FIRST DIVISION
May 15, 2017

No. 1-16-0661

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NIKUNJ PATEL, Plaintiff-Appellant/Cross-Appellee, v. SYED AKBAR, SALIM MOTEN, IRFAN MOTEN, individually and d/b/a DELHI DARBAR KABAB HOUSE, UNKNOWN OWNERS OF DELHI DARBAR KABAB HOUSE and PAKISTANI KINGS, Defendants. (Irfan Moten, individually and d/b/a Delhi Darbar Kabab House, Defendant-Appellee/Cross-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 14 L 08375 Honorable Larry Axelrood, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

***Held*:** We affirm the dismissal of counts VI, VII, VIII, and IX of plaintiff's amended complaint for failure to state a cause of action.

¶ 1 Plaintiff-appellant/cross-appellee, Nikunj Patel (hereinafter "plaintiff") brought this action against several defendants, including defendant-appellee/cross-appellant, Irfan Moten (hereinafter "Moten") stemming from an altercation at Delhi Darbar Kabab House (hereinafter "the Restaurant") in Chicago, Illinois. In the early morning hours of March 28, 2010, plaintiff and Sohankumar Subhaschandra (hereinafter "Sohan") placed an order with the Restaurant and drove to pick it up. Upon entering, the pair encountered Syed Akbar (hereinafter "Akbar"), who directed an ethnic slur at the pair before exiting the Restaurant. The only employee on duty, Salim Moten (hereinafter "Salim"), locked the door behind Akbar. However, Akbar returned with ten to twelve individuals and Salim unlocked the door. The group entered the Restaurant and a fight ensued resulting in injuries to plaintiff and Sohan.

¶ 2 On March 27, 2012, plaintiff and Sohan brought an action against Moten, Salim and Akbar in Lake County, Illinois. Only one count was brought against Moten, and he moved to dismiss it pursuant to 735 ILCS 5/2-615 (West 2014). This was granted in September 2012. An amended complaint was filled with only one count directed at Moten. This was dismissed in December 2012. A seconded amended complaint was filed, which added Delhi Darbar Management, Inc. as a defendant. Moten answered the second amended complaint. The parties were proceeding through discovery when plaintiff voluntarily dismissed his case on August 13, 2013.

¶ 3 On August 11, 2014, plaintiff filed a new complaint in Cook County. Moten moved to dismiss the counts against him and the trial court granted his motion pursuant to section 2-615 on June 1, 2015. Plaintiff filed his first amended complaint on June 29, 2015. Moten moved to dismiss pursuant to 735 ILCS 5/2-619.1 (West 2014) on the basis that all four counts failed to state a cause of action against him or, alternatively, were barred by the doctrine of *res judicata*.

The trial court denied the motion on *res judicata* grounds but agreed that the four counts failed to state a cause of action against Moten. The dismissal was with prejudice and contained Rule 304(a) language making it immediately appealable.[1]

¶ 4 On appeal, plaintiff raises only one issue – whether the trial court erred in dismissing the four counts of his first amended complaint for failure to state a cause of action. Moten filed a cross-appeal concerning the denial of his motion on *res judicata* grounds.

¶ 5 For the reasons set out more fully below, we agree with the trial court that the four dismissed counts fail to state a cause of action. Given this conclusion, defendant's cross-appeal concerning the denial of his motion on *res judicata* grounds is moot.

¶ 6 JURISDICTION

¶ 7 On February 11, 2016 the trial court granted Moten's motion to dismiss with prejudice. The dismissal order contained Rule 304(a) language making the order immediately appealable. On March 8, 2016, plaintiff filed a notice of appeal. Moten filed a cross-appeal on March 15, 2016. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 304(a). Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016).

¶ 8 BACKGROUND

¶ 9 Around 3:00 a.m. on the morning of March 28, 2010, plaintiff called Salim, an employee at Delhi Darbar Kabab House, to place a pick-up order. About thirty minutes later, plaintiff and Sohan arrived at the Restaurant to pick up their order. Salim was the only employee on duty at the time. Almost immediately after arriving, plaintiff realized he left his cell phone in his car and went to retrieve it. While exiting, plaintiff encountered Syed Akbar, a person he did not know.

