*).*

¶ 8 In support of its motion for summary judgment, Central provided evidence by affidavit establishing that the CSB was built in 1979 as a jointly owned facility of the City of Lockport

(City), The Lockport Township Park District (Park District), and The Lockport Township Board of Governors (Board). At that time the building was opened the aforementioned entities entered into an intergovernmental agreement that created the Central Square Committee to oversee the maintenance and repair of the building. The Agreement provided that the three entities would equally share in the costs for upkeep, maintenance, and repair of the building. The intergovernmental agreement was executed pursuant to the Intergovernmental Cooperation Act. 5 ILCS 220/1 *et seq.* (West 2010). Affidavits and deposition testimony supporting the motion further established that, at the time of the alleged accident, the Park District occupied the first floor of the building, the City occupied the second floor, and the Board occupied the third floor. Additionally, the evidence established that the Park District used its space for various programs, including a preschool program for children ages two to four, adult and child karate classes, youth basketball, indoor soccer, indoor cheerleading, and other similar programs in a large gymnasium located on the premises. The evidence also established that the Park District maintained its administrative offices at the CSB.

¶ 9 Grohn opposed the defendant's motion for summary judgment, maintaining that: (1) the defendant was not "local public entity" protected by the Tort Immunity Act; and (2) the CSB could not be characterized as a "recreational facilit[y]" within the meaning of the Act. The trial court rejected both arguments, finding that no genuine issue of material fact existed regarding Central's status as a "public entity" or the intended and permitted use of the CSB for recreational purposes. Thus, applying the immunity granted under the Act, the trial court granted Central summary judgment on count I. Finding no evidence to establish a genuine issue fact regarding Grohn's willful and wanton count, the trial court also granted summary judgment to Central on count II of the complaint. Grohn's motion for leave to amend count II was denied by the trial

court. The court noted that judgment had been rendered on the complaint, and that it would not be proper to allow the filing of a fourth amended complaint after entry of summary judgment. Grohn appeals the trial court's granting of summary judgment and the denial of his motion to amend count II of the complaint.

¶ 10 ANALYSIS

¶ 11 1. Summary Judgment

¶ 12 Summary judgment is properly granted when the pleadings, depositions, and the affidavits show that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1990). On review, this court must determine *de novo* if the trial court correctly decided that no genuine issue of material fact exists. *PNC Bank, National Ass'n v. Zubel*, 2014 IL App (1st) 130976 ¶ 13. In reviewing a trial court's ruling on a motion to dismiss, a court must construe the evidence strictly against the moving party to determine whether a genuine issue of material fact exists that would preclude judgment for the movant. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Likewise, to survive a motion for summary judgment, the nonmoving party must present some evidentiary facts that would arguably entitle him to judgment. *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004).

¶ 13 As a threshold matter, Central argues in its brief that it is a "local public entity" entitled to immunity under the Act. It points out that the term "local public entity" is broadly defined under the Act as including "any intergovernmental agency or similar entity formed pursuant to the *** Intergovernmental Cooperation Act [5 ILCS 220/1 *et seq.* (West 2012)] as well as any not-for-profit corporation organized for the purpose of conducting public business." 745 ILCS 10/1-206 (West 2012). It maintains that the pleadings, depositions and affidavits conclusively

establish that it is a "local public entity" within the scope of the Act. We agree. Moreover, we note that Grohn has not argued in this appeal that the trial court erred in finding that Central is a "local public entity."

¶ 14 On appeal, Grohn maintains that the trial court erred in granting summary judgment to Central based upon its finding that the CSB was property intended or permitted to be used for recreational purposes protected under the Act. We disagree.

¶ 15 The issue is whether the CSB is "public property intended or permitted to be used for recreational purposes" as contemplated by section 3-106 of the Tort Immunity Act. *Kayser v. Village of Warren*, 303 Ill. App. 3d 198, 201 (1999). Grohn argues that the CSB is not within the purview of section 3-106 because less than one-third of the building is used for activities that could possibly be characterized as "recreational purposes." He points out that two of the occupants of the CSB (the City, and the Board) did not utilize the building for recreational purposes, while the other occupant (the Park District) also used the building for non-recreational purposes since its administrative offices were located in the building. He further maintains that the area where the injury occurred, door 3 on the west side of the building, allowed access not only to the Park District's activities on the first floor, but also allowed access to non-recreational activities taking place in the City and Board offices on the second and third floors.

