2013 IL App (2d) 120572-U
No. 2-12-0572
Order filed May 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALEXANDER I. AREZINA,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-714
	)	
CITY OF ELMHURST,	)	Honorable
	)	Patrick J. Leston,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Because the plaintiff's claims were barred by the public duty rule and failed to state a cause of action under section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act, the trial court properly dismissed the plaintiff's first amended complaint.

¶ 2 On December 29, 2011, the plaintiff, Alexander Arezina, filed a first amended complaint against the defendant, the City of Elmhurst (City), alleging claims for nuisance, trespass, and negligence based on sewer backups into his home. On May 2, 2012, the trial court dismissed the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). On appeal, the plaintiff argues that the trial court erred. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The plaintiff is a resident of the City. During rain storms that occurred on June 23 and July 23-24, 2010, the storm and sanitary sewer systems overflowed, causing storm water and raw sewage to backup into the plaintiff's residence and onto his property. On June 22, 2011, the plaintiff filed a class action complaint on behalf of himself and similarly situated residents of the City. In that complaint, the plaintiff alleged as follows. The City operated and maintained separate sanitary and storm sewer systems that served the plaintiff and other City residents. The plaintiff and others were taxed and assessed fees for the sewer service. The operation of the City's sanitary sewer was regulated by the Illinois Pollution Control Board (Board), a division of the Illinois Environmental Protection Agency (IEPA). The Board's regulations (35 Ill. Adm. Code §306.304) expressly prohibited sanitary sewer overflows (SSOs) and required the City to report all SSOs to the IEPA. The plaintiff alleged that the City had a history of failing to report SSOs. As a result of the history of SSOs, the plaintiff alleged that the City had actual notice of the risk that storm water and sewage would back up into the residents' homes in the event of heavy or moderate rainfall. The plaintiff attached a violation notice issued by the IEPA to the City on February 4, 2011, which cited the City with numerous SSOs and failure to report SSOs.

¶ 5 The plaintiff further alleged that heavy rainfall on June 23 and July 23-24, 2010, resulted in numerous SSOs throughout the City, with residents suffering storm and sewer water overflows in their homes, garages, and yards. The plaintiff alleged that sewage backed up into the basement of his home causing offensive odors and damaging property. The plaintiff incurred time and expense in cleaning up the sewage. The plaintiff alleged that the overflows were the result of the City's negligent maintenance and operation of its sewer systems. The plaintiff alleged that the City breached various legal standards of care such as dumping garbage on real property (720 ILCS 5/47-

15 (West 2010)), public nuisance (720 ILCS 5/47-5 (West 2010)), and section 12 of the Environmental Protection Act (415 ILCS 5/12 (West 2010)) (prohibiting discharge of contaminants into the environment or waters of the State). Finally, the plaintiff alleged that the City's negligent acts or omissions proximately caused the damage he suffered as a result of the flooding, namely, cleanup costs, repairs, depreciation in the value of his home, discomfort and annoyance, increased insurance costs, and loss of personal property with great sentimental value. Based on the foregoing alleged facts, the plaintiff's suit included three claims against the City: trespass (count I), temporary nuisance (count II) and negligence (count III).

¶ 6 On October 17, 2011, the City filed a motion to dismiss the plaintiff's complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) for failure to state a cause of action. Specifically, the City argued that the claim was barred by the public duty rule because, under that rule, the City owed a duty only to the public at large and not to the plaintiff individually. The City also argued that the claims were barred by section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 5/3-102(a) (West 2010)), which states that a public entity is not be liable for injury unless it can be proven that the entity had actual or constructive notice of an unsafe condition. The City argued that the plaintiff failed to allege actual or constructive notice that the sewer systems were unsafe as related to the plaintiff individually.

¶ 7 On November 7, 2011, the plaintiff filed a response to the motion to dismiss. The plaintiff argued that the public duty rule only applied to a failure to provide general police or fire protection and, therefore, was not applicable to the circumstances in this case. The plaintiff also argued that it had adequately pleaded notice to the City of the potential for sewer backups based on the extensive history of SSOs. The plaintiff further argued that the City's own negligence resulted in the defective

condition and diminished capacity of the sewer systems and that, therefore, no showing of actual or constructive notice was required.

