

No. 1-12-3068

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 under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALICIA CINFIO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County, Illinois.
)	
)	
v.)	No. 11 M1 016002
)	
DAVID J. LYNAM, individually,)	Honorable
and d/b/a LYNAM & ASSOC.,)	James E. Snyder,
)	Judge Presiding.
Defendant-Appellee,)	

JUSTICE TAYLOR delivered the judgment of the court.
Justices McBride and Palmer concurred in the judgment.

ORDER

Held: Plaintiff's second amended complaint was properly dismissed pursuant to section 2-619 of the Illinois Code of Civil Procedure when she failed to (1) allege economic damages under the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505 *et seq.* (West 2010)) and failed to plead sufficient facts to state a cause of action for (2) invasion of privacy, (3) negligent infliction of emotional distress, and (4) intentional infliction of emotional distress.

¶ 1 Plaintiff-appellant, Alicia Cinfio (Cinfio), brought suit against defendant-appellee David Lynam (Lynam), alleging that by posting a link to an employment benefits proceeding involving Cinfio, Lynam had violated the Consumer Fraud Act, invaded her privacy and negligently or intentionally inflicted emotional distress. Following the filing of her initial complaint and two amended complaints, the trial court dismissed the complaint in its entirety with prejudice. On appeal, Cinfio argues that the trial court erred in dismissing her second amended complaint because she had pled economic damages and had pled sufficient facts to sustain her additional claims. Additionally, Cinfio contends that the trial court erred in dismissing count I of her initial complaint. Cinfio asks that we reverse the judgment of the trial court. For the reasons that follow, we affirm.

¶ 2 BACKGROUND

¶ 3 This case arises out of the trial court's granting of a section 2-619 motion to dismiss in Lynam's favor. Prior to the summer of 2010, Cinfio worked for New Horizon Center for the Developmentally Disabled (New Horizon) as a cook. Cinfio filed for unemployment benefits after she left her job due to a medical condition. New Horizon denied Cinfio unemployment benefits, so she filed a claim with the Illinois Department of Employment Security (IDES) to challenge New Horizon's decision. Cinfio appeared *pro se*, and Lynam represented New Horizon in the proceedings. On July 10, 2010, the IDES denied Cinfio's request for benefits, finding that because Cinfio's employer was not responsible for her health problem, Cinfio voluntarily left her job and was not entitled to unemployment benefits. After the decision was released, Lynam posted on his website a link, <http://www.lynamlaw.com/wp-content/uploads/2010/10/Favorable-IDES-Decision2.pdf>, to the full IDES opinion, which Cinfio pled included her full name, address, employment information, and social security number. In

November 2010, Cinfio sent a demand letter requesting the removal of the link, and Lynam complied.

¶ 4 Shortly thereafter, on September 2, 2011, Cinfio filed the suit at issue in the instant appeal. Cinfio's initial three-count complaint, filed with co-plaintiff Maria Torres (Torres), alleged violations under the Illinois Personal Information Protection Act (PIPA) (815 ILCS 530 *et seq.* (West 2006)), the Consumer Fraud Act, and common law invasion of privacy. Lynam filed a motion to dismiss all counts on March 15, 2012, arguing that no remedy existed under PIPA and that the complaint failed to state a cause of action under the Consumer Fraud Act and invasion of privacy. Plaintiff filed a sur-response arguing that Lynam's reply to the motion to dismiss raised issues not in the initial motion and requesting the court deny the motion. On March 15, 2011, the trial court granted the motion to dismiss on all counts; count I alleging a violation of PIPA was dismissed with prejudice because the complaint failed to allege a breach of a security system as contemplated by the statute. The court dismissed counts II and III due to Cinfio's failure to allege economic damages but allowed Cinfio to amend.

¶ 5 Following the trial court's dismissal of the initial complaint, Cinfio filed a four-count first amended complaint on March 22, 2012. Count I alleged Lynam violated the Consumer Fraud Act (815 ILCS 505/2 (West 2010)) by publishing Cinfio's social security number and additional employment information. Count II pled an invasion of privacy through the disclosure of private facts, Count III raised negligent infliction of emotional distress, and Count IV alleged intentional infliction of emotional distress; the first amended complaint pled that Lynam's actions as under Count II, III, and IV caused Cinfio to suffer emotional distress, embarrassment and medical expenses. Lynam again filed a motion to dismiss the entire complaint on April 19, 2012. However, on May 1, 2012, Torres voluntarily dismissed her claim. On that same date,

Cinfio filed a second amended complaint alleging the same four counts: a Consumer Fraud Act count, an invasion of privacy count, and negligent and intentional infliction of emotional distress counts.

¶ 6 On June 6, 2012, Lynam filed a combined motion to dismiss the second amended complaint under section 2-619.1 alleging that Count I failed to allege actual economic injury; Count II failed to plead the elements necessary; Count III failed to plead duty; and Count IV failed to plead sufficient conduct. The court heard oral arguments on July 31, 2012 and requested additional information about the text accompanying the link Lynam posted. Cinfio filed a sur-response on August 14, 2012, alleging that the information placed her in a false light and arguing that additional proof and evidence beyond the pleadings was beyond the requirements of a section 2-619 motion. On September 12, 2012, the trial court heard additional oral arguments and dismissed Cinfio's case in its entirety with prejudice, finding that no damages were pled and the complaint failed to include enough facts to support her claims. Cinfio timely filed an appeal challenging the court's ruling.

¶ 7 ANALYSIS

¶ 8 On appeal, Cinfio raises six main arguments. First, she contends that the trial court erred in dismissing her Consumer Fraud Act claim because she pled actual economic damages as required under the statute. Next, Cinfio argues that the trial court erred in dismissing her invasion of privacy claim as she successfully pled public disclosure of private facts and that the publicity placed her in a false light. Third, Cinfio maintains that she successfully alleged duty in her second amended complaint to overcome the motion to dismiss, and the trial court erred in dismissing her claim of negligent infliction of emotional distress. Next, Cinfio argues that she pled outrageous conduct and the trial court incorrectly dismissed her claim of intentional

infliction of emotional distress. Finally, Cinfio contends that the trial court erred in dismissing her claim under PIPA because the trial court failed to give the plain meaning and interpretation of the statute.

¶ 9 Section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)) allows a party to file a combined “section 2-615 motion to dismiss based upon a plaintiff’s substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses.” *Board of Education of Park Forest-Chicago Heights School District Number 163, Cook County, Illinois v. Houlihan*, 382 Ill. App. 3d 604, 608 (2008). When ruling on either a section 2-619 or a section 2-615 motion to dismiss, it is proper for the court “to accept all well-pleaded facts in the complaint and reasonable inferences from those facts as true.” *Id.* (citing *Buckner v. O'Brien*, 287 Ill. App. 3d 173, 176 (1997); *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156 (2003)). The court, “however, does not admit conclusions of law or fact which are unsupported by allegations of specific facts warranting such conclusions.” *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 299 (1991). The court reviews such motions *de novo*. *Edelman, Combs & Latturner*, 338 Ill. App. 3d at 164.

¶ 10 A motion to dismiss under section 2-615 is properly granted where the plaintiff fails to state a cause of action upon which relief can be granted. *Neade v. Portes*, 193 Ill. 2d 433, 439 (2000). “A court should grant a section 2-619 motion to dismiss when it raises one or more affirmative matters which negate the plaintiff’s cause of action or which refute crucial conclusions of law or material facts that are unsupported by allegations of specific facts contained or inferred in the complaint.” *Brackett v. Galesburg Clinic Association*, 293 Ill. App. 3d 867, 870 (1997). In reviewing the trial court’s dismissal of a complaint pursuant to section 2-619, the function of the appellate court is limited to a consideration of the legal questions

presented by the pleadings. *Miranda v. Jewel Companies, Inc.*, 192 Ill. App. 3d 586, 588 (1989).

A reviewing court may affirm a dismissal on any ground supported by the record. *Woodson v. North Chicago Community School District Number 64*, 187 Ill. App. 3d 168, 172 (1989).

¶ 11 Cinfio's first contention is that the trial court erred in dismissing count I of her complaint, which alleges that Lynam's publication of the IDES opinion violated the Consumer Fraud Act. The court recognizes five elements to successfully state a cause of action under the Illinois Consumer Fraud Act: "(1) a deceptive act or unfair practice occurred, (2) the defendant intended for plaintiff to rely on the deception, (3) the deception occurred in the course of conduct involving trade or commerce, (4) the plaintiff sustained actual damages, and (5) such damages were proximately caused by the defendant's deception." *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009) (citing *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 283 (2006)). Actual damages must be calculable and "measured by the plaintiff's loss." *Chicago v. Michigan Beach Housing Cooperative*, 297 Ill. App. 3d 317, 326 (1998). Actual damages alleged must be "in the form of specific economic injuries to overcome a motion to dismiss." *Morris*, 392 Ill. App. 3d at 402. Cinfio argues that her complaint alleged calculable and measured actual damages in the form of the amount needed for credit monitoring and medical bills. However, the court in *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 365 (2010), held that the threat of identity theft and the subsequent purchase of a credit monitoring service do not qualify as damages under the Consumer Fraud Act. The additional damages alleged in the second amended complaint are medical bills related to the mental and emotional distress suffered. Such damages that do not arise from economic injury are not allowed on their own; rather, such damages need economic injuries to sustain them. *Morris*, 392 Ill. App. 3d at 403

(citing *Xydakis v. Target, Inc.*, 333 F.Supp.2d 686, 688 (N.D.Ill.2004)). As such, the trial court did not err in dismissing count I of the second amended complaint.

¶ 12 Cinfio next contends that the trial court erred in dismissing count II, which alleged a violation of the common law invasion of privacy. “Illinois courts recognize four ways to state a cause of action for invasion of privacy: ‘(1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light.’ ” *Cooney*, 407 Ill. App. 3d at 366 (quoting *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 71 (2004)). Cinfio contends that she alleged sufficient facts to state a cause of action under intrusion upon seclusion, public disclosure of private facts and false light. We turn first to the theory of false light. To successfully state such a claim, a plaintiff must “allege that the defendant's actions placed the plaintiff in a false light before the public, that the false light would be highly offensive to the reasonable person, and that the defendant acted with actual malice.” *Moriarty v. Greene*, 315 Ill. App. 3d 225, 236 (2000) (citing *Lovgren v. Citizens First Nat. Bank of Princeton*, 126 Ill. 2d 411, 419-20 (1989)). Cinfio failed to plead such facts. In her second amended complaint, Cinfio merely alleges that there were paragraphs which contained factual misstatements and unflattering characterizations but does not, until the sur-response to Lynam’s motion to dismiss the second amended complaint, plead that anything on the website placed her in a false light. Furthermore, the complaint fails to allege that Lynam acted with actual malice in releasing the IDES decision, a decision which at the time was the IDES’ final ruling. An allegation made in a sur-response on a motion to dismiss cannot be construed as a pleading within the complaint to which a court must look to determine a motion to dismiss. As such, the theory of false light invasion of privacy claim was properly dismissed.

¶ 13 We turn next to plaintiff's last two privacy claims. To successfully state a claim under the theory of intrusion upon the seclusion of another a plaintiff must plead: (1) the defendant committed an unauthorized intrusion into seclusion; (2) the intrusion would be highly offensive to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused the plaintiff anguish and suffering. *Busse*, 351 Ill. App. 3d at 71. Additionally, a successful cause of action for the public disclosure of private facts requires the plaintiff to prove that: (1) publicity was given to the disclosure of private facts; (2) the facts were private and not public facts; and (3) the matter made public would be highly offensive to a reasonable person. *Johnson v. K mart Corp.*, 311 Ill. App. 3d 573, 579 (2000) (citing *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 978 (1990)). Both theories require the disclosure of *private* and not public or merely personal facts. The court in *Busse* distinguished private facts from personal information, determining that names and social security numbers are not private facts which are protected under 815 ILCS 530/5. *Busse*, 351 Ill. App. 3d at 72. Cinfio has alleged in the complaint that her employment status, address, social security number and temporary denial of benefits were disclosed. These facts are not private facts which are facially embarrassing and highly offensive if disclosed. *Cooney*, 407 Ill. App. 3d at 367.

¶ 14 Cinfio further argues that the IDDES proceeding was confidential and it was thereby an invasion of privacy for Lynam to disclose it on his website. Cinfio cites section 1900 of the Unemployment Insurance Act (820 ILCS 405/1900 (West 2010)) in support of her claim, arguing that the legislature amended the Unemployment Insurance Act to overturn the court's decision in *Colvett v. L. Karp & Sons, Inc.*, 211 Ill. App. 3d 731 (1991), and broadening the scope of confidentiality. However, that is not the case. The amended rule only states that the decision, ruling or order is not admissible as evidence, binding or conclusive beyond the scope

provided within the Act and does not constitute *res judicata*. 820 ILCS 405/1900 (B) (West 2010). This has no effect on the court's previous interpretation of what constituted "information" prior to the amendment.

¶ 15 In *Colvett*, the court reviewed the following statutory language: "[I]nformation obtained from any individual or employing unit pursuant to the administration of this Act shall be confidential and shall not be published or be open to public inspection." 820 ILCS 405/1900 (A) (West 2010). The court determined that the term "information" included "all investigative materials received from the parties during DES proceedings." *Colvett*, 211 Ill. App. 3d at 734. The disclosure alleged within the second amended complaint is neither investigative materials, nor was it used as evidence or in another proceeding. The information disclosed as alleged within the complaint, though personal, is not private, and, as such, the trial court did not err in dismissing count II.

¶ 16 We need next turn to Cinfio's claim of negligent infliction of emotional distress in count III of her complaint. A plaintiff claiming to be a direct victim of negligently inflicted emotional distress must establish the traditional elements of negligence: duty, breach, causation, and injury. *Cooney*, 407 Ill. App. 3d at 363 (citing *Corgan v. Muehling*, 143 Ill. App. 3d 296, 306 (1991)). Cinfio first relies on the Consumer Fraud Act and the Unemployment Insurance Act to establish that Lynam owed her a duty of care. However, because the facts alleged are insufficient to state a claim under either of those acts, no duty can be established. Next, Cinfio argues that a duty arose out of Supreme Court Rule of Professional Conduct 4.4, which states that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Ill. S. Ct. Code of Prof. Res., 4.4. However, the second amended complaint does not allege that Lynam intended to embarrass Cinfio in the

representation of his client. Instead, the complaint alleges that Lynam posted the link to the IDES decision to promote his services. Lynam was not in a privileged relationship with Cinfio, did not receive confidential information, nor are there any facts alleged that lead this court to believe that Lynam acted in such a way as to breach a duty to Cinfio under Rule 4.4. Finally, Cinfio argues that Lynam made misleading and false statements about the facts of the hearing. However, Cinfio has failed to plead any such facts in the second amended complaint that would lead us to find that the trial court erred in dismissing count III.

¶ 17 Cinfio's complaint similarly fails to state a cause of action for intentional infliction of emotional distress. Under current Illinois law, there are three elements required to state a claim for intentional infliction of emotional distress: (1) the conduct involved must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress or know that there is at least a high probability that his conduct will cause severe emotional distress; and (3) the conduct must in fact cause severe emotional distress. *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988). The conduct must be "so extreme as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community." *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992). Cinfio argues that Lynam's posting of the employment decision and the "descriptive" paragraph, in violation of several laws, is conduct which reaches the threshold level to overcome a section 2-619 motion to dismiss. However, for the reasons discussed above, none of the vague facts alleged in the second amended complaint rise to the level required to state a claim under those statutes. Also, the second amended complaint fails to allege that Lynam acted intentionally to cause Cinfio emotional distress. It merely alleges that he posted the decision to promote his business, and she suffered distress. None of the facts alleged within the complaint lend themselves to a finding that Lynam acted

intentionally to cause Cinfio emotional distress. As such, the intentional infliction of emotional distress was properly dismissed.