¶ 16 Local public entities are generally held to the same standard as private tortfeasors and under the common law have a duty to exercise ordinary care to maintain their property in a reasonably safe condition. *Bubb v. Springfield School District 186*, 167 Ill. 2d 372, 377 (1995). Section 3-106 of the Tort Immunity Act, however, provides public entities with an affirmative defense against simple negligence claims arising from conditions present on any public property intended or permitted to be used for recreational purposes, regardless of the primary purpose of

the property. *Bubb, Id. at 378; Kayser*, 303 Ill. App. 3d at 200. This section of the Tort Immunity Act was enacted with the purpose of encouraging the development and maintenance of "public parks, playgrounds, and similar recreation areas." *Lewis v. Jasper County Community Unit School District No. 1*, 258 Ill. App. 3d 419, 422 (1994).

¶ 17 Grohn first argues that the situs of the alleged accident was an entrance area leading into the CSB and not the actual building. Thus, he maintains, there can be no recreational purpose associated with the location of his injury. This argument is not persuasive. It is well-settled that sidewalks, walkways, and parking lots adjacent to public recreational facilities increase the usefulness of those facilities and therefore are encompassed within the purview of section 3-106 of the Tort Immunity Act. *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 508 (1997); *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 41 (2003); *Annen v. Village of McNabb*, 192 Ill. App. 3d 711, 713 (1990). Thus, if the CSB is a public recreational facility covered by section 3-106, the fact that Grohn's injuries occurred near the door or entranceway to the building is not relevant to the applicability of immunity granted under the Tort Immunity Act.

¶ 18 Regarding whether the CSB is a facility intended or permitted to be used for recreational purposes, Grohn acknowledges that the defendant established through affidavit and deposition evidence that the CSB had some recreational purposes. He maintains, however, that the defendant failed to establish that those "recreational purposes" were either the primary or the proportional majority of the purposes for which the CSB was intended or permitted. We do not agree that section 3-106 requires that intended or permitted recreational purposes of a public building must be either the primary or the majority purpose of the building in order for statutory immunity to apply.

¶ 19 As our supreme court has recognized, public property may have more than one intended use. *Bubb*, 167 Ill. 2d at 383. The court in *Bubb*, however, expressly rejected a primary purpose analysis to determine intended or permitted recreational use of public property. *Id. at 381* (Tort Immunity Act does not require examination of facilities "primary" purpose). Regarding Grohn's proportionality argument, our courts have consistently held that the fact that a public facility has both recreational and non-recreational purposes does not defeat the applicability of section 3-106 of the Tort Immunity Act. *Kayser*, 303 Ill. App. 3d at 203; *Wallace v. Metropolitan Pier & Exposition Authority*, 302 Ill. App. 3d 573, 578 (2001). Where public property has both recreational and non-recreational uses, the test for applicability of section 3-106 immunity is not whether the recreational use is greater than the non-recreational use, but simply whether the property has been used for recreational purposes in the past or whether recreation has been encouraged on the property. *Wallace*, 302 Ill. App. 3d at 577 citing *Bubb*, 167 Ill. 2d at 382.

¶ 20 In order to determine whether a public facility has intended or permitted recreational purposes, it is necessary to define the phrase "recreational purposes." Generally, our courts have defined "recreational purposes" broadly to include both "active" and "passive" activities involving "amusement, diversion, or enjoyment." *Ozuk v. River Grove Board of Education*, 281 Ill. App. 3d 239, 243-44 (1996). Thus, public facilities with recreational purposes have included "a multi-purpose facility used for meetings, shows, expositions, rodeos, boxing matches, wrestling events, basketball games and tournaments, karate tournaments and other public events." *Wallace*, 302 Ill. App. 3d at 578 citing *Diamond v. Springfield Metropolitan Exposition Auditorium Authority*, 44 F. 3d 599, 604 (1995). Our courts have, however, consistently found that an isolated or occasional "recreational use" of a public facility, such as special band concert on a courthouse lawn, will not trigger section 3-106 immunity. *John v. City*

of Macomb, 323 Ill. App. 3d 877, 880 (1992); *Larson v. City of Chicago*, 142 Ill. App. 3d 81, 87 (1986).

