

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2026 IL App (4th) 251343-U

NO. 4-25-1343

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

October 7, 2026

Carla Bender

4th District Appellate
Court, IL

NATHAN BAUM,
Plaintiff-Appellant,
v.
THE VILLAGE OF VIOLA,
Defendant-Appellee.

) Appeal from the
) Circuit Court of
) Mercer County
) No. 25CH3
)
) Honorable
) Matthew W. Durbin,
) Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court
Justices Zenoff and Grischow concurred in the judgment.

ORDER

¶ 1 *Held:* Count I of plaintiff's complaint was properly dismissed with prejudice, though on a different basis than that relied upon by the circuit court.

¶ 2 Plaintiff Nathan Baum filed a two-count complaint seeking equitable and monetary relief against defendant the Village of Viola (Village). The Village filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2024)). Following a hearing, the circuit court granted the motion to dismiss with prejudice, finding that the Village was immune to such claims. On appeal, plaintiff argues that the court erred in dismissing his complaint with prejudice. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are gleaned from the face of plaintiff's complaint, as we must accept as true all of its well pleaded allegations. See *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399,

407 (1996) (noting a section 2-615 motion admits the truth of all well-pleaded factual allegations); *Xochi, LLC v. City of Galena*, 2022 IL App (4th) 220340, ¶ 19 (same, regarding a section 2-619 motion).

¶ 5 In the summer of 2024, plaintiff began requesting information from Village officials regarding the proper procedure for building a structure on a piece of property in town. He initially contacted the Village clerk, and she advised plaintiff to contact a trustee of the Village board. That trustee directed plaintiff to another trustee, Michael Wherry. Plaintiff alleged that, following conversations between the two of them, Wherry ultimately said that “he could not find any regulations that would deny or allow [the] building project.” Moreover, Wherry advised that “ ‘[t]he good news is that you should be in pretty good shape’ ” and to not “ ‘worry about permits’ ” because the Village was not “ ‘issuing them yet, and there’s currently no one available to conduct inspections.’ ” The reason for this comment was that the Village apparently did not have a person appointed as the zoning officer. Plaintiff interpreted Wherry’s responses as an approval to build “ ‘as long as I stay behind where the house garage are north and south of it.’ ” He sought to confirm whether that was the “ ‘gist’ ” of his message. Wherry responded, “ ‘Yes[,] I think that’s a very fair review of what the rules allow,’ ” and that “if anyone should ever call out anything, you can say... ‘Now Wait, I followed every proper process,’ ” and finally, “Happy Building!!” These conversations were memorialized via e-mail, and plaintiff alleged that Wherry’s correspondence contained “ ‘the Village of Viola.org,’ ” although this is not apparent from the e-mail in the record.

¶ 6 In the fall of 2024, plaintiff began building the structure at issue and expended approximately \$110,000 in materials and labor for the project. In December 2024, he received a cease and desist letter from the president of the Village. Plaintiff later alleged that the letter was

not authorized by the Village board of trustees. Legal counsel for the Village allegedly stated at a January 2025 board meeting that “ ‘there was no clear process for obtaining the paperwork,’ ” when discussing this matter.

¶ 7 In June 2025, the Village served plaintiff with a document entitled “Notice of Accrued Fines,” claiming a debt of \$10,200 in fines for violating the Village’s zoning ordinance by building the partially constructed structure.

¶ 8 Plaintiff filed a two-count complaint alleging facts as laid out above, with neither count labeled as a specific cause of action. Count I sought injunctive relief from the cease and desist order and the accumulated fines, and while it used the phrase “estopped from enforcement,” it did not declare that it was an action for estoppel. Count II alleged the Village was negligent and sought money damages in the amount of \$110,000 plus the costs of the suit.

¶ 9 The Village sought dismissal under both sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2024)) in a combined motion to dismiss pursuant to section 2-619.1 (*id.* § 2-619.1). The Village also filed a motion for sanctions. Ill. S. Ct. R. 137 (eff. Jan. 1, 2018). The section 2-619 component of the Village’s motion asserted that the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2024)) shielded the Village from liability. The section 2-615 component of the Village’s motion asserted that the complaint was deficient on its face. Specifically, count I requested injunctive relief but failed to plead the necessary elements for an injunction or the necessary grounds for equitable estoppel. The Village asserted that count II failed to allege the necessary elements to establish negligence, instead relying on legal conclusions.

