

No. 1-11-2347

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FINISHING TOUCHES, LTD.,)	Appeal from the
CAROLYN L. FINN and WILLIAM J. FINN,)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	No. 09 CH 35575
)	
BAYTREE NATIONAL BANK & TRUST)	Honorables
COMPANY,)	Mary Mulhern, Allen S.
)	Goldberg and Martin Agran,
Defendant-Appellee.)	Judges Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** Where plaintiffs asked to reinstate counts one year after those counts were dismissed and proposed amendments would not have cured defects in plaintiffs' pleading, the trial court did not abuse its discretion in denying leave to amend. The judgment of the trial court was affirmed.

¶ 2 Plaintiffs Finishing Touches, Ltd., Carolyn L. Finn and William J. Finn appeal the trial court's denial of the motion to file an amended complaint in their action against defendant Baytree National Bank & Trust Company (Baytree). In the lawsuit, plaintiffs alleged, *inter alia*, that Baytree improperly sold the inventory of Finishing Touches as collateral for a business loan and that Baytree misrepresented the ability of the business to sublease space at a different location. On appeal, plaintiffs contend the trial court abused its discretion in not allowing them

to amend their complaint after the court granted Baytree's motion to strike their jury demand.

We affirm.

¶ 3 In September 2009, plaintiffs filed a five-count complaint against Baytree, seeking a declaratory judgment and alleging fraud, tortious interference with a business opportunity and other causes of action arising from the banking relationship between the parties.

¶ 4 The complaint alleged that Finishing Touches was a successful home furnishings and interior design business operating in the Lake Forest area dating back to 1995 and that Finishing Touches obtained various bank loans from Baytree. In September 2008, the lease on the space occupied by Finishing Touches had expired and the Finns were prepared to move the business to another location in Lake Forest. The complaint alleged that Alan Adams, Baytree's president, suggested to plaintiffs that they enter into a sublease on a bank-owned space at 266 East Deerpath Road in Lake Forest in which to operate Finishing Touches.

¶ 5 The complaint further alleged that plaintiffs moved to the Deerpath Road location on September 30, 2008, but that in November 2008, Adams informed plaintiffs that zoning regulations prohibited the operation of their business at that site, causing a significant loss of revenue. The complaint alleged that in March 2009, plaintiffs renewed their existing loan with Baytree, pledging the inventory of Finishing Touches, valued at \$225,000, as collateral. The loan had a principal amount of \$215,786.63 and a maturity date of July 1, 2009.

¶ 6 The complaint asserted that Baytree called the loan due on June 18, 2009, claiming plaintiffs were in default. Plaintiffs alleged that although the inventory of Finishing Touches was delivered to Baytree, plaintiffs had received no notice or accounting of the disposition of that inventory. Count I of the complaint alleged Baytree had disposed of the inventory in a commercially unreasonable manner and asked the trial court to enter a declaratory judgment stating the loan with Baytree was void. Count II alleged that Baytree violated the Illinois Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2008)) by misrepresenting plaintiffs' ability

to conduct business at the Deerpath Road location.

¶ 7 Count III of the complaint alleged common law fraud in that Adams made representations to plaintiffs regarding the move to the Deerpath Road location with the intent to defraud. Count IV alleged negligent misrepresentation. Count V alleged tortious interference with a prospective economic advantage or business opportunity, in that plaintiffs were prepared to move to another location in September 2008 but instead moved to the Deerpath Road location based on their reliance on Adams' representations.

¶ 8 Before Baytree had answered the complaint, plaintiffs moved for summary judgment on count I. During discovery, Baytree stated the Finns had constructive notice of the sale of the Finishing Touches inventory and that the proceeds were applied to the balance of plaintiffs' loan.

¶ 9 On January 12, 2010, Baytree moved to dismiss counts II, III, IV and V of the complaint. On May 3, 2010, the trial court denied Baytree's motion to dismiss as to count II but dismissed counts III, IV and V of plaintiffs' complaint. Plaintiff was given 28 days to amend the dismissed counts. The court also denied plaintiffs' motion for summary judgment as to count I and set the case for status. On the same day, in a motion to strike the July 2010 status date, plaintiffs stated they were "no longer desirous of filing" a complaint amending counts III, IV and V. A May 10, 2010, order transferring the case from the chancery division to the law division noted that plaintiffs had filed a jury demand.

¶ 10 On June 7, 2010, Baytree filed an answer to count I (declaratory judgment) and count II (the Consumer Fraud Act). Baytree also counterclaimed, seeking a judgment against plaintiffs representing the unpaid amount of the loan. In November 2010, the case was set for trial on May 2, 2011.

¶ 11 On April 21, 2011, Baytree amended its answer and counterclaim, updating the amount owed on the loan, which was accruing interest daily, to \$154,637.32. Baytree also moved to strike plaintiffs' jury demand, asserting that plaintiffs had no right to a jury trial under the two

remaining counts of the complaint and additionally, plaintiffs waived their right to a jury trial in the loan agreement with Baytree. On April 25, 2011, the court granted Baytree's motion to strike plaintiffs' jury demand.

