IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Mirko Krivokuca,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 13 L 7598
	)	
City of Chicago,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A local governmental entity is immune from liability if it has no notice of a condition that causes the plaintiff's injury. Illinois common law further prohibits a party from seeking damages in a civil lawsuit before exhausting all available administrative remedies. The defendant here had no notice of a sinkhole that caused the plaintiff's personal injuries; consequently, summary judgment is granted with prejudice as to those claims. The defendant, however, waived its exhaustion-of-administrative-remedies argument by failing to plead it as an affirmative defense; consequently, summary judgment is denied as to the property damage claim.

FACTS

In early January 2013, the City of Chicago received a complaint of water percolating onto a parkway near the intersection of East 96th Street and South Houston Avenue. On January 10, a Department of Water Management crew excavated the six-inch-diameter water main near the parkway and discovered a circumferential leak. According to the repair crew foreman, Tim Dowdy, there was no other leak in the main. The crew repaired the main with a clamp, creating a watertight seal. After the crew turned the water back on, the main did not leak, and the excavation remained dry. The crew then backfilled the hole.

On April 18, 2013, at approximately 5:20 a.m., Mirko Krivokuca was driving his car north on South Houston Avenue on his way to work as a City motor truck driver. Krivokuca was a half block from his home when the street pavement suddenly gave way, causing the back of his Toyota pickup truck to fall 10 to 12 feet into a sinkhole while the front end fell about four feet into the hole. Despite his truck resting at an approximately 45-degree angle, Krivokuca was able to crawl out of the truck and climb up to the street. Krivokuca indicated that he had not seen anything to indicate that a hole would open in the street at that time. He had driven the same route the day before and saw nothing unusual at that time. After Krivokuca's truck had been pulled out of the hole, the City towed it to a pound located at East 103rd Street and South Doty Avenue.

A Department of Water Management crew went to the scene to excavate the area. This time the foreman was John Hosty, who indicated that the water main had broken in two places and fallen to a lower elevation. In addition, a sewer line had broken. Hosty indicated that the breaks were not in the same location as the January break and repair because he saw the clamp the crew had installed in January and saw that it had not leaked. He could not determine if the water main and sewer breaks created the hole or if a street collapse crushed the water main and sewer. According to Hosty, the sewer line break or heavy rain could have eroded the area and caused the hole. Regardless, on this occasion, the City hired a contractor to repair the breaks.

On April 24, 2013, the City mailed Krivokuca notification that his truck had been impounded and informed him what he needed to do to retrieve it. The notice indicated that Krivokuca needed to request an administrative hearing with 15 days of the notice if he wanted to challenge the validity of the tow or the storage charges. The notification stated that a failure to respond within 15 days would constitute a waiver of his rights and would allow the City to dispose of his vehicle.

Krivokuca acknowledged that he received the City's notice and that he did not request an administrative hearing or seek to retrieve his truck. Rather, Krivokuca stated that he went to the pound to retrieve some items from his truck and spoke with someone who worked there. The employee allegedly told Krivokuca that his truck could remain at the pound indefinitely and free of charge. Krivokuca did not know the employee's name. The City disposed of Krivokuca's truck on May 12, 2013, an event he claims he first learned of in June 2013.

On July 2, 2013, Krivokuca filed a two-count complaint against the City. Count one was a cause of action for negligence and claimed that the City had failed to repair or had negligently repaired roadway and sewer defects and had negligently maintained South Houston Avenue in a condition that posed a risk of harm. Count two relied on the same facts and presented the same claims under the title of *res ipsa loquitur*.[1] On September 2, 2014, Krivokuca amended his complaint to add a count for property damage based on the negligent disposal of his truck.

ANALYSIS

The Code of Civil Procedure authorizes summary judgment, "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. A defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law – the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Alternatively, a defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action – the so-called "*Celotex* test." *See Resurrection Home Health*

[1] On January 30, 2014, this court dismissed the *res ipsa loquitur* count because it is not a cause of action but an evidentiary doctrine. Krivokuca properly preserved that claim by re-pleading it in his amended complaint.

Services v. Shannon, 2013 IL App (1st) 111605, ¶ 20, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The purpose of a summary judgment proceeding is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed.*, 202 Ill. 2d 414, 421, 432 (2002). A legally recognized cause of action in tort is one that alleges facts, not conclusions, which, if proven, would establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury. *See Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007). To create a genuine issue of material fact in a tort action, a plaintiff must present enough evidence in response to a summary judgment motion to support each of these four essential elements. *See Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). If the party seeking summary judgment presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001).

I. Statutory Tort Immunity

The City's summary judgment motion as to the negligence count is based on three provisions of the Local Governmental and Governmental Employees Tort Immunity Act. *See* 745 ILCS 10/1-101 to 10/9-107. The Tort Immunity Act provides only defenses and immunities to local public entities and is not a source of duties or liabilities. *See* 745 ILCS 10/1-101.1(a); *Sparks v. Starks*, 367 Ill. App. 3d 834, 838 (1st Dist. 2006). The legislature enacted statutory immunities for local governmental entities to prevent the diversion of public funds from their intended purpose to the payment of damage claims. *See Davis v. Chicago Hous. Auth.*, 136 Ill. 2d 296, 302 (1990), *quoting* 18 Eugene McQuillin, Municipal Corporations § 53.24 (3d ed. 1963). Local governmental entities are, nonetheless, "liable in tort on the same basis as private tortfeasors unless a valid statute dealing with tort immunity imposes limitations upon that liability."