[1] Sohan's portion of the case was dismissed with prejudice for reasons not relevant to this appeal.

As the pair passed, Akbar spoke to plaintiff and asked, "Are you 'bania'," with "bania" being a slang word which relates to one of the castes in the Hindu caste system. According to plaintiff, it can be used as an ethnic slur against people from India and Pakistan. Plaintiff replied, "No, I am Patel." After rejoining Sohan inside the Restaurant, plaintiff relayed the exchange he had just had. Akbar overheard this, made a threatening remark to the pair, and promptly exited the Restaurant. While Salim locked the door behind Akbar, he returned a short time later with a group of unknown individuals. For reasons unstated, Salim unlocked the door allowing the group back into the Restaurant. Plaintiff claims that almost immediately upon reentering the Restaurant, Akbar and the group initiated offensive remarks against them. The group began to throw chairs, bottles, and other objects at plaintiff. Sohan was hit in the head with a bottle while Akbar began to attack plaintiff with a knife. Akbar stabbed plaintiff approximately 17 times. Sohan came to plaintiff's aid and was also stabbed before the attack ended.

¶ 10 On March 27, 2012, plaintiff filed a nine-count complaint in the trial court of Lake County, Illinois against Salim, Akbar, and Moten. Only count X was directed at Moten, which he moved to dismiss for failure to state a cause of action. The Lake County court granted the motion on September 6, 2012, with leave to replead. Plaintiff then filed an amended complaint with a revised count X on September 27, 2012. Moten again moved to dismiss based on section 2-615, which the court granted on December 4, 2012. Plaintiff then filed a second amended complaint of January 9, 2013, adding "Delhi Darbar Management, Inc." as a party-defendant and specifically alleging that it was the employer of Salim. Moten denied all material allegations and specifically denied that he, in his individual capacity, employed Salim. He did admit that in March of 2010 Darbar Management, Inc. operated the Restaurant located at 3010 West Devon Avenue in Chicago, Illinois. He also admitted to being president of Darbar Management, Inc.

After answering the second amended complaint, the parties proceeded to discovery. Plaintiff then filed a motion to voluntarily dismiss the second amended complaint, which the court granted on August 13, 2013.

¶ 11 On August 11, 2014, plaintiff filed a new complaint in the circuit court of Cook County. This new complaint named Salim, Moten, and Akbar, but did not name Darbar Management, Inc., as a party-defendant. Instead plaintiff brought additional claims against Moten and the other individual defendants. Moten filed a motion to dismiss the newly filed complaint, which the trial court granted on June 1, 2015. The court found that Moten could not be held liable in his individual capacity. Plaintiff was given leave to amend.

¶ 12 Plaintiff then filed his first amended complaint, which is the subject of this appeal. The paragraphs containing the general allegations (paragraphs 1-35) essentially mirrored the above facts concerning the nature of the attack. The only specific allegation against Moten was that he lived in Lincolnwood, Illinois. No allegation concerning the ownership of the Restaurant was made in any of these paragraphs. Relevant to this appeal, count VI sought to hold Moten liable for the conduct of Salim based on a theory of *respondeat superior*. Count VII mirrored count VI but was directed at Unknown Owners of the Restaurant. Count VIII alleged negligent supervision against Unknown Owners. Count IX is titled "negligence" and is directed at Moten, individually, but the actual allegations in that count sound in negligent supervision.

¶ 13 Moten moved to dismiss based pursuant to 735 ILCS 5/2-619.1 (West 2014). In his section 2-615 portion, Moten again claimed that he could not be held individually liable for what occurred at the Restaurant because it was owned by Darbar Management, Inc., and he could only be held liable in his capacity as president, not individually. In his section 2-619 portion, Moten claimed that the action was barred by the doctrine of *res judicata*, based on what had occurred in

the Lake County court. On February 11, 2016, the court denied defendant's motion as to his section 2-619 claim but granted it as to his section 2-615 claim. However, the order entered simply stated "the 2-615 motion to dismiss is granted with prejudice as to Irfen Moten, individually; there remain pending no claims against Irfen Moten, individually." The court, pursuant to Supreme Court Rule 304(a), found there was no just reason to delay enforcement or appeal.

¶ 14 Plaintiff timely filed a notice of appeal seeking reversal of the trial court's order granting Moten's section 2-615 motion to dismiss. Moten timely filed a cross-appeal concerning the denial of his section 2-619 motion to dismiss based on *res judicata*.

¶ 15 ANALYSIS

¶ 16 We address plaintiff's appeal first, because if the trial court correctly dismissed the counts for failure to state a cause of action, whether or not they are barred by the doctrine of *res judicata* would be moot. Additionally, we note that while counts VII and VIII are lodged against Unknown Owners of the Restaurant, both parties treat them as being dismissed even though the dismissal order is not clear on this point.

¶ 17 A section 2-615 motion to dismiss tests the legal sufficiency of the complaint based on defects apparent on its face. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. "In other words, the defendant in such a motion is saying, 'So what? The facts the plaintiff has pleaded do not state a cause of action against me." *Winters v. Wangler*, 386 Ill. App. 3d 788, 792 (2008). A section 2-615 motion presents the question of whether the facts alleged in the complaint, viewed in a light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief can be granted. *Doe-3*, 2012 IL 1122479, ¶

16; *Winters*, 386 Ill. App. 3d at 793. "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005). We apply a *de novo* standard of review to dismissals under section 2-615. *Doe-3*, 2012 IL 112479, ¶ 15.[2]

¶ 18 We agree with the trial court that counts VI and VII of plaintiff's amended complaint fail to state a cause of action under the doctrine of *respondeat superior*. It is well established that an employer may be held liable for the negligent, willful, malicious or criminal acts of its employees where such acts are committed in the course of employment and in furtherance of the business of the employer. *Webb by Harris v. Jewel Companies, Inc.*, 137 Ill. App. 3d 1004, 1006 (1985). However, an employer will not be liable to an injured third party where the acts complained of were committed solely for the benefit of the employee. *Id.* citing *Johanson v. Johnston Printing Co.*, 263 Ill. 236, 240 (1914).

¶ 19 The amended complaint fails to set forth any facts to support liability under a theory of *respondeat superior*. In count VI, plaintiff fails to allege who employed Salim. While plaintiff states that "Salim was at all times an employee of Irfan had a duty to train [sic] Salim to conduct the Restaurant in a manner which insured the safety of business invitees such as Nikunj," such an allegation does not affirmatively state who employed Salim. Plaintiff also simply states that "Salim was at all times acting within the scope of his employment," without any supporting facts

[2] Given the section 2-615 dismissal, we confine our review to the pleadings contained in the first amended complaint filed in Cook County. We do not consider any of the allegations contained in either the original Cook County complaint or those contained within any of the Lake County complaints.

or further details. Plaintiff also fails to explain how Salim's negligent actions were in furtherance of the business of the employer, a key element of any *respondeat superior* claim. *Webb by Harris*, 137 Ill. App. 3d at 1007-08. Plaintiff also seeks to hold Moten liable in his individual capacity, but fails to plead any facts which would demonstrate Moten can be held individually liable. Nothing in count VI explains Moten's relationship to the Restaurant. The only general allegation against Moten in paragraphs 1-35, which are incorporated into count VI, is that he is a resident of Lincolnwood, Illinois. Paragraphs 36 and 38 of count VI discuss a duty on behalf Moten and his breach of said duty, which would be indicative of direct liability, but *respondeat superior* is a claim involving vicarious liability, not direct. *Vancura v. Katris*, 238 Ill. 2d 352, 375 (2010). Although we liberally construe pleadings, those contained within count VI, unsupported by allegations of specific facts, do not state a cause of action pursuant to the doctrine of *respondeat superior*.

¶ 20 While suffering from the same deficiencies noted above, count VII also fails in setting out an action against Unknown Owners. Under section 2-615, the critical question is whether the allegations in the complaint, construed in the 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). Plaintiff does not plead facts and demonstrate how the court can enter a judgment against an unknown owner pursuant to a theory of *respondeat superior*. Accordingly, we find no error in the dismissal of this count.

¶ 21 We note in his brief that plaintiff argues the actual owner of the restaurant is a question of fact and the allegations of the complaint are sufficient to put that fact at issue. To the extent plaintiff is trying to make a corporate veil piercing claim, such a claim was not well pled below and has been inadequately presented on appeal. Illinois courts will pierce the corporate veil "where: (1)

there is such a unity of interest and ownership that the separate personalities of the corporation and the parties who compose it no longer exist, and (2) circumstances are such that adherence to the fiction of a separate corporation would promote injustice or inequitable circumstances." *Tower Investors LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1033–34 (2007). To overcome a section 2–615 motion to dismiss, the party seeking to pierce the corporate veil must adequately plead facts to satisfy both of these prongs. *South Side Bank v. T.S.B. Corp.*, 94 Ill. App. 3d 1006, 1010 (1981).

¶ 22 Plaintiff fails to properly address either of the above prongs and only cites to one case, *Hoskins Chevrolet v. Hochberg*, in support of his argument, however, this case is not applicable as it involved contract, not tort claims. 294 Ill. App. 3d 550, 556 (1998). Given the deficiencies in both the pleadings and appellate argument, we decline to engage in any further analysis regarding plaintiff's ownership claim because it would invite an unnecessary discussion not needed to resolve this appeal.

¶ 23 Plaintiff next challenges the dismissal of counts VIII and IX. While titled differently, both counts contain virtually the same substantive allegations. Count VIII alleges negligent supervision against Unknown Owners of the Restaurant. Count IX is titled negligence and is brought against Moten, but we view it as also alleging negligent supervision because the relevant paragraphs discuss Moten acting as Salim's supervisor and Moten's failure to properly supervise and monitor.

¶ 24 After examining plaintiff's brief, plaintiff has waived review of this issue. Plaintiff fails to present any substantive argument demonstrating the trial court erred in dismissing his negligent supervision counts. Plaintiff fails to cite to any case law or engage in any analysis concerning his negligent supervision claims. Illinois Supreme Court Rule 341(h)(7) states, "[p]oints not argued

are waived and shall not be raised in the reply brief, in oral argument, or in a petition for rehearing." S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented, and it is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." *People v. Universal Public Transp., Inc.*, 2012 IL (1st) 073303-B, ¶50 citing *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993).

¶ 25 Absent waiver, we agree with the trial court that counts VIII and IX fail to state a cause of action for negligent supervision. "In order to hold an employer liable for injuries resulting to third persons for negligent training or supervision of an employee, it must be established that the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, having this knowledge, failed to supervise the employee adequately, or take other action to prevent the harm." *Doe v. Brouillette*, 389 Ill. App. 3d 595, 606 (2009). None of the allegations in either count VIII or IX demonstrate that Salim's employer had any knowledge that he was behaving in a dangerous or otherwise incompetent manner. *Reynolds v. Jimmy John's Enterprises*, LLC, 2013 IL App (4th) 120139, ¶ 48. The complaint does not state the dangerous action Salim is supposed to have routinely engaged in. *Id.* Plaintiff does not allege any other specific incidents of ethnic violence occurring at the Restaurant, or that Salim had previously allowed rival ethnic groups to engage in violent behavior at the Restaurant. *Id.* The lack any specific facts in support of counts VIII and IX prevent either from

stating a cause of action for negligent supervision. *Webb by Harris*, 137 Ill. App. 3d at 1005. Accordingly, the trial court did not err in dismissing counts VIII and IX.[3]

¶ 26 Given this disposition, we need not address the cross-appeal on whether the challenged counts are barred by the doctrine of *res judicata*. See *Forest Preserve District of Du Page County v. Miller*, 339 Ill. App. 3d 244, 257 (2003) (based on resolution of plaintiff's appeal, issues that the defendant raised in cross-appeal are moot and need not be addressed).

¶ 27 CONCLUSION

¶ 28 Based on the above, we affirm the trial court's dismissal of counts VI, VII, VIII, and IX of plaintiff's amended complaint.

¶ 29 Affirmed.

[3] We also conclude count VIII would fail for the same reason discussed in paragraph 20.