

FILED
1/15/2026 12:04 AM
Mariyana T. Spyropoulos
CIRCUIT CLERK
COOK COUNTY, IL
2024L005346
Calendar, D
36192866

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

DELBERT J. CHARLES as Independent)
Administrator of the Estate of ABNERD JOSEPH,)
deceased,)
Plaintiff,)

v.)

SUDLER AND COMPANY d/b/a SUDLER)
PROPERTY MANAGEMENT, LEGACY AT)
MILLENNIUM PARK CONDOMINIUM)
ASSOCIATION, DEBORAH ROMERO,)
DOMINIC TEDALDI, GARRETT MARK SMITH,)
YOUNAN “JONAH” NENA, ANDREW)
CLEMENT, ROBERT JOHN BISHOPP, JR.,)
and NATALIE BISHOPP,)
Defendants.)

STEVEN LEVY, CONSTANTINE “DEAN”)
ANDREWS, JOHN CARONA, and ASSOCIA,)
INC.,)
Respondents in Discovery.)

Case No. 2024-L-005346

Calendar D

Jury Trial Demanded

COMBINED MOTION FOR PARTIAL DISMISSAL

Defendant Garrett M. Smith (“Smith”), through his undersigned counsel, respectfully moves this Court for dismissal of Counts 9, 22, 23, 24, and 25 of Plaintiff’s Fourth Amended Complaint, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619, and in support thereof, states as follows:

INTRODUCTION

On December 17, 2025, Plaintiff filed his Fourth Amended Complaint, alleging twenty-five separate claims. Among them, Plaintiff asserts four new claims jointly against Smith, Andrew

Clement (“Clement”), Younan Nena (“Nena”), Robert Bishopp (“Mr. Bishopp”), and Natalie Bishopp (“Mrs. Bishopp”):

- (i) Count 22 – Tortious Intentional Conspiracy to Cause Harm – Survival Action;
- (ii) Count 23 – Tortious Intentional Conspiracy to Cause Harm – Wrongful Death;
- (iii) Count 24 – Restatement sec. 876 Negligently Acting in Concert – Survival Action; and
- (iv) Count 25 – Restatement sec. 876 Negligently Acting in Concert – Wrongful Death.

These claims fail under Section 2-615 because Plaintiff’s allegations impermissibly comprise mere legal conclusions that cannot substantiate a conspiracy. Moreover, the uncontroverted record evidence undercuts these conclusory allegations, thus requiring dismissal under Section 2-619.

Against Smith only, Plaintiff also alleges one count of willful and wanton conduct (Count 9) but does not, and cannot, plead the elements of such a claim. Count 9 should therefore be dismissed under section 2-615. As with Plaintiff’s conspiracy-based claims, Count 9 also requires dismissal under Section 2-619 because the record evidence contradicts the conclusions of law and fact that Plaintiff alleged to support the willful and wanton claim.

LEGAL STANDARD

A Section 2-615 motion challenges the legal sufficiency of a complaint on its face. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 44 (2001). To survive a motion to dismiss, a plaintiff must allege facts that are essential to the asserted cause of action. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). It is well settled that “[a] plaintiff cannot rely simply upon conclusions of law or fact unsupported by specific factual allegations.” *Powell v. Am. Serv. Ins. Co.*, 2014 IL App (1st) 123643, ¶ 13 (citation omitted). A “complaint is properly dismissed pursuant to section 2-615 if it is either legally or factually insufficient.” *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 163 (1st Dist. 1998).

When ruling on a motion to dismiss under Section 2-619, the Court can look outside the Complaint to consider other affirmative matter that operates to defeat Plaintiff's claims. *See* 735 ILCS 5/2-619. "Affirmative matter" is something that "negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Levi E. Schlenker*, 209 Ill. 2d 456, 461 (2004). The "affirmative matter" may "appear on the face of the complaint or [be] established by external submissions." *LaSalle Nat'l Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 789 (1st Dist. 2001); *Krilich v. Amer. Nat'l Bank & Trust Co. of Chi.*, 334 Ill. App. 3d 563, 570 (2d Dist. 2002) (stating that the court may consider "pleadings, depositions, and affidavits").