¶ 21 In the instant matter, the evidence of record established that there was no genuine issue of material fact concerning whether the CSB was a public facility having intended and permitted recreational purposes under section 3-106 of the Tort Immunity Act. The record contained unrebutted testimony from a competent witness that the CSB was used for numerous and varied recreational activities, including adult and child karate classes, youth basketball games and practices, indoor soccer, indoor cheerleading, and other activities (active and passive) intended for the amusement, diversion, and enjoyment of the public. Grohn provided no evidence to the contrary, suggesting instead that the current state of the pleadings was insufficient to establish the recreational purposes of the facility. We disagree. When the party moving for summary judgment supplies evidence in support of that motion that, if not contradicted by competent evidence, would entitle the party to summary judgment, the opposing party cannot rely on the pleadings alone to raise issues of material fact. *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 232 Ill. App. 3d 8, 12 (1992). Here, Grohn offered no evidence to support an argument that the recreational uses of the CSB were isolated or occasional. We hold, therefore, that the CSB is public property intended or permitted to be used for recreational purposes entitling the defendant to immunity on count I of the complaint. We affirm the trial court's judgment on negligence count (count I) of the complaint.

¶ 22 We next address the trial court's grant of summary judgment in favor of Central on the willful and wanton conduct count of the complaint (count II). Pursuant to section 3-106, Central is not liable for Grohn's injuries unless it "is guilty of willful and wanton conduct proximately causing" his injury. 745 ILCS 10/3-106 (West 2012); *Fennerty v. City of Chicago*, 2015 IL App

(1st) 140679 ¶ 17. The Tort Immunity Act provides that a public entity engages in willful and wanton conduct if its actions show "an actual or deliberate intention to cause harm or which, if not intentional show[ ] an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-120 (West 2012). The public entity's knowledge regarding the safety of others can be either actual or constructive. *Tagliere v. Western Springs Park District*, 408 Ill. App. 3d 235, 242-43 (2011). However, "willful and wanton misconduct must be manifested by the well-pled facts contained in the complaint. *Majewski v. Chicago Park District*, 177 Ill. App. 3d 337, 341 (1988). The mere characterization of actions as "willful and wanton" misconduct is insufficient to survive summary dismissal. *Cipolla v. Bloom Township High School District No. 206*, 69 Ill. App. 3d 434, 437 (1979).

¶ 23 The question of what constitutes willful and wanton conduct is generally reserved for the trier of fact; however, a court may make a determination of that issue on summary judgment if the evidence so overwhelmingly favors one party that a contrary determination cannot stand. *Lester v. Chicago Park District*, 159 Ill. 2d 415 (1987). Here, the record contained no evidence of the defendant's alleged willful and wanton misconduct proximately causing the plaintiff's injuries. The only record evidence regarding the defendant's actual or constructive knowledge of an alleged dangerous condition that it failed to remedy was an affidavit given by the plaintiff's son wherein he recounted an alleged telephone conversation with an unidentified individual assumed to be the defendant's maintenance supervisor. During this conversation the unnamed individual was supposed to have stated that he was aware that someone had previously tripped over the mat located near the door 3 entrance to the CSB. The affiant was not sure when the conversation took place.

¶ 24 We find this evidence is insufficient to create a genuine issue of material fact regarding the actual or constructive knowledge of the defendant regarding any dangerous condition proximately causing the plaintiff's injury. In contrast to the plaintiff's son's speculation that he was speaking to an agent of the defendant with knowledge of the alleged dangerous condition, the defendant's motion for summary judgment was accompanied by the deposition testimony of Larry Pena, the maintenance official in charge of the area, whose testimony contained no statement that he or any other responsible individual was aware of prior complaints of injuries sustained as the result of tripping over the mat located at door 3 of the CSB. Simply put, while there is a scintilla of evidence that the defendant might have had constructive knowledge of an alleged dangerous condition, it is insufficient to establish that a genuine issue of material fact exists so as to preclude summary judgment for the defendant. *Benner v. Bell*, 236 Ill. App. 3d 761, 768-69 (1992) (a scintilla of evidence to support a verdict against a defendant does not create an issue of material fact that will defeat a motion for summary judgment); *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584 (2007) ("Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment.").

¶ 25 We find no evidence was presented by Grohn to establish that there was a genuine issue of material fact regarding the defendant's actual or constructive knowledge of the existence of a dangerous condition which proximately caused his injuries. We therefore affirm the trial court's grant of summary judgment to the defendant on count II of the complaint.

¶ 26 2. Leave to Amend the Complaint

¶ 27 Grohn next maintains that the trial court erred in denying his motion for leave to amend count II of the complaint following the court's grant of summary judgment on that count. Motions to amend pleadings are governed by section 2-616 of the Code of Civil Procedure

(Code) (735 ILCS 5/2-616) (West 2012). Regarding the timing for such motions, section 2-616(a) provides "[a]t any time before final judgment amendments may be allowed on just and reasonable terms *** in any manner, either of form or substance, in any process, pleading *** which may enable the plaintiff to sustain the claim for which it was intended to be brought ***." 735 ILC 5/2-616(a) (West 2012). Additionally, a complaint may be amended "at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2012). With regard to motions to amend the pleadings after entry of summary judgment, section 5/2-1005(g) of the Code provides that "[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2012).

¶ 28 Our courts have a liberal policy of allowing amendments of pleadings, but that right is not unlimited. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). A trial court is permitted wide discretion in granting or denying motions to amend pleadings, and its decision will not be overturned on appeal absent an abuse of discretion. *Lee*, *Id*. at 467. An abuse of discretion occurs when no reasonable person would agree with the trial court's ruling. *1515 N. Wells, L.P. v. 1515 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009). The factors in deciding whether a trial court abused its discretion on a motion to amend a pleading include: (1) whether the amendment would cure a defect in the pleading; (2) whether the proposed amendment was timely; (3) whether the opposition would be prejudiced or surprised by the amendment; and (4) whether there were earlier opportunities to amend the pleading. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). The party seeking leave to amend must establish all four factors set forth in *Loyola*. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010).

¶ 29 Having considered each of the four *Loyola* factors, we find no abuse of discretion in the trial court's denial of Grohn's motion to amend the willful and wanton count of his complaint. Specifically, we note that Grohn's proposal to amend the complaint was based upon the record that existed at the time the trial court granted the motion for summary judgment. The trial court observed that there was no evidence in the record that would have allowed Grohn to plead facts that would have established a *prima facie* case on the willful and wanton count. *Majewski*, 177 Ill. App. 3d at 341 ("willful and wanton misconduct must be manifested by the well-pled facts contained in the complaint"). Since there were no facts which could be plead to allege willful and wanton misconduct, the court did not err in denying the motion to amend. *Regas v. Associated Radiologists, Inc.*, 230 Ill. App. 3d 959, 968 (1992) ("[w]here it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied").

¶ 30 We further note that the fourth *Loyola* factor, whether there were earlier opportunities to amend that pleadings, supports the trial court's ruling. In denying the motion to amend the complaint, the trial court observed that the motion should have been made prior to entry of summary judgment. While Grohn is correct in asserting that he may be allowed to amend his complaint at any time, even after entry of summary judgment, it is equally correct that the court may deny his motion to amend if an earlier opportunity existed. *Loyola*, 146 Ill. 2d at 273. Here, the trial court noted a lack of evidentiary facts either in the complaint or in the record to support the willful and wanton count. The court's observation that the motion to amend should have been made prior to entry of summary judgment appears to be refer the availability of further discovery prior to entry of judgment. We cannot say that the trial court's determination that the motion to amend the compliant should have been filed before entry of summary judgment was

one that no reasonable person would make under the facts and circumstances. We therefore find no abuse of discretion in denying the motion for leave to amend count II of the complaint.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 33 Affirmed.