¶ 10 Plaintiff filed a response, acknowledging the general rule that a municipal entity cannot be estopped by the conduct of an agent when that conduct is beyond the authority conferred

unto that agent, but he asserted that a narrow exception existed where a party could show “(1) ‘his action was induced by the conduct of municipal officers,’ and (2) ‘in the absence of such relief he would suffer a substantial loss and the municipality would be permitted to stultify itself by retracting what its agents had done.’ ” (quoting *Cities Service Oil Co. v. City of Des Plaines*, 21 Ill. 2d 157, 161 (1961)). Plaintiff claimed the complaint made factual assertions that, when viewed in the light most favorable to him, were sufficient to overcome the Village’s motion to dismiss as to count I. The response made no argument in support of count II.

¶ 11 The Village’s reply to plaintiff’s response noted that plaintiff’s response failed to address the motion as to count II. As to count I, the Village argued that (1) equitable estoppel was an affirmative defense and not an avenue for direct relief; (2) it was rare for equitable estoppel to be imposed against public entities; and (3) a claim of equitable estoppel based on advice from a municipal official required plaintiff to plead that the official possesses express authority, not just apparent authority. Attached to the reply was the Village zoning ordinance that stated the zoning officer was appointed by the Village president with the advice and consent of the Village board of trustees. The duties of the zoning officer included issuing zoning certificates and occupancy permits. A subsequent section noted that no zoning certificate or occupancy permits could issue without review by the zoning officer. Finally, the ordinance states that “[a]ny permit or certificate issued in conflict with the provisions of the Ordinance shall be null and void.” Viola Ordinance art. XVIII, § 101.1 (adopted Feb. 6, 2006).

¶ 12 At the hearing on the motion to dismiss, plaintiff voluntarily dismissed count II with prejudice. Plaintiff argued that he did everything a reasonable person would have done in his position and that he relied on the advice of Village officials. The Village argued that the trustee lacked the express authority required to establish equitable estoppel and that the Village zoning

ordinance put plaintiff on notice that the structure he was attempting to build was not allowed under the property's existing zoning designation.

¶ 13 The circuit court took the matter under advisement and entered a dismissal order by docket entry. The docket entry noted that the court found that the Tort Immunity Act controlled and the matter was “dismissed.”

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Plaintiff argues on appeal that the Tort Immunity Act does not apply to his claim requesting injunctive relief and that the claim for equitable relief was sufficient to survive the motion to dismiss. The Village contends that plaintiff's argument that the Tort Immunity Act does not apply has been waived and that the claim for equitable relief fails as a matter of law.

¶ 17 The circuit court granted the Village's combined motion to dismiss pursuant to section 2-619.1 of the Code. This statutory section allows a party to combine motions to dismiss under sections 2-619 and 2-615 into one structured pleading. *Kopf v. Kelly*, 2024 IL 127464, ¶ 63. A motion to dismiss under section 2-619 admits the legal sufficiency of the claim but asserts defenses or defects outside the pleading to defeat the claim, while a motion to dismiss under section 2-615 challenges the legal sufficiency of the plaintiff's claim. *Id.* (quoting *Cahokia Unit School District No. 187 v. Pritzker*, 2021 IL 126212, ¶ 23).

¶ 18 Under section 2-619, the movant is essentially stating, “ ‘ “Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.” ’ ” *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788, 792 (2008)). Under section 2-615, the movant is essentially saying, “ ‘So what? The facts the plaintiff has pleaded do not state a cause of action against me.’ ” *Winters*, 386 Ill. App.

3d at 792.

¶ 19 As a whole, the combined motion “ ‘admits as true all well-pleaded facts and all reasonable inferences from those facts,’ and the court ‘must construe the pleadings and supporting documents in the light most favorable to the nonmoving party.’ ” *Kopf*, 2024 IL 127464, ¶ 63 (quoting *Cahokia Unit School District No. 187*, 2021 IL 126212, ¶ 24). A reviewing court must also determine “ ‘whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.’ ” *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). We review dismissal under either section *de novo*. *Id.*

¶ 20 A. Tort Immunity and Injunctive Relief

¶ 21 In Illinois, the Tort Immunity Act governs a municipal corporation’s liability in tort. The purpose of the Tort Immunity Act is to shield public entities and employees from liability due to government operations. *Enbridge Energy, Ltd. Partnership v. Village of Romeoville*, 2020 IL App (3d) 180060, ¶ 71. Because the Tort Immunity Act was enacted in derogation of common law, it must be strictly construed against public entities. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). Similar to interpreting any other statutory enactment, the goal when interpreting the Tort Immunity Act is to give effect to the legislature’s intent, as best expressed by the plain language. *Bayer v. Panduit Corp.*, 2016 IL 119553, ¶ 18.

