

No. 1-12-2964

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

EARDIA BASSETT,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 09 L 4016
)	
BARNES USED CARS, INC., doing business as)	Honorable
BARNES AUTO GROUP, INC., and MEL)	John P. Kirby,
SEREMEK,)	Judge Presiding.
)	
Defendants-Appellees)	
)	
(ROBERT J. ESPARZA, individually, and doing)	
business as FALCON RECOVERY, and FALCON)	
RECOVERY,)	
)	
Defendants).)	

JUSTICE MASON delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed seven counts of plaintiff's eight-count complaint where the counts failed to adequately separate plaintiff's causes of action and did not state a claim upon which relief could be granted. However, the

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court erred in dismissing count 2, which sufficiently pled wrongful conversion based on the allegation that no payments were due and owing to defendants at the time they repossessed plaintiff's vehicle.

¶ 2 Plaintiff-appellant Eardia Bassett appeals the dismissal, with prejudice, of her complaint against defendants-appellees Barnes Used Cars, Inc. and Mel Seremek (collectively defendants)¹ alleging wrongful conversion and repossession, consumer fraud, negligent physical conduct, willful and wanton and malicious physical conduct, and negligent hiring, all arising out of the repossession of a vehicle she purchased from defendants. On appeal, plaintiff contends the circuit court erred in granting defendants' motion to dismiss her complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) (Code) because she sufficiently pled each cause of action. In addition, plaintiff asks us to rule on the legality of a document she signed requiring her to make a special payment of \$500 in addition to her cash down payment of \$2,000 for the purchase of the vehicle. Finally, plaintiff seeks sanctions against defendants pursuant to Rule 137. For the reasons that follow, we affirm in part and reverse in part and remand.

¶ 3 BACKGROUND

¶ 4 This case stems from plaintiff's purchase and defendants' repossession of a used car in 2007. The factual allegations giving rise to this suit have remained consistent throughout the several amendments to plaintiff's pleadings. Specifically, plaintiff alleges that she purchased a car on March 5, 2007, from defendant Barnes Used Cars, Inc., which is owned by co-defendant

¹ Defendant Robert Esparza, individually and d/b/a Falcon Recovery, was defaulted for failing to file an answer or appearance in February 2010. He has since participated in the proceedings only to give his discovery deposition.

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Seremek. On the date of the purchase, plaintiff signed at least two forms. The first was a Retail Installment Contract, which was also signed by a salesperson at Barnes. The Contract listed a cash price for the vehicle of \$5,449. In a section titled "Itemization of Amount Financed," the Contract listed \$2,500 as a cash down payment. A \$50 documentary fee was added to the unpaid balance of \$2,949, leaving \$2,999 as the amount financed. The Contract specified that plaintiff would pay off the unpaid balance in 12 monthly installments of \$300 beginning on April 21, 2007. Plaintiff and the same Barnes salesperson also signed a Memorandum of Installment Sale. The Memorandum listed the total price of the vehicle as \$5,499 and listed the previous deposit as \$2,000 in addition to a \$500 "deferred cash on delivery" charge. Again, the unpaid balance amounted to \$2,999.

¶ 5 In her initial complaint, which contained three counts alleging wrongful conversion and repossession, negligent conduct, and negligent hiring, plaintiff alleged the repossession of her vehicle on April 11, 2007 (slightly over five weeks after she purchased it), was wrongful because she had no outstanding payments due and owing at that time. With respect to the latter two counts, plaintiff alleged defendants were negligent in instructing co-defendant R.J. Esparza d/b/a Falcon Recovery (Esparza) to repossess the vehicle, where during the repossession Esparza forcibly pulled plaintiff from the car and struck her chest, causing her to hit a wall and suffer a heart attack. In addition, plaintiff alleged defendants knew or should have known of Esparza's violent nature prior to hiring him as a repossession agent and as such were liable for negligent hiring.

¶ 6 Defendants moved to dismiss this complaint pursuant to section 2-615 of the Code, which

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the circuit court denied. In defendants' answer to the complaint, they attached an untitled document requiring plaintiff to make a special payment of \$500 by March 21, and pled that they undertook the repossession when plaintiff failed to pay this amount in full by the due date. The document, on which plaintiff's signature appears, reads as follows: "I, Eardia Bassett, know that my payments are \$300.00 and my first payment is due 4/21/07. I also know that I have a special payment of \$500.00 due on or before 3/21/07. ... Any changes in this payment schedule will result in legal problems or repossession. All accounts are rated with Credit Bureau."

¶ 7 Following the filing of defendants' answer, plaintiff's counsel informed the court that he was unaware of the document's existence prior to receiving defendants' answer and promptly moved for summary judgment on the issue of the "legality of an unnamed side agreement relating to the purchase of an automobile." This motion was never the subject of a ruling by the trial court.

¶ 8 One month later, plaintiff was granted leave to file a first amended complaint, which contained six causes of action, including two counts of wrongful conversion and repossession, one count of wrongful conversion and repossession and consumer fraud, one count of negligent physical conduct, one count of willful and wanton and malicious physical conduct, and one count of negligent hiring. In her amended complaint, plaintiff added several factual allegations pertaining to the special payment document. Plaintiff alleged that she gave defendants \$2,000 in cash on March 5 and at the same time gave defendants her debit card to charge the \$500 special payment due on March 21. However, on March 22, defendants charged only \$300 to her debit card. Following that transaction, defendants issued a receipt stating that "Next Deferred Down of

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200.00 was due on Wednesday, March 21, 2007." Then, on April 11, 2007, defendants, claiming that plaintiff failed to make a \$200 "special payment, " repossessed her vehicle.

¶ 9 Plaintiff further alleged that defendants' use of this document violated numerous statutes, including the Illinois Motor Vehicle Retail Installment Sales Act (815 ILCS 375/1 *et seq.* (West 2010)) and the Illinois Uniform Commercial Code (810 ILCS 5/9-101 *et seq.* (West 2010)), and pled that the failure of defendants to comply with these statutes also amounted to a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq.* (West 2010)). The circuit court granted defendants' motion to dismiss this amended complaint without prejudice pursuant to section 2-615.

¶ 10 Plaintiff then filed a second amended complaint, which is at issue in this case. There, plaintiff alleges five counts of wrongful conversion and repossession. Each count has a separate basis: count 1 alleges the purchase agreement was illegal, count 2 alleges plaintiff fully paid for the vehicle, count 3 alleges defendants failed to follow proper repossession procedures, count 4 alleges consumer fraud, and count 5 alleges breach of the peace during defendants' repossession. In separate counts, plaintiff also alleges negligent physical conduct (count 6) and wilful and wanton physical conduct (count 7, incorrectly labeled count 5), both of which are premised on Esparza's actions during the repossession. The eighth and final count (incorrectly labeled count 6) alleges negligent hiring.

¶ 11 Defendants moved to dismiss plaintiff's complaint pursuant to sections 2-603, 2-612, 2-613, 2-615 and 2-619(a)(9) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-603, 2-612, 2-613, 2-615, 2-619(a)(9) (West 2010). The circuit court granted defendants' motion pursuant to

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section 2-615 and, at the request of plaintiff's counsel, the order provided that the dismissal was with prejudice. Plaintiff timely filed this appeal.

¶ 12 ANALYSIS

¶ 13 There are several preliminary matters that require our attention before we can begin our review of the circuit court's dismissal. First, we first address plaintiff's challenge to the form of defendants' motion to dismiss. Plaintiff maintains that defendants' motion improperly relied on sections 2-603, 2-612, and 2-613 of the Code in conjunction with sections 2-615 and 2-619. We disagree. The former sections all prescribe pleading requirements – section 2-603 provides that pleadings must contain "a plain and concise statement of the pleader's cause of action;" section 2-612 addresses insufficient pleadings; and section 2-613 requires parties to plead each cause of action it may have in a separate count – while the latter sections are vehicles by which a party may move to dismiss a complaint. Violations of sections 2-603, 2-612, or 2-613 are thus often cited as bases for dismissal pursuant to sections 2-615 and 2-619. See, e.g., *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 18-19 (2009). Accordingly, defendants' argument that plaintiff's failure to comply with one or more of these sections should result in dismissal pursuant to section 2-615 is well-taken.²

¶ 14 Next, we address defendants' contention that the circuit court's order dismissing plaintiff's complaint with prejudice should not be subject to review because plaintiff herself requested a dismissal with prejudice. For this proposition, defendants cite *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813 (2005). There, proceedings in the trial court also

² On appeal, defendants abandon their arguments for dismissal under section 2-619(a)(9).

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resulted in a section 2-615 dismissal of one count of the plaintiff's complaint with prejudice at the plaintiff's request. *Id.* at 816. On appeal, however, this court still reviewed the dismissal on its merits and declined to review only the portion of the order specifying that the dismissal was with prejudice. *Id.* at 821-24. We do the same here.

¶ 15 Our review of a dismissal order pursuant to section 2-615 is *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). A section 2-615 motion attacks only the legal sufficiency of the complaint. 735 ILCS 5/2-615. It does not require or permit a court to weigh facts. Instead, all well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). However, conclusions of law or fact are not considered well-pleaded, even if they generally inform the defendant of the nature of the claim. *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002). Stated differently, " 'an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done.' " *Id.* (quoting *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 520 (1989)). Rather, because Illinois is a fact-pleading jurisdiction, a complaint must set forth a legally recognized claim and plead facts in support of each element that brings the claim within the cause of action in order to withstand a motion to dismiss. *Rabin v. Karlin and Fleisher, LLC*, 409 Ill. App. 3d 182, 186 (2011). With these principles in mind, we proceed to an evaluation of plaintiff's complaint.

¶ 16 In this case, plaintiff's complaint contains eight counts over 24 pages. We turn our attention first to those counts that we conclude were properly dismissed, beginning with counts 1, 3, and 4, all of which purport to allege wrongful repossession and conversion. In count 1,

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subtitled "Illegal Agreement," plaintiff argues that defendants' reliance on a "special payment document" as a basis for repossessing her vehicle was "illegal," "unlawful," and "malicious." Specifically, she maintains that this untitled document requiring her to make a \$500 payment in addition to her \$2,000 cash down payment violated the Illinois Motor Vehicle Retail Installment Sales Act (Retail Installment Sales Act), the Illinois Uniform Commercial Code, the Truth in Lending Act (15 U.S.C. § 1601 *et seq.* (2006)), and Regulation Z (12 C.F.R. § 226 *et seq.* (2008)). These allegations are repeated in large part in count 3, captioned "Creditor Failed to Follow Proper Repossession Procedures." In count 4, plaintiff alleges defendants' use of this document also violated the Illinois Consumer Fraud and Deceptive Practices Act. These counts are deficient both in form and in substance.

¶ 17 To begin, plaintiff fails to separate these alleged statutory and regulatory violations in individual counts, as is required under section 2-613 of the Code. In addition, plaintiff uses conclusory language to describe defendants' conduct, such as "shrewd," "cunning," and intended to "scam and cheat its customer consumer." Further, paragraphs are misnumbered throughout these counts. This is particularly problematic because of the adoption of paragraphs in count 1 in each subsequent count of the complaint. Taken together, these deficiencies in form violate section 2-603 of the Code and make it difficult for defendants to adequately respond.

¶ 18 Counts 1, 3, and 4 are also substantively deficient. Defendants correctly note that recovery for conversion requires a plaintiff to plead and prove that: (1) she has a right to the property at issue; (2) she has an absolute and unconditional right to the immediate possession of that property; (3) the defendant wrongfully and without authorization assumed control, dominion,

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or ownership over the property; and (4) she made a demand for the property's return. *Cirrinzione v. Johnson*, 184 Ill. 2d 109, 114 (1998). In counts 1, 3 and 4, plaintiff does not allege how defendants' assumption of ownership over the vehicle was unlawful. Instead, she alleges statutory violations without explaining how these violations give rise to a cause of action for conversion. For example, in paragraph 18 of count 1 – incorporated by reference in counts 3 and 4 – plaintiff quotes extensively from the Retail Installment Sales Act, but in the next paragraph alleges only that the special payment document is an attempt by defendants "to sidestep, evade, circumvent, and ignore all consumer protections as legislatively authorized by the Retail Installment Sales Act." Similarly, after quoting from the Uniform Commercial Code in paragraph 24 of count 1, she alleges the special payment document "fails totally to contain any consumer protections legally authorized by the above statutory remedies." Missing from plaintiff's complaint are allegations that the failure to comply with any of these statutes or regulations renders a subsequent repossession of collateral "wrongful" for purposes of proving conversion. Because of this failure to state a cause of action, counts 1, 3, and 4 are insufficient to withstand a motion to dismiss.

¶ 19 The same is true of count 5. In this count, plaintiff alleges wrongful repossession and conversion based on breach of the peace due to Esparza's allegedly violent conduct during the repossession. In support, plaintiff cites section 9-609 of the Uniform Commercial Code, which permits a secured party to take possession of collateral following default without judicial process if repossession can proceed without a breach of the peace. 810 ILCS 5/9-609(b)(2) (West 2010). However, in *Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 266 (1985) we held that section 9-

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503 – the former section 9-609 – does not provide a debtor with a cause of action. Instead, the debtor is required to specifically plead a violation under section 9-625 – formerly section 9-507 – which prescribes the statutory remedies for noncompliance with Article 9. See *id.*; see also 810 ILCS 5/9-625 (West 2010). Plaintiff's failure to so plead prohibits her from recovering for breach of the peace. See *Kouba*, 135 Ill. App. 3d at 266.

¶ 20 Counts 6, 7, and 8 were likewise properly dismissed for failure to state a claim. Counts 6 and 7, alleging negligence and willful and wanton conduct against defendants during the repossession, are ostensibly premised on the existence of an agency relationship between defendants and Esparza, who performed the actual repossession of the vehicle. An agency relationship exists where the principal has the right to control the manner and method of the work carried out by the agent and the agent is capable of subjecting the principal to personal liability. *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999).

¶ 21 Though the existence of a principal-agent relationship is one of fact, this does not absolve plaintiff of the responsibility of pleading those facts, which, if proved, could give rise to an agency relationship. See *Knapp v. Hill*, 276 Ill. App. 3d 376, 382 (1995). Plaintiff does not succeed in meeting this requirement here. Instead, she makes the conclusory statement that Esparza was acting as "an agent or employee or representative" of defendants when he negligently and/or willfully and wantonly removed plaintiff from her vehicle. This bare assertion, standing alone, is insufficient to withstand a motion to dismiss. See *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 498 (1996) (allegation in plaintiffs' complaint that the Suzuki dealers from whom they purchased their vehicles were "agents of defendants" was insufficient

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to plead agency).

¶ 22 Similarly, the count alleging negligent hiring fails to set forth facts in support of plaintiff's contention that Esparza was defendants' employee, which is the fundamental element of all negligent hiring claims. See *Mueller by Math v. Community Consolidated School Dist. 54*, 287 Ill. App. 3d 337, 341-42 (1997). Plaintiff rests on the statement that Esparza and Falcon Revoery "were hired and retained as agents or employees or representatives" of defendants "to repossess automobiles and other vehicles." This is a conclusion without any supporting factual allegations, and as such, does not state a claim of negligent hiring. Accordingly, we conclude that count 8 was properly dismissed.

¶ 23 Count 2 on the other hand, while plagued with drafting problems similar to those in the above-referenced counts, including the use of conclusory language and repetitive allegations, successfully states a cause of action. This count alleges wrongful repossession and conversion and is subtitled "Buyer Fully Paid For The Vehicle." Plaintiff begins by incorporating by reference paragraphs 1-15 of count 1, which allege that plaintiff paid \$2,000 in cash towards the down payment of her vehicle on March 5. Plaintiff further alleges that at that time she provided a Barnes' salesperson with her debit card to pay the additional \$500 down payment which was due on March 21. However, according to paragraph 19 of count 2, defendants charged only \$300 to her debit card on March 22, allowing them to claim that plaintiff was in default on her payments and repossess her vehicle. At the time of the repossession, plaintiff alleges she demanded her vehicle be returned. Taking these allegations as true, as we must for purposes of a 2-615 motion (Mihelcic, 209 Ill. 2d at 81), we conclude that plaintiff satisfactorily alleged the

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elements of conversion: (1) she had a right to the property, (2) she had a right to possession of the property, (3) defendants wrongfully assumed control over it, and (4) she demanded the return of her property. See *Cirincione*, 184 Ill. 2d at 114. Thus, notwithstanding the inartful pleading, we conclude that this count is answerable and so reverse the circuit court's decision to dismiss count 2 pursuant to section 2-615.

¶ 24 With regard to plaintiff's argument regarding the legality of the document requiring her to make a special payment, in light of our affirmance of the dismissal of all counts of the complaint that are premised on the document's illegality, this issue is moot. As such, we need not address the merits of this argument. See *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009) (Illinois courts generally "do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided").

¶ 25 Plaintiff also urges us to impose sanctions against defendants for pursuit of the motion to dismiss. Sanctions may be imposed where a party files a pleading or motion that is not grounded in fact and warranted by existing law or a good faith argument for the extension of the law. Ill. S. Ct. R. 137 (eff. Jan. 4, 2013). Given that the trial court did not rule on plaintiff's request for sanctions, it would be inappropriate for us to reach the merits of this issue under any circumstances. However, in light of our ruling that seven of eight counts were properly dismissed, the availability of sanctions is doubtful.

¶ 26 CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court dismissing counts 1, 3, 4, 5, 6, 7, and 8 with prejudice, but reverse the judgment with respect to count 2.

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¶ 28 Affirmed in part and reversed in part and remanded.