2012 IL App (1st) 120464-U

SECOND DIVISION
October 23, 2012

No. 1-12-0464

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RIVER CITY FACILITIES MANAGEMENT COMPANY, LLC; WRT-MARC RC, LLC; RIVER CITY PRIVATE RESIDENCES CONDOMINIUM ASSOCIATION; and RIVER CITY MARINA FACILITIES, LLC,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellees,	)	No. 11 L 7656
v.	)	
METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO,	)	Honorable John P. Kirby, Judge Presiding.
Defendant-Appellant.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Trial court properly dismissed plaintiffs' statutory claim under section 19 of the Metropolitan Water Reclamation District Act, and properly found that plaintiffs' negligence action was barred by the public duty rule.

¶ 2 River City Facilities Management Company, LLC, an Illinois limited liability company, WRT-MARC RC, LLC, an Illinois limited liability company, River City Private Residences Condominium Association, and River City Marina Facilities, LLC (collectively, plaintiffs), sued the Metropolitan Water Reclamation District of Greater Chicago (the District) for property damage that occurred when the Chicago River overflowed its banks during heavy rainfall between July 23, 2010, and July 24, 2010. The trial court dismissed the complaint and plaintiffs now appeal. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On or about July 23, 2010, through July 24, 2010, Cook County experienced very heavy rainfall, which caused the Chicago River to overflow its banks and flood the River City Condominiums, Marina, and Commercial Facilities. The overflow caused significant property damage. Plaintiffs brought an action against the District, alleging that it failed to utilize means to empty or drain storm water and sewage retention facilities prior to the approaching storm, failed to carefully monitor rising water levels of the Chicago River, failed to request the opening of the Chicago River lock in a timely and effective manner, and failed to follow its own written guidelines as to reversal of the Chicago River water to Lake Michigan. Count I of the complaint sought statutory relief under section 19 of the Metropolitan Water Reclamation District Act (Act) (70 ILCS 2605/1 *et seq*.) (West 2010)), and count II of the complaint asserted a common law negligence action against the District.

¶ 5 In response, the District filed a combined section 2-615 (735 ILCS 5/2-615 (West 2010)) and section 2-619 (735 ILCS 5/2-619(a)(9) (West 2010)) motion to dismiss. The District argued

that plaintiffs' claim for statutory relief under section 19 should be dismissed because the Act was not intended to afford plaintiffs relief for their damages, and that the common law negligence claim was barred by the public duty rule.

¶ 6 The trial court granted the District's combined motion to dismiss both counts of the complaint, finding that the District's alleged failure to provide adequate storm protection services was not actionable under section 19 of the Act, and that pursuant to the public duty rule, the District owed no duty to protect the individual plaintiffs because a public entity cannot be liable for its failure to provide adequate governmental services. Plaintiffs now appeal.

¶ 7 II. ANALYSIS

¶ 8 There are two issues on appeal: (1) whether the trial court properly dismissed plaintiffs' claim seeking damages under section 19 of the Act by finding that section 19 did not apply in these circumstances, and (2) whether the trial court properly dismissed plaintiffs' common law negligence count based on the public duty rule.

¶ 9 A. Section 19 of the Act

¶ 10 In response to plaintiffs' contention that they were owed damages under section 19 of the Act, the District filed a section 2-615 motion to dismiss. Section 2-615 of the Code of Civil Procedure provides for dismissal for defects in the pleadings where the complaint is substantially insufficient in law. *Becker v. Zellner*, 292 Ill. App. 3d 116, 121 (1997); 735 ILCS 5/2-615 (2010). Motions to dismiss pursuant to this section attack only the legal sufficiency of the complaint. *Id*. "A motion to dismiss pursuant to section 2-615 attacks the legal sufficiency of the complaint. [Citation.] A court reviewing an order granting a section 2-615 motion takes all

well-pled facts as true. [Citation.] On review of a section 2-615 dismissal, the court must determine whether the allegations of the complaint, when interpreted in the light most favorable to the plaintiff, sufficiently set forth a cause of action on which relief may be granted. [Citation.]" *Uhlich Children's Advantage Network v. National Union Fire Co. of Pittsburgh, PA.*, 398 Ill. App. 3d 710, 714 (2010). We review a circuit court's dismissal of a complaint pursuant to section 2-615 *de novo*. *Id*. A claim should not be dismissed unless it appears that no set of facts can be proved that would entitle the plaintiff to recovery. *Becker*, 292 Ill. App. 3d at 122.