Here, the deposition testimony of Smith, Clement, Nena, and the Bishoppes "negates the cause of action" and "refutes crucial conclusions" of Plaintiff's allegations. The uncontradicted deposition testimony establishes that there is not, and was not ever, any agreement to support Plaintiff's conspiracy claims or any intentional or reckless conduct by Smith. For these reasons, outlined more fully below, Counts 9, 22, 23, 24, and 25 must be dismissed.

ARGUMENT

Counts 22 and 23 for "tortious intentional conspiracy to cause harm" in the Fourth Amended Complaint must be dismissed because Plaintiff fails to allege facts essential to the cause of action. Similarly, Plaintiff has failed to allege the elements of a willful and wanton conduct claim in Count 9. Instead, Plaintiff relies on legal and factual conclusions to support his claims. Such "allegations" cannot state a claim under Illinois law and are thus insufficient to withstand a motion to dismiss under section 2-615. Plaintiff's claims should therefore be dismissed.

Plaintiff's claims are similarly insufficient to withstand a motion to dismiss under Section 2-619. The deposition testimony in this case establishes that there was no agreement among

Defendants Smith, Nena, Clement, or the Bishopps to commit an unlawful act or commit a lawful act using unlawful means. The absence of any agreement affirmatively defeats Counts 22 and 23. Additionally, Counts 24 and 25 for “negligently acting in concert” allege claims similar to the civil conspiracy counts and likewise fail in the absence of an agreement to commit an unlawful act or to commit a lawful act unlawfully, which absence is borne out in the deposition testimony. Accordingly, Counts 9, 22, 23, 23 and 25 should be dismissed.

I. Plaintiff Cannot State a Claim for Civil Conspiracy in Counts 22 and 23.

“Civil conspiracy is defined as a combination of two or more persons for the purpose of accomplishing, by some concerted action, either an unlawful purpose or a lawful purpose by unlawful means.” *Lewis v. Lead Indus. Ass’n*, 2020 IL 124107, ¶ 19. The essential elements of a civil conspiracy claim are “an agreement between the parties and a tortious act committed in furtherance of that agreement.” *Id.* at ¶ 20. Thus, Plaintiff must allege facts that could establish that Defendants Smith, Nena, Clement, Mr. Bishopp, and Mrs. Bishopp “knowingly and voluntarily participate[d] in a common scheme to commit an unlawful act or a lawful act in an unlawful manner.” *Adcock v. Brakegate, Ltd.*, 164 Ill. 54, 64 (Ill. 1994). Critically, the defendants in a conspiracy claim must “understand the general objectives of the conspiratorial scheme, accept[] them, and agree” to further those objectives. *Id.* While the agreement is rarely susceptible to direct proof, a plaintiff still must allege more than conclusory allegations that the defendant agreed to achieve the general objective. *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 92. Plaintiff cannot muster more than conclusory allegations here.

Plaintiff does not, and cannot, meet the burden of alleging sufficient facts to show that Smith knowingly and voluntarily agreed to any scheme to commit an unlawful act or a lawful act in an unlawful manner. Plaintiff, in conclusory fashion, alleges that Smith and others “entered into

an agreement . . . to confront and subdue” the decedent and that they acted “as a physical group.” (Fourth Am. Compl. ¶¶ 300, 302, attached as Exhibit A.) However, “the mere characterization of a combination of acts as a conspiracy are insufficient to withstand a motion to dismiss.” *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549, ¶ 92.