¶ 22 We find that review of the Village’s contention that plaintiff waived the argument regarding the inapplicability of the Tort Immunity Act to the request for injunctive relief also resolves the issue of the Tort Immunity Act’s applicability on the merits. A review of the record shows that plaintiff acknowledged that the Tort Immunity Act barred his claim for monetary damages and dismissed count II at the hearing on the motion to dismiss. However, plaintiff asserted

that count I of the complaint stated a claim for equitable estoppel that was not barred by the Tort Immunity Act. Given that plaintiff disputed the Tort Immunity Act's application to his cause of action, the argument was not forfeited. See *Brunton v. Kruger*, 2015 IL 117663, ¶ 76 (noting that parties forfeit issues, not arguments).

¶ 23 Moreover, our review is *de novo*, where we perform the same analysis required of the circuit court without regard to its reasoning. See *Evans v. Cook County State's Attorney*, 2021 IL 125513, ¶ 42. While a party can forfeit an issue, they cannot forfeit the law, and as a matter of law, it has long been settled that the Tort Immunity Act does not immunize public entities from requests for injunctive relief. See *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 500-502 (2000) (noting the plain language of the Tort Immunity Act required an interpretation that it did not apply in suits requesting injunctive relief); *PACE, Suburban Bus Division of Regional Transportation Authority v. Regional Transportation Authority*, 346 Ill. App. 3d 125, 143 (2003) ("It is well settled that the Tort Immunity Act applies only to tort actions seeking damages and not to actions seeking injunctive relief."); *People ex rel. Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 204 (2001) ("[T]he Tort Immunity Act applies only to tort actions seeking damages against municipalities and not to actions seeking injunctive relief."); *Romano v. Village of Glenview*, 277 Ill. App. 3d 406, 410 (1995) (noting the "language of the Act applies only to tort actions and not suits for injunctive relief.").

¶ 24 Given the established precedent, it is apparent that the Tort Immunity Act did not operate to bar count I, so the circuit court erred in dismissing the claim on that basis.

¶ 25 B. Equitable Estoppel

¶ 26 The Village also argues that plaintiff's equitable estoppel claim fails as a matter of law. Because the Village's section 2-619 portion of the combined motion admitted the legal

sufficiency of plaintiff's claim (see *Reynolds*, 2013 IL App (4th) 120139, ¶ 31), that portion of the motion is not a proper vehicle for the argument that count I was legally insufficient on its face. The sufficiency of plaintiff's pleading can be addressed only in the context of the Village's section 2-615 pleadings. This is not the basis on which the circuit court dismissed plaintiff's case, but we may affirm on any basis appearing in the record. *Carroll v. Community Health Care Clinic, Inc.*, 2017 IL App (4th) 150847, ¶ 18.

¶ 27 We question whether equitable estoppel can be a freestanding cause of action, as opposed to a defense. See *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 94 n.11 (noting that while promissory estoppel is a type of claim, equitable estoppel "is used as a defense to preclude a party from denying a representation of past or existing fact"). Assuming, for the sake of argument, that equitable estoppel can be asserted as an independent claim, there are particular facts that must be pleaded in order to invoke it.

¶ 28 Our supreme court provided "a template for determining what specific facts must be pleaded" to invoke equitable estoppel. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 38 (where estoppel was invoked in support of the plaintiff's breach of contract claims). The supreme court stated that:

"A plaintiff seeking to invoke equitable estoppel against a municipality must plead specific facts that show (1) an affirmative act by either the municipality itself or an official with express authority to bind the municipality; and (2) reasonable reliance upon that act by the plaintiff that induces the plaintiff to detrimentally change its position. Although agency [citation] and reliance [citation] are typically questions of fact, a plaintiff must offer more than mere conclusions on these elements because Illinois is a fact-pleading jurisdiction, and because, when public revenues are at

stake, estoppel is particularly disfavored. [Citations.] Without relaxing that requirement, we note that a plaintiff may be forced to present allegations of express authority upon information and belief. ‘[A]n allegation made on information and belief is not equivalent to an allegation of relevant fact’ [citation], but at the pleading stage a plaintiff will not have the benefit of discovery tools to expose details about a municipality’s bureaucratic hierarchy.” *Id.* ¶ 40.