¶ 18 Finally, Cinfio contends that the trial court erred in dismissing her PIPA claim because she pled actual damages in the form of medical bills. Lynam contends that we lack jurisdiction over this claim because of Cinfio's failure to include the earlier March 15, 2012, order in her notice of appeal. Supreme Court Rule 303(b)(2) states that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). A notice of appeal "confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal." *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (citing *Illinois Health Maintenance Organization Guaranty Association v. Shapo*, 357 Ill. App. 3d 122, 148 (2005)). Cinfio contends that the earlier order was merely a step in the procedural process, which does not prevent the appellate court from having jurisdiction over the PIPA claim, as the deficiency is not fatal. *People v. Smith*, 228 Ill. 2d 95, 104-05 (2008). We will first examine the sufficiency of the notice of appeal. Cinfio contends that Illinois courts generally construe the notice of appeal liberally. *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991). However, Cinfio cites only an unpublished Second District case, *Grimaudo-Wallen v. Nat'l City Corp.*, 2013 IL App (2d) 120386-U, in violation of Illinois Supreme Court Rule 23. (Ill. S. Ct. R. 23(e)(1)) (eff. July 1, 2011) to support her argument that an order which was not listed on the notice of appeal was connected to the orders included on the notice of appeal.

¶ 19 "There is no tie or connection [between two orders when they] deal with totally different subject matters and claims within the case." *McGath v. Price*, 342 Ill. App. 3d 19, 34 (2003).

The mere fact that the order dismissing the PIPA count was temporally before the order listed on

the notice of appeal would not put the other party on notice that Cinfio intended to appeal an additional, previous count. Lynam maintains, and we agree, that a notice of appeal can only be considered whole and sufficient “when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal.” *Lang*, 222 Ill. App. 3d at 229. This case is unlike *U.S. Bank Nat. Association v. Luckett*, 2013 IL App (1st) 113678, ¶ 13, where the court determined that a possession order closing the case, the order denying the motion to dismiss, and the order granting the motion to amend were sufficiently linked to give the court jurisdiction. This case is also distinguishable from *Burtrell*, where the court found that the notice could be inferred, and the orders being appealed were directly related. *Burtrell v. First Charter Service Corp.*, 76 Ill. App. 3d 427, 434–35 (1979).

¶ 20 Cinfio failed to list the earlier March 15, 2012 order in the notice of appeal. Supreme Court Rule 303(b)(2) states that a notice of appeal “shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court.” (Ill. S. Ct. R. 303(b)(2)) (eff. June 4, 2008). A notice of appeal “confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal.” *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (citing *Illinois Health Maintenance Organization Guaranty Association v. Shapo*, 357 Ill. App. 3d 122, 148 (2005)). Cinfio failed to preserve her PIPA claim, and as such, this court does not have jurisdiction to hear the claim. “A party who files an amended pleading waives any objection to the trial court’s ruling on the former complaints.” *Bonhomme v. St. James*, 2012 IL 112393, ¶17 (citing *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983)). In this case, when Cinfio filed her first and subsequently, her second amended complaint, she did not “refer to or adopt” her prior PIPA claim. *Id.* The trial court dismissed the PIPA count completely and with prejudice, and Cinfio

amended her complaint excluding the PIPA count. As such, that claim ceased to be a part of the record and was effectively abandoned and withdrawn. *Id.* This court does not have jurisdiction over the PIPA claim and cannot review it.

¶ 21 The court did not abuse its discretion by dismissing Cinfio’s second amended complaint with prejudice. Plaintiffs do not have an unlimited right to amendments. *Plocar v. Dunkin’ Donuts of America, Inc.*, 103 Ill. App. 3d 740, 750 (1981). As in *Plocar*, Cinfio had filed two amended complaints that failed to state a cause of action under which relief could be granted. *Id.* However, here the trial court also allowed Cinfio to file sur-responses to address the deficiencies in order to overcome the motions to dismiss, but even in those sur-responses, Cinfio failed to address the court’s request for additional facts needed. “The trial court may bring the litigation to an end when it believes that further amendments to pleadings will not further the interests of justice.” *Id.* (citing *Beresky v. Teschner*, 64 Ill. App. 3d 848, 856 (1978)). The trial court gave Cinfio ample opportunity to cure and address the deficiencies within the complaint. Therefore, we conclude that the trial court did not abuse its discretion in dismissing Cinfio’s complaint with prejudice.

¶ 22 Affirmed.