The Fourth Amended Complaint is entirely devoid of any allegation that defendants knowingly understood and agreed to accomplish an unlawful purpose or a lawful purpose by unlawful means, as Illinois law requires. *Adcock*, 164 Ill. at 64. To the contrary, far from alleging facts that could establish the existence of an actual agreement between the defendants, Plaintiff effectively asserts the opposite—that “none of this group, Defendants Nena, Smith, Clement, Mr. Bishopp, and Mrs. Bishopp, formed a plan of any kind as to how they would attempt to subdue Joseph, other than knowing that Smith intended to use his handgun as he deemed fit.” (Exhibit A at ¶ 91.) This admission—the absence of *any* plan—undermines Plaintiff’s contention of an agreement of any sort, let alone one that the defendants knowingly and voluntarily entered into with one another. Absent an agreement, there can be no tortious act performed in furtherance of such an agreement and no civil conspiracy. Furthermore, the allegation is precisely the type of conclusory statement which is not permitted to substantiate a conspiracy claim. Accordingly, Plaintiff’s claims in Counts 22 and 23 of the Fourth Amended Complaint must be dismissed.

II. Plaintiff Cannot Plead Willful and Wanton Conduct in Count 9.

There is no tort of “willful and wanton conduct.” *Krywin v. Chi. Transit Authority*, 238 Ill. 2d 215, 236 (2010). Rather, willful and wanton conduct is “an aggravated form of negligence.” *Papadakis v. Fitness 19 IL 116, LLC*, 2018 IL App (1st) 170388, ¶ 22 (2018). Thus, to substantiate allegations of willful and wanton conduct, Plaintiff must allege both facts that would establish each of the elements of negligence as well as facts that support a deliberate intention to harm or

conscious disregard for a plaintiff's welfare. *Id.*; see also, *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989) (“To sufficiently plead willful and wanton misconduct, a plaintiff must allege either deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff.”). However, the mere use of descriptive language such as “falsely” or “maliciously” to describe a defendant’s actions is conclusory and insufficient to demonstrate factual allegations to support a willful and wanton allegation. *Adkins* at 519-20 (“[A]n actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done.”). Moreover, if those conclusory words and statements are disregarded from the allegations, and the remaining allegations contain insufficient facts to support a cause of action, a motion to dismiss must be granted even if the conclusions generally inform a defendant of what plaintiff alleges against him. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426 (1981). Because Plaintiff has failed to plead facts supporting the required “heightened state of mind,” Count 9 must be dismissed. *Papadakis*, 2018 IL App (1st) 170388, ¶ 22.

Plaintiff alleges that Smith “acted with willful and wanton disregard for the safety of Joseph, deceased, in one or more of the following respects:

- a. With conscious disregard and utter indifference for JOSEPH’s safety, left multiple places of safety to encounter JOSEPH with his firearm.
- b. With conscious disregard and utter indifference for JOSEPH’s safety, chose to participate in a posse by going with other residents to encounter JOSEPH.
- c. With conscious disregard and utter indifference for JOSEPH’s safety, refused to wait for the police and took it upon himself to act as an armed vigilante.
- d. With conscious disregard and utter indifference for JOSEPH’s safety, Defendant SMITH sought to punish JOSEPH.
- e. With conscious disregard and utter indifference for JOSEPH’s safety, Defendant SMITH discharged his firearm at JOSEPH five times while JOSEPH was unarmed and dressed only in his bathrobe and underwear, and thus, was not justified.

(Exhibit A at ¶ 205.)

These contentions cannot establish negligence, much less willful and wanton conduct. The Fourth Amended Complaint alleges neither a recognized duty nor a breach of such duty. For example, Plaintiff has not established, nor can he, that there is a duty imposed by law to stay in any one particular area of one's own residence. Additionally, there is no duty to wait for police to arrive, and no facts pled to support any purported "refusal" to wait for police. Even if Plaintiff sufficiently alleged negligence, Plaintiff has not alleged any *facts* sufficient to show a deliberate intention to harm or reckless disregard for the Joseph's safety such as could qualify as willful and wanton conduct. When the conclusory words—"with conscious disregard and utter indifference for JOSEPH's safety"—are stripped from Count 9, there are no facts tending to show that Smith acted with a heightened state of mind. Conclusory statements characterizing Smith as a "vigilante" or alleging that he purportedly sought to punish someone, without facts or supporting evidence, are insufficient to plead intentional or reckless conduct. Plaintiff cannot disguise with conclusory language a lack of actionable facts to support Plaintiff's willful and wanton allegation.

