2018 IL App (1st) 180147-U

THIRD DIVISION
September 28, 2018

No. 1-18-0147

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

PEOPLE FOR A SAFER SOCIETY, Plaintiff-Appellant, v. THE VILLAGE OF NILES, a municipal corporation, and 6143 HOWARD VENTURE, LLC, an Illinois corporation, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 14 CH 16850 Honorable Franklin Ulyses Valderrama, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1. *Held*: The judgment of the circuit court of Cook County is affirmed; plaintiff, an Illinois not-for-profit corporation, failed to establish it had standing to challenge a special use permit granted by the Village of Niles; plaintiff's members did not face special harm different from what the general public faces.

¶ 2. This is the second time this case has come before us. In the first appeal the trial court dismissed the complaint for lack of standing. We reversed the dismissal under section 2-619 for lack of standing because plaintiff, People for a Safer Society, established standing when it alleged a special harm suffered by one of its members. However, we affirmed the trial court's

dismissal under section 2-615 because the harm as pleaded was speculative. We remanded the case with directions that the trial court allow plaintiff to amend the complaint. On remand, the trial court dismissed plaintiff's second amended complaint for lack of standing. For the reasons that follow we affirm the judgment of the trial court.

¶ 3. BACKGROUND

¶ 4. The Village of Niles (Niles) enacted an ordinance approving the special use permit application of 6143 Howard Venture, LLC (Howard Venture) to open a gun store and indoor firing range at 6143 Howard Street, Niles, Illinois (the "Howard property"). Plaintiff appeals from the trial court's dismissal of its second amended complaint alleging Niles' grant of a special use permit to Howard Venture was unconstitutional. Plaintiff, an Illinois not-for-profit corporation, was formed for the purpose of reducing gun violence and improving care for the seriously mentally ill, and it represents members from various Chicago neighborhoods. Plaintiff sought injunctive and declaratory relief to prevent Howard Venture from operating a gun store and indoor firing range at the Howard Property.

¶ 5. The amended complaint alleged the ordinance is unconstitutional based on a substantive due process violation because the ordinance is arbitrary, irrational, unreasonable, capricious, and bears no substantial relation to the public health, safety, welfare, or morals. The complaint alleged the harms of reduction in tax revenue for Niles, as well as reduction of property values and commercial activity in Niles. In addition, the complaint argued New Hope Academy, a therapeutic school serving students ages 11-21 who have severe/profound emotional disabilities, would be displaced should Howard Venture be allowed to operate a gun shop at the Howard property. The complaint sought relief of declaring the ordinance unconstitutional to prevent the construction and operation of a gun shop on the Howard property, and any other relief the court

deemed just.

¶ 6. Defendants filed motions to dismiss the amended complaint under sections 2-615 and 2-619 arguing the plaintiffs lacked standing because they were not owners of property adjacent to or adjoining the Howard property, and because the complaint failed to properly raise an as-applied constitutional challenge. When a plaintiff complains of an injury from the rezoning of a third party's property, to have standing to bring the complaint, the plaintiff must assert they face special harm that differs from the harm suffered by the general public. *Garner v. Du Page County*, 8 Ill. 2d 155, 158-59 (1956).

¶ 7. The trial court agreed with defendants that the plaintiffs lacked standing and that the amended complaint was deficient under section 2-615. The court accordingly dismissed the first amended complaint under sections 2-615 and 2-619. 735 ILCS 5/2-615, 2-619 (West 2016). Plaintiffs appealed and the matter came before this court.

¶ 8. We affirmed the trial court's dismissal under section 2-619 with prejudice as to several individual plaintiffs who are not parties to the second amended complaint, finding those plaintiffs did not have standing because they did not allege they faced special harm different than the general public faced. *People for a Safer Society v. Village of Niles*, 2017 IL App (1st) 160674-U. However, we found the trial court erred dismissing plaintiff's claim under section 2-619 because plaintiff articulated a special harm such that it had standing to pursue the claim. New Hope Academy, one of plaintiff's members, alleged it would be displaced as a consequence of the new ordinance and this was a sufficient allegation of a special harm to establish standing. Although plaintiff had standing on the basis of New Hope Academy, we affirmed the trial court's dismissal of plaintiff's claim under section 2-615 because the harm plaintiff claimed was too speculative, and we directed the trial court to grant plaintiff leave to file an amended complaint.