¶ 29 The record here shows that count I of plaintiff’s complaint is deficient in several aspects with respect to asserting equitable estoppel. Most notably, the complaint makes no allegations concerning Wherry’s express authority to act on behalf of the Village with respect to approval or disapproval of plaintiff’s construction plans. Individual board members of a legislative body generally lack the authority to act individually and bind that body. See, *e.g.*, *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 526 (1983) (stating this principle with respect to county board members). Consequently, it is necessary for plaintiff to allege some fact supporting the contrary inference here, *i.e.*, that Wherry possessed express authority to bind the Village concerning the representations in question. For this reason, dismissal of plaintiff’s complaint under section 2-615 is appropriate.

¶ 30 That is not, however, the end of our analysis, as we must decide whether the dismissal order should be with prejudice to amendment. A “ ‘cause of action should not be dismissed with prejudice unless it is clear that no set of facts can be proved under the pleading which would entitle the plaintiff to relief.’ ” *Richter v. Prairie Farms Dairy, Inc.*, 2015 IL App (4th) 140613, ¶ 26 (quoting *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85 (2003)). But the concept of dismissal with prejudice and the possibility of amendment are inextricably linked; if dismissal is without prejudice, it would mean that the plaintiff would have

the opportunity to amend, while dismissal with prejudice precludes amendment. The question we struggle with, however, is whether plaintiff here has ever *asked* for leave to amend.

¶ 31 Illinois courts have consistently held that a trial court does not err by dismissing a complaint with prejudice when a plaintiff does not request leave to amend. See *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 844 (2006) (“[W]e cannot say that the trial court abused its discretion where no exercise of that discretion was requested because the record demonstrates that plaintiff never sought leave to amend its complaint.”). “[I]t is the burden of the plaintiff to persuade the trial judge to include a specification that dismissal is without prejudice if he wishes to plead over.” *Illinois Municipal League v. Illinois State Labor Relations Board*, 140 Ill. App. 3d 592, 608 (1986). Here, it is understandable why plaintiff never asked the circuit court—after its ruling—for leave to amend because the court never ruled on the sufficiency of plaintiff’s pleading. However, in neither the briefing which preceded the ruling on the motion nor in the hearing below did plaintiff request that, if count I were dismissed, it should be without prejudice to amendment.

¶ 32 Moreover, even on appeal, plaintiff has not asserted that any defect in his pleadings could be cured by amendment, nor has he asked the court, even conditionally, for leave to amend. It is not our role to reach for an outcome plaintiff himself has not requested.

“The general rule is that where a trial court dismisses a complaint and plaintiff does not seek leave to amend, the cause of action must stand or fall on the sufficiency of the stricken pleading. [Citations.] In the interest of judicial economy and to prevent a plaintiff from circumventing the rule against interlocutory appeals, a party should not ordinarily be permitted to stand on his pleadings before the trial court and then seek leave to amend in the appellate court after the dismissal of the trial court is affirmed. [Citation.] However, this general rule is not without

exception, and in certain cases a reviewing court may properly allow a plaintiff the opportunity to amend pleadings on remand. See, e.g., *Miller v. Gupta*, 174 Ill. 2d 120, 128-29, *** (1996) (the appellate court properly allowed plaintiff the opportunity to amend a negligence count where this court decided a case that favorably affected the potential count while the case was pending before the appellate court). Thus, where the invalidity of plaintiff's legal theory is determined for the first time in the reviewing court, and where it would have been futile to request amendment in the trial court, a court of review may allow the plaintiff the opportunity to amend the complaint to cure the defect on remand in spite of the failure to seek leave to amend in the first instance in the trial court." *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 435-36 (2004).

¶ 33 Here, plaintiff stood on the sufficiency of his pleading in the circuit court and did not request leave to amend in order to bolster the sufficiency of his allegations. Similarly, plaintiff defended the adequacy of his pleading on appeal but did not request, even in the alternative, that he should be given leave to amend. Thus, the general rule described in *Bajwa* applies here, and the exceptions to that rule do not. Furthermore, at no time has plaintiff suggested that he could cure the deficiency in his pleading by making additional factual allegations concerning Wherry's express authority to bind the Village, a factor relevant to the question of amendment. See *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992) (noting the relevance of whether a "proposed amendment would cure the defective pleading").

¶ 34 Consequently, we conclude that the dismissal of plaintiff's complaint pursuant to section 2-615 should be with prejudice.

¶ 35

III. CONCLUSION

¶ 36 For the reasons stated, we affirm the circuit court's judgment.

¶ 37 Affirmed.