III. The Evidence Established in Discovery Contradicts Plaintiff's Claim for Civil Conspiracy in Counts 22 and 23.

Dismissal is warranted under Section 2-619 based on uncontradicted deposition testimony establishing that no agreement existed between the parties to commit an unlawful act or a lawful act in an unlawful manner. *See Lewis v. Lead Indus. Ass'n*, 2020 IL 124107, ¶ 19. In ruling on a motion to dismiss pursuant to Section 2-619, a trial court may properly consider depositions already taken. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004) (uncontradicted sworn testimony is a proper basis upon which to grant relief under Section 2-619.).

Plaintiff alleges that Smith and four other defendants “entered into an agreement not to wait for the police but instead to confront and subdue the decedent . . . which included the understanding between them that the firearm discussed with them by Defendant Smith might need to be used to accomplish said goal.” (Exhibit A at ¶ 300.) The uncontradicted testimony, however, establishes the opposite—there was never any agreement to take any action. The relevant testimony is set forth below:

- Nena testified under oath that the four other defendants volunteered to go up to the 48th floor, and before they went up Defendant Nena told them “[l]et’s see who is this person and see what we’re going to deal with it.” (*See* Nena Dep. Tr. at 62:9-23, attached hereto as Exhibit B.)
- Smith testified that the conversation in the lobby was very disorganized, each defendant had a different motive, that “there was no discussion, and . . . certainly no decision” to go to the 48th floor, and no plan as to what they were going to do once they got to the 48th floor. (*See* Smith Dep. Tr. at 150:21-24; 153:3-10, attached hereto as Exhibit C.)
- Clement explicitly stated that he went up to the 48th floor only because he did not want Defendant Nena to go alone, and that he did not know that Smith was carrying a gun. (*See* Clement Dep. Tr. at 105:20-106:22; 107:9-109:14, attached hereto as Exhibit D.)
- Mr. Bishopp testified that Nena stated he needed to go upstairs to investigate, but there was no agreement, let alone discussion, to physically subdue the decedent. (*See* R. Bishop Dep. Tr. at 23:15-19, attached hereto as Exhibit E.)
- Mrs. Bishopp testified that she heard no discussion or agreement between the others and that her goal in returning upstairs was “[t]o make sure [decedent] was not in [her] home,” (*see* N. Bishop Dep. Tr. at 58:1-8, attached hereto as Exhibit F), and that she had no idea that Smith had a gun prior to getting on the elevator. (*Id.* at 107:2-11.)

The testimony is consistent and unequivocal: there was no agreement—nor was there even as much as a discussion—about “confronting” or “subduing” an aggressor. Indeed, nearly every witness testified to a different reason for going to the 48th floor, ranging from a doorman fulfilling his job responsibilities to a resident ensuring her home had not been invaded. Plaintiff’s allegation that Smith and the others agreed to confront and physically subdue the decedent is made from

whole cloth—and is wholly at odds with the record evidence. There are simply no facts to support Plaintiff’s allegation that any defendant “knowingly and voluntarily participate[d] in a common scheme to commit an unlawful act or a lawful act in an unlawful manner.” *Adcock*, 164 Ill. at 64. Accordingly, Plaintiff’s civil conspiracy claim fails and must be dismissed pursuant to Section 2-619.

IV. There is No Evidence to Support Plaintiff’s Claims for Negligently Acting in Concert in Counts 24 and 25.

Plaintiff’s claims for negligently acting in concert must also be dismissed because the deposition testimony establishes that there was no agreement among the defendants to act in concert. Restatement (2d) of Torts § 876 provides that a party may be held liable for the harm caused to an individual from the tortious conduct of another if the party committed the tortious conduct in concert with the tortfeasor or pursuant to a common design to cause harm, knew the conduct was a breach of a duty and provided substantial assistance or encouragement to the other to act, or gave substantial assistance to the actor and in doing so committed his own breach of duty. *See* Restatement (2d) of Torts § 876; *Norman v. Brandt*, 397 Ill. App. 3d 1074, 1077 (4th Dist. 2010).

As discussed above, the sworn testimony in this case establishes that no common design or scheme to commit any tortious act ever existed. The allegations in the Complaint that these defendants agreed “to act in concert to not wait for the police but instead to confront and subdue the decedent Joseph, which included the understanding between them that the firearm discussed with them by Defendant Smith, might need to be used to accomplish said goal, and to which [these defendants] acceded consent to do so,” (Exhibit A at ¶ 314), is belied by the deposition testimony. Absent evidence of facts establishing a shared plan or agreement, Plaintiff’s concerted-action claims fail as a matter of law.

Illinois courts have confronted—and rejected—similar claims. In *Norman v. Brandt*, the plaintiff claimed that the defendant-driver was responsible for the plaintiff’s injuries resulting from a car accident because the defendant allegedly acted “in concert” with a third-party driver by speeding pursuant to a common design. *Id.* at 1076-77. The court concluded that there was no such common design to engage in the tortious conduct of speeding. *Id.* At most, the evidence showed a plan to follow each other on the road, with one vehicle traveling in front of the other, and the only conduct undertaken “in concert” was that one car led while the other followed. *Id.* at 1077–78. Because there was no evidence of a mutually agreed-upon plan to commit a tortious act, the trial court rejected the plaintiff’s concerted-action theory and dismissed the “acting in concert” based negligence claim. The appellate court affirmed.

Here, as in *Norman*, the testimony establishes that no “design” or “scheme” was ever formed between Smith and the others. Each of Smith, Nena, Clement, and the Bishopps went to the 48th floor for independent reasons and without a common plan. There was no agreement to “confront or subdue” the aggressor and there was no discussion or understanding about the potential use of Smith’s firearm for any purpose—let alone to use it to “confront or subdue” any individual. The only act undertaken in concert or that they may have impliedly consented to was riding the elevator together. But, like in *Norman*, the sworn testimony shows there was no mutually agreed-upon plan to commit any tortious act, nor can one be reasonably inferred from the testimony. Absent concrete facts to establish of a common design, Plaintiff’s claims for negligently acting in concert fail as a matter of law and must be dismissed.

V. The Evidence Does Not Support Plaintiff’s Willful and Wanton Allegation in Count 9.

As explained above, Plaintiff alleges that Smith “acted with willful and wanton disregard for the safety” of the aggressor in one or more of the following respects:

- a. With conscious disregard and utter indifference for JOSEPH's safety, left multiple places of safety to encounter JOSEPH with his firearm.
- b. With conscious disregard and utter indifference for JOSEPH's safety, chose to participate in a posse by going with other residents to encounter JOSEPH.
- c. With conscious disregard and utter indifference for JOSEPH's safety, refused to wait for the police and took it upon himself to act as an armed vigilante.
- d. With conscious disregard and utter indifference for JOSEPH's safety, Defendant SMITH sought to punish JOSEPH.
- e. With conscious disregard and utter indifference for JOSEPH's safety, Defendant SMITH discharged his firearm at JOSEPH five times while JOSEPH was unarmed and dressed only in his bathrobe and underwear, and thus, was not justified."

(Exhibit A at ¶ 205.)

None of these allegations demonstrate willful and wanton conduct or establish that such conduct caused Plaintiff's injury. Intentional or reckless conduct has been found, for example, when paramedics waited seven to eight minutes to administer two medications and failed to administer a third to someone they knew was experiencing a life-threatening allergic reaction to walnuts. *See Kirwan v. Lincolnshire-Riverwoods Fire Protection Dist.*, 349 Ill. App. 3d 150 (2d Dist. 2004.) Smith's sworn testimony demonstrates that there was no intentional or reckless conduct here undertaken with conscious disregard or utter indifference towards Joseph:

- "I did not leave my unit to confront Abnerd Joseph." (Exhibit C at 54:20-21.)
- "I was not trying to encounter somebody with a mental issue." (*Id.* at 57:17-18.)
- "I'm not aware of it being anybody's idea to encounter Joseph." (*Id.* at 152:16-17.)
- "There was no concerted – there was no discussion, and there was certainly no decision by the five of us to go to 48." (*Id.* at 153:2-5.)