Michigan Ave. Nat'l Bk. v. County of Cook, 191 Ill. 2d 493, 502 (2000). Thus, the resolution of the City's motion hinges on the statutory construction of the Tort Immunity Act, which is a legal question for the court. *Id.*

When interpreting any statute, a court is to ascertain and give effect to the legislature's intention. *See Ries v. City of Chicago*, 242 Ill. 2d 205, 215-16 (2011). The first Tort Immunity Act section at issue here provides limited immunity for conditions of public property. The section states that:

> Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be 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 in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

745 ILCS 10/3-102(a). The two other provisions relied on by the City provide immunity for discretionary decision making by governmental employees. As codified:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201. Finally, the statute provides that local governmental entities are immune from vicarious liability if their employees are not liable:

> A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

745 ILCS 10/2-109.

The City's argument based on section 3-102(a) is a simple one – that the City did not have actual or constructive notice of the sinkhole or its cause. Whether a local governmental entity had notice of a particular property condition prior to a plaintiff's injury is typically a question of fact, "but becomes a question of law if all the evidence when viewed in the light most favorable to the plaintiff so overwhelmingly favors the defendant public entity that no contrary verdict could ever stand." *Pinto v. DeMunnick*, 168 Ill. App. 3d 771, 774 (1st Dist. 1998), *citing Buford v. Chicago Housing Auth.*, 13 Ill. App. 3d 235, 245-46 (1st Dist. 1085), and others. Further, the burden of establishing that the local public entity had notice of the defect is on the plaintiff. *Id.*

The record provided by the parties contains no evidence that the City had actual notice of any infrastructural defects beneath South Houston Avenue that led to the formation of the sinkhole. Not surprisingly, Krivokuca testified that he, too, had no idea that a sinkhole would occur at the very moment he drove above the latent condition. In fact, he had driven the same route the day before and noticed nothing unusual. Absent any actual notice, the only question is whether the City had constructive notice.

The January 2013 water main leak did not and could not provide the City with constructive notice that the water main and the sewer would crack three months later because the causes and locations were distinct. Indeed, Hosty testified that the April 2013 excavation exposed the January 2013 water main repair that showed the clamp in place with no leaking. Hosty could not determine if the water main and sewer breaks caused the formation of the hole or if the street collapse crushed the water main and sewer. Hosty testified that sinkholes such as this can be caused by a variety of reasons, including heavy rain.

If a latent defect is undetected by any other means – in this instance, for example, by a drop in water pressure, percolating water, or backed up sewers – a local governmental entity certainly cannot be said to have constructive notice of the unseen condition. That principle applies here and, as a result, section 3-102(a) immunizes the City from Krivokuca's personal injury claims – counts one and two – because he has failed to establish that the City had constructive notice of the sinkhole or the water main and sewer breaks that may have caused it. Since the City is immune from liability based on its lack of actual or constructive notice, this court need not consider the City's other arguments based on Tort Immunity Act sections 2-201 and 2-109.

II. Exhaustion of Administrative Remedies

The Illinois Municipal Code authorizes a municipality to establish a "system of administrative adjudication." 65 ILCS 5/1-2.1-4. Illinois strongly favors adjudication through established administrative hearings because they provide for continuity in agency decision making and protect civil courts from a substantial number of cases that may be handled more expeditiously before a specialized hearing officer. *See Gallagher v. Hasbrouk*, 2013 IL App (1st) 122696 ¶ 18. The City's municipal code provides for a variety of post-deprivation hearing procedures, including one for owners whose vehicles have been impounded. *See* Chicago Mun. Code § 9-92-10.

A claim that a plaintiff failed to exhaust administrative remedies before filing a civil lawsuit is an affirmative defense that is waived unless pleaded. *See Hawthorne v. Village of Olympia Fields*, 204 Ill. 2d 243, 254 (2003). In general, " waiver means the voluntary relinquishment of a known right" and arises from an affirmative, consensual act and intentional act. *Center Prtnrs., Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 66, *citing Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 947 (1st Dist. 2010). In contrast, "forfeiture is the failure to timely comply with procedural requirements." *James R.D. v. Maria Z.*, 2015 IL 117904, ftn. 3.

The record here indicates that Krivokuca forfeited his right to bring a property damage claim since he failed to request an administrative hearing in a timely fashion. Yet the docket in this case indicates that the City waived its right to the exhaustion-of-administrative-remedies argument. On September 4, 2014, Krivokuca filed an amended complaint adding a claim for property damage. On October 6, 2014 the City answered the amended complaint and pleaded three affirmative defenses: (1) that the street was reasonably safe and, therefore, the City was immune under Tort Immunity Act section 3-102(a); (2) that the City had no notice of the defect and, once again, was immune under section 3-102(a); and (3) that the City enjoyed immunity under Tort Immunity Act section 2-201 for its discretionary decision making. On October 9, 2014, Krivokuca responded to these affirmative defenses.

This court could not find an entry in the electronic docket indicating that the City previously filed a motion for leave to add the exhaustion-of-administrative-remedies affirmative defense. While the affirmative defense would otherwise appear to be dispositive, the City cannot now make the argument for the first time on summary judgment. The City's summary judgment motion as to count three is, therefore, denied.

CONCLUSION

For the reasons stated above, it is ordered that:

1. the City's summary judgment motion as to counts one and two is granted with prejudice;
2. the City's summary judgment motion as to count three is denied;
3. the May 12, 2015 ruling at 11:00 a.m. is stricken; and
4. this matter is set for case management on May 27, 2015 at 10:00 a.m.

Judge John H. Ehrlich

MAY 11 2015

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge