

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

MARY CUMMINS
Plaintiff,

vs.

AMANDA LOLLAR, DENISE
TOMLINSON, DOROTHY HYATT,
MICHELLE MCCAULLEY, KATE
RUGRODEN, LESLIE STURGES, BAT
WORLD SANCTUARY, JOHN DOES 1-10

Defendants.

) **Civil Action No.: 4:12-CV-00560-Y**
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)

) **PLAINTIFF’S REPLY TO DEFENDANT**
) **HYATT’S RESPONSE ON 12(b)(6)**
) **MOTION TO DISMISS**
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)
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**PLAINTIFF’S REPLY TO DEFENDANT HYATT’S RESPONSE ON 12(b)(6) MOTION
TO DISMISS**

COMES NOW Plaintiff Mary Cummins (“Cummins”) and files this Response to Defendant Dorothy Hyatt’s (“Hyatt”) Motion to Dismiss the Second Amended Complaint for Failure to State a Claim (Document 83), and respectfully shows the Court as follows:

1. SUMMARY OF RESPONSE

Defendant Hyatt is a member of the board of directors of Bat World Sanctuary as proven in Plaintiff’s previous reply. Bat World Sanctuary owns the property at 115/117 NE 1st St, Mineral Wells, Texas where Plaintiff was injured (Exhibit 1). Legally Hyatt was therefore the owner, occupier and possessor of the premises in question. When Cummins was injured in June 2010 Bat World Sanctuary was an unincorporated association of board members (Exhibit 2). The individual members of the unincorporated association are thereby legally, personally liable for the premises as they are the owners individually and as a group. Hyatt is also a board member of Bat World Sanctuary and is in charge of overseeing the organization, electing the President,

appointing the manager, making sure the organization is properly insured and the properties are properly maintained. Hyatt in essence is Defendant Bat World Sanctuary. Hyatt has been in the building many times and knew of its condition. As such, Plaintiff's Second Amended Complaint against Hyatt should not be dismissed under Rule 12(b)(6). Plaintiff has stated a claim for which relief may be granted against Defendant Hyatt.

2. PLAINTIFF HAS STATED A CLAIM

Plaintiff has stated a claim for premises liability. May 14, 2013 this Court ruled that Cummins has stated a claim for premise liability (Document 61). From the order "Cummins alleges that Lollar and Bat World acted negligently in failing to tell her "that the building did not have an occupancy permit [and] was not up to code." (Pl.'s Second Am. Compl. ¶ 21.) Cummins further alleges that Lollar and Bat World should be held liable under a theory of negligence because "the premises [was] dangerous and the step stool was unstable." (Id.) Given these allegations, it is evident that Cummins's negligent claim is based on a theory of premises liability, rather than a negligent-activity theory. See *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992) (stating that to recover on a negligent-activity claim, the plaintiff must show that he was harmed by, or as a contemporaneous result of, the activity itself); *Wyckoff v. George C. Guller Contracting Co.*, 357 S.W.3d 157, 163 (Tex. App.--Dallas 2011, no pet.) ("When the alleged injury is the result of the condition of the premises, the injured party can recover only under a premises liability theory.").

To state a claim for premises liability, a plaintiff must plead facts showing:

(1) the defendant knew or should have known of some condition on the premises; (2) the condition posed an unreasonable risk of harm, was defective or not working properly; (3) the

defendant did not exercise reasonable care to reduce or eliminate the risk; and (4) the defendant's failure to use such care proximately caused the plaintiff's injuries.

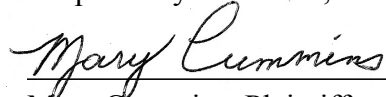
Weech v. Baptist Health Sys., 392 S.W. 3d 821, 826 (Tex. App.--San Antonio 2012) (citing Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 296 (Tex. 1983)).”

Defendant Hyatt as Board of Director of Bat World Sanctuary meets all four of the elements of premises liability. In Texas, it is an owner, occupier or possessor of premises that are potentially subject to a premises liability claim. CMH Homes Inc. v. Daenen, 15 S.W.3d 97, 99 (Tex. 2000); City of Cameron v. Brown, 80 S.W.3d 549, 554-56 (Tex. 2001). Hyatt is a board member of Bat World Sanctuary. Bat World Sanctuary owns, occupies and possesses the premises. Hyatt is legally a part of, actually the owner, occupier and possessor of the premises in question. Therefore, Hyatt is subject to Plaintiff's premises liability claim. Dismissal is not Appropriate

PRAYER

WHEREFORE, PLAINTIFF MARY CUMMINS respectfully requests that the court deny Defendant Dorothy Hyatt's request for dismissal per FED R CIV P 12(b)(6).

Respectfully submitted,



Mary Cummins, Plaintiff
645 W. 9th St. #110-140
Los Angeles, CA 90015-1640
August 27, 2013
In Pro Per

CERTIFICATE OF SERVICE

I, Mary Cummins, hereby certify that a copy of **PLAINTIFF'S REPLY TO DEFENDANT HYATT'S RESPONSE ON 12(b)(6) MOTION TO DISMISS** was served on the Defendants' Attorneys of record by CM/ECF, FAX and EMAIL at,

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By: 
Mary Cummins, Plaintiff Pro Se
August 27, 2013