¶ 8 On November 21, 2011, the City filed its reply. The City argued that the plaintiff's allegations stemmed from historic storms during the summer of 2010 and that the plaintiff failed to allege any particular obstruction, infiltration, or defect that caused the backup into his home. General allegations as to systemic problems were not sufficient to state a cause of action. Rather, the plaintiff was required to allege facts that would have put the City on notice that the plaintiff's own property would be subject to backflows during the 2010 storms. The City further argued that the case law cited by the plaintiff to support its argument that municipalities are liable for sewer backups involved situations where the municipality took specific actions that resulted in a backflow problem and thus satisfied the "special duty" exception to the public duty rule.

¶ 9 On November 22, 2011, the trial court entered an order that "continued generally" the plaintiff's motion for class certification. On December 8, 2011, the trial court granted the City's motion to dismiss the plaintiff's complaint. The trial court found that the plaintiff's claims included only "generic pleadings" that were barred by the public duty rule. The trial court further found that the section 3-102(a) of the Act (745 ILCS 10/3-102(a) (West 2010)) also barred the claims because the plaintiff had not pleaded any specific notice to the City of any unsafe act or condition as to his own home. The trial court found that the plaintiff had only pleaded general reasons as to why sewers back up. The trial court granted the plaintiff leave to file an amended complaint.

¶ 10 On December 29, 2011, the plaintiff filed a first amended complaint. In addition to the allegations in the original complaint, the plaintiff alleged that the City's sanitary and storm sewer systems were interconnected and that during heavy rainfall the storm sewer would back up into the sanitary sewer causing sanitary sewer backups throughout the City. In order to operate at their

designed capacity, the systems required routine maintenance. The plaintiff alleged that in order to comply with IEPA reporting requirements, the City monitored the condition of its sewer systems through the use of cameras. The plaintiff alleged that since 2006, those reviews had shown hundreds of obstructions and sources of unintended infiltration into the sewer systems. The plaintiff alleged that in 1987, 2006, and 2009 the City had suffered extensive SSOs as a result of deficiencies in the maintenance and operation of the sewer systems. At those times, City engineers identified unintended sources of infiltration as the principal cause of the SSOs.

¶ 11 The plaintiff also alleged that the City's negligent maintenance of its sewer systems included the failure to: inspect, clear obstructions, properly manage, eliminate infiltration, and supply continuous electric power to generators and pumping stations. According to the plaintiff, video inspections prior to the June 2010 storms showed hundreds of sewer obstructions and sources of unintended infiltration and those were the areas most affected by backups during the storms. In addition to alleging breach of the various legal standards as set forth in the original complaint, the plaintiff also alleged that the City violated (1) section 3-102(a) of the Act by failing to use ordinary care to maintain the sewer systems in a reasonably safe condition and (2) its common law duty to refrain from discharging sewage onto plaintiff's property. Finally, the plaintiff alleged that the City took no action between the June and July 2010 storms to correct the deficiencies in the sewer systems. In addition to attaching the IEPA violation notice, the plaintiff also attached a list of all the SSOs recorded by the City since 2006. The plaintiff alleged that the list was incomplete because it did not include numerous reported SSOs, including the ones in his own home although he had reported those SSOs to the City.

¶ 12 On February 2, 2012, the City filed a motion to dismiss the plaintiff's first amended complaint. The City argued that the amended complaint did not cure the original defects and merely

added more generic allegations. The City reiterated that the public duty rule barred the plaintiff's claims. The City noted that there were exceptions to the public duty rule but that none applied in this case. The City further argued that the plaintiff failed to allege facts supporting the notice requirement under section 3-102(a) of the Act. Specifically, the City argued that the amended complaint was deficient because it did not allege that the City was aware of any specific obstruction or other defect in the sewer systems around the plaintiff's property that resulted in damage to the plaintiff. The City noted that the list of recorded SSOs attached to the amended complaint did not include any at the plaintiff's address.