¶ 11 We now address plaintiffs' contention that section 19 of the Act permits recovery against the District. Section 19 states in pertinent part:

> "Every sanitary district shall be liable for all damages to real estate within or without such district which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch, drain, outlet, or other improvements under the provisions of this act; and actions to recover damages may be brought in the county where such real estate is situated, or in the county where such sanitary district is located, at the option of the party claiming to be injured. And in case judgment is rendered against such district for damage, the plaintiff shall also recover his reasonable attorneys' fees to be taxed as costs of suit: Provided, however, it shall appear on the hearing of plaintiff's motion to tax such attorney's fees that the plaintiff notified the trustees of such district, in writing, at least 60 days before suit was commenced by leaving a copy of such notice with

> some one of the trustees of such district, stating that he claims damages to the amount of ..... dollars by reason of (here insert the cause of damage) and intends to sue for the same: And, provided further, that the amount recovered shall be larger than the amount offered by said trustees (if anything) as a compromise for damages sustained." 70 ILCS 2605/19 (West 2010).

¶ 12 Section 19 imposes strict liability, and therefore a plaintiff suing under this section does not need to prove negligence by the District to recover. *Jones v. Sanitary District of Chicago*, 265 Ill. 98, 100 (1914). Plaintiffs contend that this section imposes liability on the District for injuries, like the one in the case at bar, occurring on, in, or adjacent to waterways and rivers which it owns, supervises, maintains, operates, manages, or controls.

¶ 13 This exact issue was recently decided by this court in *The Town of Cicero v. The Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164. In *Cicero*, the town of Cicero filed suit against the same defendant as in this case, the District, seeking monetary damages and injunctive relief after its residents allegedly sustained property damage as a result of flooding and sewage backup. Cicero sought monetary damages under section 19 of the Act based on the District's alleged failure to accurately predict and manage sewage backup flooding, which resulted in damage to real and personal property during the periods of heavy rainfall. The circuit court dismissed the complaint, ruling that the legislative history of section 19 of the Act demonstrated that it did not apply to the type of claims asserted by Cicero. *Town of Cicero*, 2012 IL App (1st) 112164, ¶¶ 11-12.

¶ 14 Cicero appealed, alleging that section 19 provided it with the right to seek damages for the flooding and sewage backup alleged in its complaint. The District argued that section 19 did not apply to the circumstances of the case because section 19 was intended solely to compensate downstream landowners for flooding when the District constructed the main channel of the Sanitary and Ship canal and reversed the flow of the Chicago River at the turn of the twentieth century. *Id.* ¶ 20.

¶ 15 This court agreed with the District and found that by looking at the legislative history of section 19, it is apparent that the legislators did not contemplate use of section 19 in this way. The Act was passed in 1889 to "create sanitary districts and to remove obstructions in the Des Plaines and Illinois Rivers" *Cicero*, 2012 IL App (1st) 112164, ¶ 3 (basing its recitation of facts on our supreme court's review of the history of the Act in *Canal Commissioners v. Sanitary District of Chicago*, 191 Ill. 326 (1901), *City of Chicago v. Green*, 238 Ill. 258 (1909), and *Gentleman v. Sanitary District of Chicago*, 260 Ill. 317 (1913)). The Act created what is known as the District in order to preserve public health by improving the facilities for the disposal of sewage and the supply of pure water. To prevent the City's drainage and sewage from being carried into Lake Michigan, the Act authorized the District to reverse the flow of the Chicago River and to issue bonds to fund the construction of the "Drainage Canal," now known as the Sanitary and Ship Canal (the main channel). The main channel was completed in 1899 and ran from the Chicago River to Lockport, Illinois. The main channel connected the Chicago and Calumet River systems to the Des Plaines River, reversing the flow of those rivers away from Lake Michigan. *Id.* ¶ 4.

¶ 16 Construction of the main channel and reversal of the Chicago River was expected to cause a large amount of sewage to flow through the main channel into the Illinois and Des Plaines Rivers, as well as a large amount of water to flow from Lake Michigan through the main channel to dilute the sewage. The legislature knew that such a large amount of water would cause flooding in the Illinois and Des Plaines River valleys and thereby damage the property of those living near the rivers. To address concerns about health effects and property damage resulting from the construction of the main channel and to gain support for the Act, the legislature included a provision in the Act, section 19, that imposed strict liability on the District and required it to pay for any damage to private property caused by construction of the main channel. *Id*. ¶ 5.

¶ 17 In *Cicero*, this court found that the comments made before the Board of Trustees of the Sanitary District in 1891 reflect that section 19 was included in the Act "specifically to assuage concerns regarding property damage from flooding caused by construction of the main channel and the effect that such a large amount of sewage could have on the health of those living in downstream areas." *Id*. ¶ 25 (citing Proceedings of the Board of Trustees of the Sanitary District of Chicago, Jan. 3, 1891, at 105). This court specifically stated that section 19 was "passed to ease concerns about these sewage and flooding problems and to compensate downstream landowners for damages to their property resulting from construction of the main channel and reversal of the Chicago River." *Id*. ¶ 27.

¶ 18 Furthermore, this court found that "section 19 was not intended to apply to the circumstances of this case," which was damages "not caused by flooding that resulted from

construction of the main channel or reversal of the Chicago River," but instead were "caused by natural instances of heavy rainfall that caused Cicero's systems to back up until they flooded parts of the town." This court stated that "[t]hese are not the types of damages envisioned by the legislature when it passed section 19 of the Act." *Id*. ¶ 28.

¶ 19 Likewise in the case at bar, we find the damage was caused by flooding from heavy rainfall, not the reversal of the Chicago river or the construction of the main channel, and thus section 19 does not apply. Accordingly, the circuit court properly dismissed count I of the complaint.

¶ 20 C. Public Duty Rule

¶ 21 We next address plaintiffs' contention that the public duty rule should not have been a basis for the court to dismiss their common law negligence count because the survivability of the public duty rule has been called into question.

¶ 22 We first note that the District brought this claim under the section 2-615 portion of its motion to dismiss rather than the section 219(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)) portion. Section 2-619(a)(9) of the Code allows for dismissal on the pleadings if "the claim asserted against defendant is barred by other affirmative mater avoiding the legal effect or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2010). "Affirmative matter" includes something in the nature of a defense that completely negates the alleged cause of action. *Young by Young v. Chicago Housing Authority*, 162 Ill. App. 3d 53, 54 (1987); *Brown v. Chicago Park District*, 218 Ill. App. 3d 612, 616 (1991) (reversed on other grounds). "The absence of a legal duty to a plaintiff is affirmative matter which can be asserted by a section 2-619 motion." *Id*.

(citing *Holubek v. City of Chicago*, 146 Ill. App. 3d 815, 817 (1986)). While plaintiffs' public duty rule argument should have been brought under section 2-619, misdesignation of a motion to dismiss is not always fatal to the movant's right to prevail. *Becker*, 292 Ill. App. 3d at 121. Reversal may only be required if the nonmovant is prejudiced by the movant's improper motion practice, and we see no prejudice since plaintiffs did not raise the issue in the trial court or on appeal. *Id*.

¶ 23 Turning to the merits of the argument, we note that the public duty rule provides that a municipality is not liable in tort and owes no duty to individual members of the general public when performing customary governmental duties for the public at large. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 345 (1998); *Moran v. City of Chicago*, 286 Ill. App. 3d 746, 750 (1997). The rationale behind this rule is that "a municipality's duty is to preserve the 'well-being of the community' and that such a duty is 'owed to the public at large rather than to specific members of the community.' " *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 44 (1998) (quoting *Schaffrath v. Village of Buffalo Grove*, 160 Ill. App. 3d 999, 1003 (1987)). Plaintiffs argue on appeal that the current state of the law surrounding the public duty doctrine is unclear, and thus summary dismissal was improper. Plaintiffs cite to *DeSmet v. County of Rock Island*, 219 Ill. 2d 497 (2006), and *Hess v. Flores*, 408 Ill. App. 3d 631 (2011), for the proposition that the "continuing viability of the public duty doctrine after enactment of the Local Government and Governmental Employee Immunity Act has been called into question by both the Illinois Supreme Court and the First District Appellate Court." (Pls.' Br. at 26).

¶ 24 In *DeSmet*, however, our supreme court specifically recognized that Illinois courts

"continue to reference and apply the public duty rule in various contexts," but that in the context of police protection services, the public duty rule has been codified in the Tort Immunity Act. *DeSmet*, 219 Ill. 2d at 508. Five years later, in *Hess*, this court stated that "this state continues to recognize the common law public duty rule that a governmental entity generally owes no duty to provide an individual citizen with specific municipal services." *Hess*, 408 Ill. App. 3d at 644. Although the court in *Hess* noted that it would be reasonable to question the continued relevance of a common law rule limiting the liability of governmental units, in the absence of a decision from our supreme court to the contrary, "it remains clear that the public duty rule continues to play a role in the determination of governmental tort liability." *Hess*, 408 Ill. App. 3d at 639.

¶ 25 Accordingly, Illinois continues to recognize the viability of the public duty rule. See also *Green v. Chicago Board of Education*, 407 Ill. App. 3d 721, 726 (2011) (discussing the public duty rule in the context of a suit against the Chicago Board of Education); *Taylor v. Bi-County Health Dept.*, 2011 IL App (5th) 090475 (2011) (holding, under the public duty rule, that a county health department did not owe any individual duty to require that a child be provided with pneumococcal conjugate vaccine). Moreover, Illinois has specifically recognized the existence of the public duty rule in the context of a governmental unit's failure to provide adequate waste water collection. See *Town of Cicero v. The Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164 (while the plaintiff's claim for relief was based exclusively on the Act, and not on a tort theory of liability, this court noted in a footnote, relying on *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 334, 345 (1998), that the public duty rule "would appear to bar any such claims" because a public entity may not be held

liable for its failure to provide adequate governmental services); *Alexander v. Consumers Illinois Water*, 358 Ill. App. 3d 774, 779 (2005) (even if village owed general duty to protect homeowners from sewage back-flow caused by clogged sewer line, public duty exception applied to bar village from legal liability).

¶ 26 Alternatively, plaintiffs contend, relying on *Jane Doe-3 v. McLean County Unit Dist. No.5 Board of Directors*, 409 Ill. App. 3d 1087 (2011), that even if the public duty rule is still viable, it should not apply in this case because plaintiffs complain of a danger created by the District. In *McLean*, two second grade students were abused by an elementary school teacher. They, along with their mothers, filed lawsuits against several defendants, including McLean County Unit District No. 5 Board of Directors (McLean). They claimed that the defendants knew that the teacher had sexually abused students at his previous school, but failed to report the abuse, and instead allowed and facilitated the teacher to secure employment. McLean claimed that pursuant to the public duty rule, it owed no legal duty to plaintiffs because plaintiffs were never students in the McLean district. The trial court found that the public duty rule applied and granted defendants' motions to dismiss. *McLean*, 409 Ill. App. 3d at 1088-92.

¶ 27 On appeal, the Fourth District held that the public duty rule did not apply. The court's reasoning was that the public duty rule generally applies when a plaintiff alleges damages based on a governmental entity's failure to perform adequate governmental services. *McLean*, 409 Ill. App. 3d at 1096. The court stated that "[t]his is not a case where McLean or the individual administrators have allegedly negligently performed their ordinary governmental *** function. Instead, this is a case where plaintiffs allege the individual administrators engaged in intentional

egregious conduct while in the course of their employment, and that the conduct harmed plaintiffs." *Id*. The court specifically found that it was "the nature of the alleged conduct of the individual administrators that bars the rule's applicability here." And further, that there is a distinction between conduct that would give rise to a conclusion that a governmental entity owes a duty to protect the public at large, and conduct by the governmental entity that "specifically creates the danger complained of." *Id*. (Affirmed on appeal by *Jane Doe-3 v. McLean County Unit Dist. No. 5 Board of Directors*, 2012 IL 112479 (2012), finding in part that the public duty rule was of "no moment in this case" because the plaintiffs did not allege that defendants failed to protect them or that they owed any affirmative duty to do so).

¶ 28 Here, plaintiffs contend that while this case does not concern intentional conduct, *McLean* is instructive as to the non-application of the public duty doctrine where the governmental entity, such as the District, creates the complained-of danger. Plaintiffs make the argument that but for the actions of the District, namely the reversing of the natural flow of the Chicago river by constructing an artificial channel and locks at the mouth of the river, the complained-of storm water would not have flooded and damaged plaintiffs' property.

¶ 29 We do not agree. In the recent case of *Cicero v. Metropolitan Water Reclamation District of Greater Chicago*, the town brought action against the District seeking damages and injunctive relief after its residents sustained damage due to sewage backup and flooding caused by heavy rainfall. *Cicero*, 2012 IL App (1) 112164, ¶ 1. The same lock system and channel system was at issue in that case as in this case. This court found that the damages alleged in the case were not caused by flooding that resulted from the "construction of the main channel or

reversal of the Chicago River." *Id.* ¶ 28. Instead, "they were caused by natural instances of heavy rainfall." *Id.* Accordingly, we do not adopt plaintiffs' theory that the public duty rule does not apply because the District created the complained-of danger.

¶ 30 Rather, the conduct at issue in this case is the exact conduct that the public duty rule protects. See *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 334, 345 (1998) (a public entity may not be held liable for its failure to provide adequate governmental services). In this case, plaintiffs have alleged negligence by the District solely based on its performance of ordinary governmental functions.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.