2016 IL App (1st) 152096-U

SIXTH DIVISION
Order Filed: March 31, 2016

No. 1-15-2096

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

OLHA VOVCHUK,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff, Appellant,	)	
	)	
v.	)	No. 14 M1 302996
	)	
	)	
VILLAGE DISCOUNT OUTLET, INC.,	)	Honorable
	)	Sheryl A. Pethers
Defendant, Appellee.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court dismissing the plaintiff's complaint for failure to state a claim upon which relief could be granted is affirmed, where the plaintiff failed to allege facts showing that her injuries were proximately caused by the defendant's alleged negligence, or, under the doctrine of *res ipsa loquitur*, that the mechanism causing her injury was under the defendant's exclusive control.

¶ 2 The plaintiff, Ohla Vovchuk, filed the instant action against the defendant, Village Discount Outlet, seeking damages for injuries she sustained when she was struck by a shopping cart while shopping in the defendant's store. The circuit court dismissed the plaintiff's third-

amended complaint (complaint) for failure to state a claim on which relief could be granted under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), and the plaintiff timely appealed. For the following reasons, we affirm.

¶ 3 The complaint consisted of two counts, Count I asserting general negligence, and Count II claiming negligence under the doctrine of *res ipsa loquitur*. The allegations underlying both counts are set forth as follows. On November 22, 2012, Village Discount operated a store in Chicago at which the plaintiff was present and shopping. Village Discount had a duty under the Premises Liability Act (740 ILCS 130/1 *et seq*. (West 2010)), and section 344 of the Restatement of Torts (Restatement (Second) of Torts § 344, at 223-24 (1965)), to maintain its store in a reasonably safe condition for shoppers and to exercise reasonable care to protect shoppers against physical harm caused by the "accident[al], negligent or intentionally harmful acts of third persons or animals" on the premises. Village Discount also had a duty to exercise reasonable control over "third parties" allowed to use chattels in the store's possession, so as to prevent such third parties from using the chattels to intentionally harm or create an unreasonable risk of injury to shoppers. Restatement (Second) of Torts, §318 at 126-27 (1965). The complaint asserted that Village Discount had prior notice of "serious safety issues [concerning] store operations" at the same store location, based upon an incident in 2010 in which a purse belonging to the instant plaintiff had been stolen out of a shopping cart. Notwithstanding this notice, Village Discount breached its duty of care by negligently failing to "supervise the delivery of shopping carts to customers and other individuals on the premises so as to prevent the use of carts by inexperienced operators" who could collide with a customer and cause an injury. The plaintiff alleged that, as a direct and proximate result of the foregoing act or omission by Village Discount, she was "hit by a shopping cart" and fell on the store premises, suffering bruises,

contusions, strains, sprains and lacerations to various parts of her body. Count II specifically alleged that the "cart that caused injury" to the plaintiff was under the control or management of Village Discount and that her injury would not have happened in the ordinary course of things if the store had used proper care. Accordingly, the plaintiff requested damages for her incurred medical expenses, pain and suffering, and mental anguish.

¶ 4 Village Discount filed a motion to dismiss the complaint pursuant to section 2-615 of the Code. Following a hearing, the court dismissed the case with prejudice on the basis that the plaintiff failed to properly plead negligence and proximate cause. This appeal followed.

¶ 5 A motion to dismiss under section 2–615 of the Code challenges the legal sufficiency of a complaint based upon defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). We review an order granting a section 2–615 motion under the *de novo* standard. *Id.* The critical inquiry is whether the allegations of the complaint, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). In making this determination, all well-pleaded facts in the complaint must be taken as true. *Id.* Conclusions of law will not be taken as true, however, unless they are supported by specific factual allegations. *Ziemba v. Meirzwa*, 142 Ill. 2d 42, 47 (1991). Our supreme court has emphasized that Illinois is a fact-pleading jurisdiction which requires the plaintiff to allege sufficient facts "to bring a claim within a legally recognized cause of action." See *Marshall*, 222 Ill. 2d at 429-30 (citing cases)). While the plaintiff need not plead evidence, mere conclusions are insufficient to withstand a motion to dismiss. *Id.* at 430.

¶ 6 In order to state a cause of action for negligence, a complaint must provide facts that establish the existence of a duty of care owed by the defendant to the plaintiff; a breach of that

duty by the defendant; and an injury to the plaintiff that was proximately caused by the defendant's breach. *Marshall*, 222 Ill. 2d at 430. The term "proximate cause" includes two distinct requirements: that of cause in fact and that of legal cause. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257–58 (1999). To establish cause in fact, the plaintiff must allege sufficient facts to show there is a reasonable certainty that the defendant's acts were a substantial factor in bringing about her injury. *Galman*, 188 Ill. 2d at 258. Legal cause, by contrast, requires proof that the injury was reasonably foreseeable as a result of the defendant's conduct. *Id.* Further, where the plaintiff's injury results from the intervening act of a third party, and the defendant's alleged negligence did nothing more than furnish a condition by which the injury was made possible, the creation of the condition is not the proximate cause of the injury. *Id.* at 257. Rather, the test is whether the intervening act was reasonably foreseeable to the party creating the condition as a natural and probable result of its own negligence. *Id.*

¶ 7 In this case, the complaint falls short of alleging facts to support a claim that Village Discount engaged in any negligent act or omission, or that its conduct was the proximate cause of the plaintiff's injuries. The plaintiff places great emphasis on the general duty of Village Discount to protect shoppers from an unreasonable risk of harm caused by the conduct of third parties on its premises, particularly parties having access to its shopping carts. However, even assuming such a duty exists, the plaintiff does not state how it was breached. The complaint simply alleges that Village Discount "failed to supervise the delivery of shopping carts to customers and other individuals on its premises" so as to prevent the use of the carts by "inexperienced operators." This assertion gives no indication of any consequence resulting from Village Discount's alleged conduct, nor does it suggest how the conduct created an unreasonably dangerous condition on the store's premises. In the absence of specific facts giving rise to an

inference that a breach of duty occurred, an action for negligence cannot be sustained. See *Bell v. Village of Midlothian*, 90 Ill. App. 3d 967, 969 (1980).

¶ 8 More essentially, the complaint fails to state how Village Discount's conduct proximately caused the plaintiff's injuries. It concludes that the store's negligence resulted in the plaintiff being "hit by a shopping cart." There is no description of the occurrence itself, nor any indication of whom or what set the cart in motion or otherwise caused it to hit the plaintiff. Further, the complaint never alleges that the culprit was under the supervision or control of Village Discount or that the occurrence or ensuing injury reasonably should have been anticipated by Village Discount. A business is not an insurer of the safety of its business invitees, but must only exercise reasonable care for their safety by correcting defective conditions of which it is aware or that it may reasonably anticipate. See *Anderson v. Woodlawn Shell, Inc.*, 132 Ill. App. 3d 580, 582 (1985). Further, it is well-settled that the mere fact of an injury is insufficient to establish liability in negligence *(Barham v. Knickrehm*, 277 Ill. App. 3d 1034, 1040 (1996) (citing *Teter v. Clemens*, 112 Ill. 2d 252 (1986)) and that liability in negligence cannot be predicated upon surmise or conjecture regarding the cause of the injury. *Barham*, 277 Ill. App. 3d at 1040. The complaint in this case has failed to sufficiently plead a causal link between the plaintiff's alleged injuries and a defective condition on the premises of Village Discount. Accordingly, it fails to state a claim for negligence.

¶ 9 For similar reasons, the plaintiff cannot avail herself of the doctrine of *res ipsa loquitur*. For the doctrine to be applicable, the plaintiff must allege that (1) her injury is one that ordinarily does not occur in the absence of negligence, and (2) the defendant had exclusive control of the instrumentality that caused the injury. *Dyback v. Weber*, 114 Ill. 2d 232, 242, (1986). Here, the complaint fails to provide facts suggesting how, at the time of the injury, either the shopping cart

or the force acting upon it and causing it to make contact with the plaintiff were under the control of Village Discount. Therefore, the plaintiff's claim under *res ipsa loquitur* must fail.

¶ 10 For the foregoing reasons, we affirm the judgment of the circuit court dismissing the complaint under section 2-615 of the Code.

¶ 11 Affirmed.