¶ 9. On remand, plaintiff filed its second amended complaint, which is at issue in the present appeal. The second amended complaint alleged plaintiff's members are located in close proximity to the Howard property and will therefore feel the adverse effects of a gun shop operating more than the larger community. Plaintiff also alleged two of its members faced special injury differing from the general public: 1) New Hope Academy had been displaced due to facing the prospect of a gun shop operating in close proximity; and, 2) Lifeway Foods, Inc. (Lifeway) faces special harm because it will be required to change its security procedures and incur additional costs for numerous security measures which were alleged in paragraph 59 of the second amended complaint. Plaintiff again sought injunctive and declaratory relief. The second amended complaint did not seek monetary damages.

¶ 10. Defendants filed a motion to dismiss plaintiff's second amended complaint under sections 2-615 and 2-619. Plaintiff attached to its response the affidavit of Douglas Hass, general counsel for Lifeway, who averred that the new security measures would be required if a gun shop operated at the Howard property and that the security measures would not be necessary otherwise. The trial court found plaintiff could not establish standing through its member New Hope Academy because New Hope Academy had already vacated its previous location and now operates in Arlington Heights. Plaintiff did not seek monetary damages on behalf of New Hope Academy, and the court found injunctive and declaratory relief alone could not remedy New Hope Academy's alleged harm of being displaced. Although plaintiff claimed one of its members, Lifeway, faced a special harm, the court found plaintiff's claimed harm was not causally related to operation of a gun shop.

> "According to the Village, the Hass declaration establishes that it's not the proximity of the proposed gun shop which would require the security measures

> which are cited in Paragraph 59 of the second amended complaint but rather regulations of the federal government governing food producers and processors in an attempt to prevent against intentional adulteration of the food supply from criminal or terrorist acts."

The court found plaintiff failed to establish its standing because plaintiff failed to argue any of its members faced a special harm differing from the general public and dismissed plaintiff's second amended complaint under sections 2-615 and 2-619. 735 ILCS 5/2-615, 2-619 (West 2016).

¶ 11. ANALYSIS

¶ 12. Plaintiff argues it has standing to pursue its claim that Niles violated plaintiff's substantive due process rights enacting the zoning ordinance and granting the special use permit because plaintiff sufficiently pleaded a causal connection between defendants' conduct and the special harm plaintiff's members face. Plaintiff claims New Hope Academy was displaced due to Niles enacting the ordinance granting the special use permit to allow Howard Venture to operate a gun shop at the Howard property. New Hope Academy now operates in Arlington Heights. Plaintiff also claims it faces special harm differing from the general public because Lifeway will be required to enhance its security measures to comply with federal regulations based on the alleged increased security risk from a gun store operating in close proximity.

¶ 13. A section 2-615 motion to dismiss challenges the sufficiency of the allegations of the complaint, and on review "we accept as true all well-pleaded facts and all reasonably drawn inferences from those facts in favor of the plaintiff." *Doe ex rel. Ortega-Piron v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004). A cause of action should only be dismissed under section 2-615 if no set of facts can be proven that would entitle plaintiff to relief. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. "The critical inquiry is whether the allegations of the complaint,

when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. A complaint will not survive this analysis if it only consists of conclusory or speculative allegations. *Time Savers, Inc. v. LaSalle Bank, N.A.*, 371 Ill. App. 3d 759, 767 (2007) ("conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted.").

¶ 14. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and all well-pleaded facts and reasonable inferences therefrom, and raises an affirmative matter outside the complaint that defeats the cause of action. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. A defendant may raise the plaintiff's lack of standing as an affirmative matter defeating the plaintiff's claim, although the burden lies with the defendant to prove the plaintiff's lack of standing. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 45 (2005). "Under Illinois law, a plaintiff need not allege facts establishing standing." *Id.* A plaintiff will have standing to sue in their own right if that plaintiff complains of some injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development*, 122 Ill. 2d 462, 492 (1988).