¶ 13 On March 7, 2012, the plaintiff filed a response to the motion to dismiss. The plaintiff argued that the public duty rule did not bar his claims because the claims were based on the City's failure to maintain its property, not on any failure to provide government services. The plaintiff further argued that it adequately pleaded notice under section 3-102(a) of the Act by alleging that (1) the City routinely inspected its sewer systems and knew of hundreds of obstructions and sources of unintended infiltration, (2) outside engineering firms had identified unintended infiltration, and (3) the City experienced hundreds of SSOs.

¶ 14 On May 2, 2012, a hearing was held on the City's motion to dismiss the plaintiff's first amended complaint. Following argument, the trial court granted the City's motion to dismiss. The trial court found the plaintiff's claims barred by the public duty rule. The trial court found that this was a sewer services case and that, while the City owed a public duty to provide sewer services, it did not owe a specific duty to the plaintiff absent more specific allegations of an act or omission that led to the plaintiff's damages. With respect to the Act, the trial court found that the City had to have constructive knowledge of a specific defect causing the sewer backups. General claims that sewers in the neighborhood backed up during previous rainfalls was not sufficient.

¶ 15 On July 25, 2012, this court granted the plaintiff's motion to file a late notice of appeal. On July 30, 2012, the plaintiff filed his notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, the plaintiff argues that the trial court erred in finding that (1) the City owed no duty to the plaintiff and (2) the plaintiff failed to plead sufficient facts to establish notice to the City as required by section 3-102(a) of the Act. A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2010); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). A claim should not be dismissed on the pleadings "unless it is clearly apparent that no set of facts can be proved which will entitle [the] plaintiff to recover." *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995). We review the dismissal of a complaint pursuant to section 2-615 *de novo*. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). A plaintiff cannot pursue a class action without alleging a viable individual cause of action. *Weiss v. Waterhouse Securities, Inc.*, 335 Ill. App. 3d 835, 883 (2002).

¶ 18 In order for a municipality to be held liable in a negligence action, a plaintiff must establish that the municipality owed the plaintiff a duty of care, that the municipality breached that duty, and that the plaintiff sustained an injury proximately caused by the breach. *Latimer v. Chicago Park District*, 323 Ill. App. 3d 466, 468 (2001). The purpose of the Act is to protect local public entities and public employees from liability arising from the operation of government. 745 ILCS 10/1-101.1(a) (West 2010); *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001). The Act grants only immunities and defenses; it does not create any new duties. *Id.* The Act merely codifies existing common law duties, to which the delineated immunities apply.

Bloomingdale, 196 Ill. 2d at 490. The existence of a legal duty and the existence of immunity are separate issues. *Id.* Only if a duty is found is the issue of whether an immunity or defense is available to the municipality considered. *Id.*

¶ 19 As stated by our supreme court:

> "The public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services, such as police and fire protection. [Citation.] This rule of nonliability is grounded in the principle that the duty of the governmental entity to 'preserve the well-being of the community is owed to the public at large rather than to specific members of the community.' [Citation.]" *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 32 (1998).

In *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 506-09 (2006), our supreme court addressed questions about the continued validity and scope of the common law public duty rule; however, the court did not decide the issue of duty in that case, instead resolving the appeal on the basis of a statutory immunity. Nonetheless, since that case, courts have continued to recognize that under the public duty rule a governmental entity generally owes no duty to provide an individual citizen with specific municipal services. See *Green v. Chicago Board of Education*, 407 Ill. App. 3d 721, 726 (2011); *Hess v. Flores*, 408 Ill. App. 3d 631, 644 (2011); *Taylor v. Bi-County Health Dept.*, 2011 IL App (5th) 090475, ¶ 36 (under the public duty rule, a county health department did not owe any individual duty to require that a child be provided with a specific vaccine); *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 581 (2007) (the City of Chicago did not owe the plaintiffs an individual duty to protect them from a porch collapse); *Sims-Hearn v. Office of the Medical Examiner*, 359 Ill. App.

3d 439, 444 (2005) (office of the medical examiner did not owe a duty of care to individual citizens to perform customary duties such as autopsies).

¶ 20 In *Alexander v. Consumers Illinois Water Co.*, 358 Ill. App. 3d 774, 777 (2005), the plaintiff homeowners filed claims against the Village of University Park (Village) and Consumers Illinois Water Co. (Consumers) seeking damages for sewer backups into their homes. Consumers, who owned and operated the sewer lines in the Village, filed a counterclaim against the Village for contribution. *Id.* The trial court granted summary judgment in favor of the Village finding that because the Village did not own, manage, or maintain the sewer system, it did not owe the plaintiffs a common law duty, and also found that even if the Village owed a duty, it was immune from suit under the Tort Immunity Act. *Id.*

¶ 21 Consumers appealed. *Id.* The reviewing court affirmed the trial court's determination. *Id.* at 778-79. The reviewing court found that the Village did not owe a duty to the plaintiffs because the Village did not own or maintain the sewer lines and was not in a position to know of possible threats to the clogging of the main sewer line. *Id.* at 778. The court further found that even if the Village owed a general duty to the public to prevent the sewer backups, the public duty rule would bar legal liability. *Id.* at 779. The court noted that under the public duty rule, a public entity may not be " 'held liable for its failure to provide adequate governmental services'." *Id.* (quoting *Harinek v. 161 N. Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 345 (1998)).

¶ 22 In the present case, the trial court properly found that the public duty rule barred the plaintiff's claims. As in *Alexander*, the City may not be held liable for its failure to provide adequate governmental services. See also *Town of Cicero v. The Metropolitan Water Reclamation District of Greater Chicago*, 2012 IL App (1st) 112164, ¶ 41 (noting in a footnote that the public duty rule "would appear to bar" the plaintiff's claim based on sewer backup because a public entity may not

be held liable for its failure to provide adequate governmental services). In this case, the plaintiff has alleged negligence by the City based solely on its performance of ordinary governmental functions, namely, operation and maintenance of the City's sewer systems.

¶ 23 The plaintiff argues that *Alexander* is distinguishable from the present case. The plaintiff first argues that, unlike the City here, the village in *Alexander* did not own or operate the defective sewer systems. Nonetheless, the *Alexander* court found that even if the village had a duty, *i.e.*, owned and operated the sewer systems, the village would still not be legally liable for its failure to provide adequate governmental services. *Alexander,* 358 Ill. App. 3d 779. Accordingly, the first distinction raised by the plaintiff was considered by the *Alexander* court in its ruling and is not a basis on which the case can be distinguished.

¶ 24 Second, the plaintiff argues that the claims asserted against the village in *Alexander* are distinguishable. Specifically, in *Alexander*, the claims asserted were for failure to inspect the sewers and failure to pass legislation. The plaintiff argues that those claims were inherently claims for failure to provide government services and the public duty rule therefore applied. The plaintiff argues that, in the present case, the claims are based on negligent maintenance of the sewer systems, which is not a government service. We find this argument unpersuasive. Maintenance of the sewer systems is a government service and the public duty rule applies. See *Donovan v. Village of Ohio*, 397 Ill. App. 3d 844, 850 (2010) (public duty rule barred claim based on village's failure to maintain its 911 emergency telephone system). The plaintiff even alleges in his amended complaint that the City's negligent maintenance of its sewers included the failure to inspect, failure to clear obstructions, and failure to properly manage storm water flooding. Accordingly, the claims asserted are for failure to provide government services.

¶ 25 The plaintiff next argues that, independent of the public duty rule, section 3-102(a) of the Act imposes a duty on the City to maintain its sewer systems in a reasonably safe condition. We disagree. The Act does not create any new bases for liability. 745 ILCS 10/1-101.1(a) (West 2010); *Village of Bloomingdale*, 196 Ill. 2d at 490. We refer to the common law to determine the duties of a local governmental entity and we look to the Act to determine whether that entity is liable for the breach of a duty. *Hess v. Flores*, 408 Ill. App. 3d 631, 638 (2011).

¶ 26 The plaintiff also argues that Illinois common law, statutes, and IEPA regulations impose a duty on municipal bodies to prevent sewer backups and flooding, citing *Porter v. Urbana-Champaign Sanitary District*, 237 Ill. App. 3d 296, 302 (1992) (a municipality has a duty to refrain from discharging sewage onto private property); 35 Ill. Adm. Code §306.304 (expressly prohibiting overflows from sanitary sewers); 415 ILCS 105/4 (West 2010) (Environmental Protection Act prohibiting the dumping or deposit of litter on private property); 720 ILCS 5/47-15 (West 2010) (prohibiting dumping, depositing or placing garbage, rubbish, trash, or refuse on another's property without consent); 720 ILCS 5/47-5(1) (West 2010) (defining public nuisance to include causing offal or filth to collect to the prejudice of others; and 720 ILCS 5/47-5(15) (West 2010) (public nuisance includes storage, dumping, or accumulation of debris, refuse, garbage, or trash in a manner that is dangerous to another's health).