- “Our desire, as we were going to 48, was for me to escort Mr. and Mrs. Bishopp to their residence.” (*Id.* at 158:17-19.)
- “In the event of September 14, Joseph had already attacked multiple people before I pulled my firearm.” (*Id.* at 59:10-12.)
- “Q: You told the police that you killed Abnerd Joseph because he spit on your door, right? A: “That’s categorically false.” (*Id.* at 94:8-12.)
- “So I never said I was carrying a gun. I said I have a CCL . . . I recall my exact words were, I have a CCL.” (*Id.* 149:18-150:1.) “I specifically said, I have a CCL. I like that wording because if people know what it means, they know what I’m saying is that I am capable of carrying a concealed firearm.” (*Id.* at 154:4-7.)
- “So the conversation in the lobby was very disorganized. There were people talking over each other. For example, Ms. Bishopp was very insistent with Jonah about wanting to return to her residence. And I was trying to convey to people they should pick up their cell phone and call 911 in order to get the police. So it was a very disorganized conversation that I don't recall who was saying what at what point because we were all kind of -- we all had our different motives, and Jonah was kind of stuck in the middle of it.” (*Id.* at 150:14-151:1.)
- “After I discharged my weapon, I was very concerned for Joseph . . . after I discharged my weapon and after he tackled me, he retreated. At that point, I retreated with the other four people to the main elevator lobby, and called 911.” (*Id.* at 250:13-23.)

Plaintiff has no facts to support his allegations of willful and wanton conduct. In point of fact, the deposition testimony in this case establishes the opposite. Willful and wanton conduct is conduct of the sort that “shocks the conscience.” *Pryor v. Chicago Transit Authority*, 2022 IL App (1st) 200895, ¶ 42. Under the circumstances that Smith confronted and his reaction to those particular circumstances, his actions cannot be said to “shock[] the conscience.” The evidence in this case shows no deliberate intention to harm Plaintiff, nor does it establish a conscious disregard for Plaintiff’s safety. Rather the undisputed facts establish that Smith was confronted by an extremely aggressive individual (Joseph) who had already violently attacked two other men (Nena and Clement), including striking one (Clement) with such force as to render him unconscious,

before turning to attack him (Smith) and possibly others (the Bishoppes), and that Smith feared that he and others were in imminent danger of death or serious bodily harm. Simply put, there are no facts to support a willful and wanton count against Smith, and that count should be dismissed as a matter of law.

WHEREFORE, Defendant Garrett M. Smith moves this Court to dismiss Counts 9, 22, 23, 24 and 25 of Plaintiff's Fourth Amended Complaint and order any other relief the Court deems just and equitable under the circumstances.

Dated: January 14, 2026

Respectfully submitted,

GARRETT M. SMITH

By: s/ John J. Scharkey

John J. Scharkey

Robert D. Sweeney

Erin I. Wenger

SWEENEY SCHARKEY LLC

230 West Monroe Street

Suite 1500

Chicago, Illinois 60606

(312) 384-0500

Firm: 62488

– and –

Michael Z. Gurland

THE GURLAND LAW FIRM

414 North Clay Street

Hinsdale, Illinois 60606

Tel. (312) 420-8812

Firm No. 59813

Counsel for Garrett M. Smith

CERTIFICATE OF SERVICE

I certify that on January 14, 2026, I caused a copy of the foregoing to be served by the Odyssey eFileIL system, which will transmit notice to all counsel of record.

Date: January 14, 2026

s/ Erin I. Wenger