¶ 15. We review orders granting section 2-615 and 2-619 motions to dismiss *de novo*. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 275 (2004). "In ruling on motions to dismiss pursuant to either section 2-615 or 2-619 of the Code, the trial court must interpret all pleadings in the light most favorable to the nonmoving party." *Doe ex rel. Ortega-Piron*, 213 Ill. 2d at 23-24.

¶ 16. <u>Plaintiff's Standing to File the Second Amended Complaint</u>

¶ 17. Plaintiff's claims arise from a rezoning of property owned by Howard Venture. When a

plaintiff complains of an injury from the rezoning of a third party's property, to have standing to complain that plaintiff must assert they face special harm that differs from the harm suffered by the general public. *Garner v. Du Page County*, 8 Ill. 2d 155, 158-59 (1956).

¶ 18. Because plaintiff is an organization suing on behalf of its members, plaintiff will only have standing to file the suit on behalf of its members if it can meet the three part *Hunt* test our supreme court adopted for determining association standing. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 47 (2005).

> " '[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.' " *Id.* (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

Plaintiff's interest in preventing establishment of a gun shop is germane to its purpose because plaintiff is a not-for-profit corporation formed for the purpose of reducing gun violence and improving care for the seriously mentally ill. Also, plaintiff's claim against Niles and Howard Venture does not require the participation of any of its individual members in the lawsuit. The issue here is whether any of plaintiff's members would have standing to bring this claim in their own right. Because plaintiff complains of an injury from the rezoning of a third party's property, and plaintiff is an organization suing on behalf of its members, we will determine whether any of plaintiff's members would have standing in their own right from facing a special harm as a consequence of the rezoning that differs from the harm suffered by the general public. *Garner*, 8

Ill. 2d at 158-59.

¶ 19. A. New Hope Academy's Standing

¶ 20. The trial court ruled plaintiff could not establish standing through New Hope Academy because New Hope Academy could not bring a suit seeking only declaratory and injunctive relief against defendants in its own right. New Hope Academy vacated its Niles location. A claim seeking the court declare the zoning ordinance unconstitutional and enjoin the operation of a gun shop at the Howard property by New Hope Academy is not justiciable because such a claim would be moot. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002) ("Generally, a 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests."). "As a general rule, courts in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). Plaintiff alleges New Hope Academy was harmed by the rezoning of the Howard property because New Hope Academy did not renew its lease in Niles and relocated to Arlington Heights. However, plaintiff has not sought any money damages. Plaintiff only seeks injunctive and declaratory relief. Although New Hope Academy changed locations, it is not seeking damages to provide redress for displacement. Injunctive and declaratory relief standing alone cannot provide redress to New Hope Academy. Therefore, a claim by New Hope Academy against Niles and Howard Venture seeking declaratory and injunctive relief would be moot. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10 (A claim is moot if it is "impossible for the reviewing court to render effectual relief."). Because New Hope Academy cannot bring a claim against Niles and Howard Venture for declaratory and injunctive

relief in its own right, plaintiff cannot establish its standing through New Hope Academy's alleged special injury. *International Union of Operating Engineers, Local 148, AFL-CIO*, 215 Ill. 2d at 47.

¶ 21. B. Lifeway's Standing

¶ 22. The trial court also found plaintiff could not establish standing through its member Lifeway, and dismissed the second amended complaint under section 2-619. Plaintiff argues Lifeway would have standing in its own right because it is required to incur costs other members of the general public will not: Lifeway is obligated by federal regulations to implement increased security measures due to its proximity to a gun shop. The FDA promulgated a rule requiring facilities that manufacture, process, pack, or hold food for consumption to assess their vulnerabilities and create mitigation strategies to minimize vulnerabilities to food safety. 21 C.F.R. § 121 (2017). This amended the Federal Food, Drug, and Cosmetic Act with respect to the safety of the food supply. 21 U.S.C. § 9 (2018). In response to the motion to dismiss, plaintiff submitted the declaration of Douglas Hass, general counsel for Lifeway. Hass averred that the proximity of a gun store to Lifeway alters Lifeway's current risk assessment such that additional security measures will be required under federal law to account for the increased risk faced. Plaintiff claims the FDA will review Lifeway's vulnerability assessment and that increased security measures will be required because a gun shop operating at the Howard property alters the vulnerability assessment. Hass averred other grocery stores owned by Lifeway, one in Philadelphia, Pennsylvania and the other in Waukesha, Wisconsin, operate in close proximity to a gun shop and firearm producer, respectively. Hass stated those two facilities must maintain increased security measures (*i.e.* perimeter fencing, gated access to parking lots and loading docks, entry fobs for employees, and security cameras) due to the proximity of the

gun shop and firearm producer.

¶ 23. As we stated earlier, to have standing plaintiff must show one of its members suffers harm different from the general public. The trial court found that plaintiff could not establish standing through its member Lifeway because federal regulations require the enhanced security measures, not the proximity of a gun shop. Plaintiff has not shown Lifeway would be affected by the operation of a firearm retailer any differently from other businesses in the same proximity. Those businesses would also suffer from the alleged harms of increased crime and risk from a gun shop operating in close proximity. Any businesses in the same vicinity would purportedly need to increase their own security measures (with perimeter fencing, gated access to parking lots and loading docks, entry fobs for employees, and security cameras) if they feared a potential increase in crime. Plaintiff claims Lifeway faces the unique harm of abiding by federal regulations. However, those federal regulations only require Lifeway to have appropriate security for the risk it faces. We find the security measures proposed to be taken by Lifeway are no different than the measures any other business would take if it feared an uptick in crime. Even though those businesses may or may not be subject to federal regulations, the cost faced is the same because the security measures to be implemented are no different. Therefore, Lifeway would not have standing to bring its claim in its own right, *Garner*, 8 Ill. 2d at 158-59, and plaintiff cannot establish its standing because none of its individual members could bring the claim in their own right. *International Union of Operating Engineers, Local 148, AFL-CIO*, 215 Ill. 2d at 47.

¶ 24. Even if plaintiff could show the harm Lifeway faces is distinct from the harms the general public would suffer, we would still affirm the trial court's dismissal of plaintiff's second amended complaint under section 2-615 because the harm plaintiff pleaded is speculative. 735

ILCS 5/2-615 (West 2016). Plaintiff's claim that Lifeway must implement enhanced security measures due to operation of a gun shop at the Howard property is mere speculation. "Generally, the damage sought to be enjoined must be likely and not merely possible. 'Injunctive relief will not be granted merely to allay the fears and apprehensions or to soothe the anxieties of the parties.' " *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 371 (2001). Although Hass indicated in his declaration that Lifeway would not need to enhance its security measures if a gun shop was not allowed to operate in close proximity, Hass failed to provide any reason why this was the case. While a plaintiff need only plead ultimate facts, conclusory allegations must be supported by specific facts else they are not properly pleaded. *Time Savers, Inc.*, 371 Ill. App. 3d at 767. Plaintiff must explain why defendants' conduct will actually cause plaintiff's injury. The second amended complaint failed to articulate why operation of a gun shop at the Howard property is causally connected to increased safety measures Lifeway may implement. The allegation of harm from operation of a gun shop near Lifeway is conclusory and is not supported by any facts. It is mere speculation that a gun shop at the Howard property will create need for increased security. Taking the allegations of the declaration and complaint as true, the allegations do not support the inference that defendants' conduct is the cause of plaintiff's alleged harm. Therefore, plaintiff's second amended complaint was properly dismissed under section 2-615. 735 ILCS 5/2-615 (West 2016).

¶ 25. Plaintiff does not have standing to bring its second amended complaint because it has not shown any of its individual members could bring the claim in their own right. *International Union of Operating Engineers, Local 148, AFL-CIO*, 215 Ill. 2d at 47. Plaintiff has not pleaded that any of its individual members would suffer a special harm different than the general public

faces. *Garner*, 8 Ill. 2d at 158-59. The harms plaintiff alleged its members would face are too speculative to support plaintiff's claim. *Time Savers, Inc.*, 371 Ill. App. 3d at 767. Therefore, the trial court's order dismissing with prejudice plaintiff's second amended complaint under sections 2-615 and 2-619 is affirmed.

¶ 26. CONCLUSION

¶ 27. For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 28. Affirmed.