¶ 27 Assuming, *arguendo*, that the foregoing case, regulation, and statutes give rise to a duty on the City's part, "the mere existence of such a duty does not answer the fundamental question at issue: to whom are the duties owed?" See *Donovan,* 397 Ill. App. 3d at 849. In *Donovan*, the court held that any common law or statutory duty to provide 911 services ran to the public at large, not to individual plaintiffs, absent a special relationship between a plaintiff and a defendant. *Id.* at 850.

Similarly in this case, any common law or statutory duty to provide sewer services ran to the public at large, not to the individual plaintiff. *Id.*

¶ 28 Nonetheless, even assuming the City owed the plaintiff a duty, we would affirm the dismissal of the first amended complaint based on section 3-102(a) of the Act. Pursuant to that section of the Act, a municipality has the duty to maintain its property in a reasonably safe condition but is not "liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe." 745 ILCS 10/3-102(a) (West 2010). Notice is generally a question of fact for the jury to decide. *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 997 (2002). Nonetheless, a court may decide as a matter of law whether a plaintiff has stated a cause of action. *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 301 (2010). A motion to dismiss under section 2-615 presents the question of whether the facts alleged in the complaint, when viewed in the light most favorable to the claimant, are sufficient to entitle the claimant to relief as a matter of law. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). Illinois is a fact-pleading state; conclusions of law and conclusory allegations unsupported by specific facts are not deemed admitted for purposes of a section 2-615 motion to dismiss. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 22, 35. "Conclusions of fact are insufficient to state a cause of action regardless of whether they generally inform the defendant of the nature of the claim against him." *Id.* at ¶ 22.

¶ 29 In the present case, the plaintiff has failed to allege sufficient facts of any specific condition that is not reasonably safe. The plaintiff alleged that the City had a duty to maintain the City's sewer system and that the City breached that duty by failing to adequately inspect the sewers, clear obstructions, eliminate infiltration, manage flooding, and supply continuous power to generators and pumping stations. The plaintiff further alleged that these general failures resulted in sewage and

storm flooding to his property and home, resulting in damages. Such general allegations do not satisfy Illinois' fact-pleading requirements or establish actual notice. See *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 550 (1980) (plaintiff alleged that sewage backup into her house was caused by city closing a specific overflow line); *Trtanj v. Granite City*, 379 Ill. App. 3d 795, 797-98 (2008) (plaintiffs alleged the failure of a specific lift station and untimely repair of that lift station as the cause of their injuries); *Alexander*, 358 Ill. App. 3d at 777 (plaintiffs alleged that sewer backup into their homes was caused by debris created by a specific homeowner cleaning out his lateral line); *Powell v. Village of Mt. Zion*, 88 Ill. App. 3d 406, 410 (1980) (plaintiff alleged that village allowed a developer to connect to village sewer system near plaintiff's property resulting in backflow onto the plaintiff's property). Moreover, such general allegations are insufficient to establish constructive notice of a condition that is not reasonably safe. See *Brzinski v. Northeast Illinois Regional Commuter Railroad Corporation,* 384 Ill. App. 3d 202, 206 (2008) (evidence that Metra may have been aware of sinkholes in other areas was insufficient to charge it with constructive notice of the specific sinkhole which caused plaintiff's injury); *Pinto v. DeMunnick*, 168 Ill. App. 3d 771, 775 (1988) (general sinkhole problem in the village not sufficient to establish notice to municipality of sinkhole that caused plaintiff's injury). Here, the plaintiff's allegations of general storm and sanitary sewer inadequacies and overflows are not sufficient to place the City on notice of any specific sewer failure that caused the plaintiff's injury.

¶ 30 III. CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 32 Affirmed.