¶ 12 On May 2, 2011, plaintiffs requested leave to file an amended complaint *instanter* restating counts III, IV and V. The motion stated plaintiffs would "cure the technical defects" found by the court in the May 2010 dismissal. In a memorandum in support of amending the complaint, plaintiffs argued that because the court struck their jury demand as to counts I and II, they should be allowed to replead counts III and IV to "preserve their constitutional right to a jury," asserting Baytree would not be prejudiced by this amendment.

¶ 13 That afternoon, the trial court heard arguments and denied plaintiffs' motion to file the amended complaint. The court also struck plaintiffs' jury demand as to the counterclaim in Baytree's complaint. The court set the case for a bench trial.

¶ 14 After trial, the court entered judgment for Baytree on counts I and II and on Baytree's counterclaim. In an eight-page written order dated July 18, 2011, the court held that Baytree had established that plaintiffs voluntarily turned over the inventory of the business and that Baytree disposed of the inventory in a "commercially reasonable" manner. As to the consumer fraud count, the court stated plaintiffs failed to prove that Baytree engaged in any deceptive conduct, either intentional or unintentional, in representing to plaintiffs the likelihood of obtaining a sublease at the Deerpath Road site. The court entered judgment for Baytree on its counterclaim in the amount of \$154,967.11 plus interest from May 1, 2011. On August 11, 2011, plaintiffs filed a notice of appeal from the May 2, 2011, order and the July 18, 2011, judgment entered for Baytree.

¶ 15 On appeal, plaintiffs contend the court abused its discretion in denying their motion to file an amended complaint. Plaintiffs argue that after Baytree successfully challenged their right to a jury under counts I and II, it became necessary to include additional facts regarding the

representations made to plaintiffs about a sublease at the Deerpath Road location to allow plaintiffs to preserve their right to a jury as to the other counts in the complaint.

¶ 16 The right to amend a complaint is neither absolute nor unlimited. *Rosen v. Larkin Center Inc.*, 2012 IL App (2d) 120589, ¶ 24. The decision to grant leave to amend a complaint rests within the sound discretion of the trial court, and this court will not reverse such a decision absent an abuse of that discretion. *Id.* We note that plaintiffs have not included in the record on appeal any report of proceedings from the trial court.

¶ 17 In determining whether a trial court has abused its discretion in granting or denying such leave, this court must consider the following factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleading could be identified. *Id.* The plaintiff must meet all four factors, and if the proposed amendment does not state a cognizable claim, thus failing the first factor, the reviewing court need not proceed further. *Id.*

¶ 18 We first note that count IV of the proposed amended complaint, alleging negligent misrepresentation, is identical to the same count in the original complaint. The only relevant amendment to the complaint involves count III, the common law fraud count and the purported representations made to plaintiffs to sublease the space on Deerpath Road.

¶ 19 A complaint for common law fraud must allege "with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496-97 (1996). Paragraphs 10 and 13 of the original complaint alleged that Adams told plaintiffs that Baytree would have "no difficulties obtaining sublease approval" for the Deerpath Road location. It further alleged that after plaintiffs moved the business there, Adams said he did not have approval for the operation of

plaintiffs' business in that space and he demanded they not display any signage at that location.

¶ 20 The proposed amended complaint alleged Adams told plaintiffs that if they moved the business to the Deerpath Road space, Baytree would sign a sublease with them, and that plaintiffs relied on those statements as being true. The complaint further alleged that after plaintiffs moved, Adams said he would not sign a sublease for plaintiffs to conduct their retail business in that location. The proposed amended complaint, taken as true, does not state a claim for fraud because plaintiffs did not reasonably believe that the sublease approval was solely in the hands of Adams. Indeed, as Baytree points out, the record contains evidence that plaintiffs were aware in 2008 that the approval of plaintiffs' business at the location was contingent on a zoning exemption.

¶ 21 Moreover, plaintiffs cannot meet any of the remaining factors required to show the trial court abused its discretion here, including whether Baytree would sustain prejudice by allowing the proposed amendment, the timeliness of the proposed amendment and previous opportunities to amend the pleading. In bringing this appeal, plaintiffs appear to operate under the belief that they are entitled to one jury trial per complaint and may amend their complaint at any time to allow that to occur. Plaintiffs contend they should have been allowed to replead their common law fraud (count III) and negligent misrepresentation (count IV) counts so as to enable a portion of their claims to be heard by a jury.

¶ 22 The record establishes Baytree successfully struck plaintiffs' jury demand after the counts under which plaintiffs could receive a trial by jury were no longer part of the complaint, leaving only the count seeking a declaratory judgment that the loan was void (count I) and the count alleging that Baytree violated the Illinois Consumer Fraud Act (count II). When the trial court dismissed those counts in May 2010, which was about 12 months before trial, the court allowed plaintiffs 28 days to amend the complaint. Plaintiffs therefore had a previous opportunity to amend their pleadings, to which plaintiffs responded in writing that they were not interested in

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pursuing counts III, IV and V. For all of those reasons, the trial court did not abuse its discretion in barring plaintiffs from resurrecting those counts one year later on the eve of trial.

¶ 23 Accordingly, the judgment of the trial court is affirmed.

¶ 24 Affirmed.