

No. 1-13-0448

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT J. RAYFORD and SHARON JONES,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	
)	No. 10 CH 12274
MONROE/WABASH DEVELOPMENT, LLC,)	
a Delaware Limited Liability Company,)	Honorable
)	Peter Flynn,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER.

¶ 1 *Held:* We affirmed the orders granting summary judgment in favor of defendant on plaintiffs' fraud counts, denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' mutual mistake count. We reversed the dismissal of plaintiffs' unilateral mistake count and remanded for further proceedings thereon.

¶ 2 Plaintiffs, Robert J. Rayford and Sharon Jones, commenced this action against defendant Monroe/Wabash Development, LLC, to rescind a condominium purchase agreement entered into for the purchase of a yet-to-be constructed residential condominium unit in a new high-rise structure in downtown Chicago. The circuit court granted summary judgment in favor of defendant on the counts sounding in fraud, denied plaintiffs' motion for summary judgment, and subsequently dismissed the counts seeking rescission based on unilateral and mutual mistake.

Plaintiffs appeal the summary judgment and dismissal orders. We affirm the orders granting summary judgment for defendant on plaintiffs' fraud counts, denying plaintiffs' motion for summary judgment, and dismissing plaintiffs' mutual mistake count. We reverse the order dismissing plaintiffs' unilateral mistake count and remand for further proceedings thereon.

¶ 3

I. BACKGROUND

¶ 4 Plaintiffs filed an amended complaint on October 22, 2010, alleging that they are Cook County residents and that defendant is a Delaware limited liability company which was formed in 2004 to plan and erect a 73-story high-rise building at 60 E. Monroe Street in Chicago known as the Legacy at Millennium Park (the Legacy). Defendant retained Equity Marketing Services, Inc. (Equity) to market and coordinate the sale of the condominium units within the Legacy.

¶ 5 Plaintiffs alleged that in late 2005 or early 2006, they noted a newspaper advertisement for the Legacy and then decided to visit an Equity sales office. At the sales office, plaintiffs were presented with a number of marketing materials that included a detailed description of the Legacy. According to these documents, the Legacy would feature 355 distinct condominiums varying in size between 875 and 9,300 square feet with prices ranging between \$400,000 for a one-bedroom residence up to \$7 million for a penthouse unit.

¶ 6 Plaintiffs alleged that at their request, Equity provided them with a number of available floor plans, including one (the Plan) for Unit 2007 (the Unit), a two-bedroom, two-bathroom residence to be constructed on the 20th floor. Among other things, the Plan reflected that the square footage of the finished Unit was to total 1,491 square feet. A copy of the Plan was attached to the amended complaint.

¶ 7 Plaintiffs alleged that Equity also provided them with a property report (the Report) that confirmed the square footage of the Unit. The Report included a copy of the proposed

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declaration and bylaws (the Declaration) for the contemplated condominium association. A copy of the Declaration was attached to the amended complaint. Section 2.1(b) of the Declaration defines a residential unit as "the space enclosed and bounded by the horizontal and vertical planes set forth in the delineation thereof on Exhibit A [the Survey of the Units and Legal Description of the Property in the proposed Declaration] *** *excluding all structural components of the Building.*" (Emphasis added.) See Declaration § 2.1(b). Section 2.1(b) of the Declaration defines "structural components" to include "structural columns or pipes, wires, conduits, ducts, flues, shafts, or public utility lines" running through a unit but serving more than that unit. See Declaration § 2.1(b). Section 2.2 of the Declaration further provides that no unit owner shall own any "structural components of the Building, including structural columns or pipes, wires, conduits, ducts, flues, shafts, or public utility lines" running through a unit but serving more than that unit. See Declaration § 2.2. Section 3.1 of the Declaration defines "common elements" to include: (a) "pipes, ducts, flues, shafts, electrical wiring and conduits" other than those situated entirely within and serving only a single unit; and (b) "[s]tructural columns located within the boundaries of a Unit." See Declaration § 3.1.

¶ 8 Plaintiffs alleged that the Declaration's definition of "common elements" was in accord with section 4.1 of the Illinois Condominium Property Act (Act) (765 ILCS 605/4.1(a)(2)-(3) (West 2010)), which states:

"(2) To the extent that perimeter and partition walls, floors or ceilings are designated as the boundaries of the units or of any specified units, all decorating, wall and floor coverings, paneling, molding, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished surfaces thereof, shall be deemed a part of such units, while all other portions of such walls, floors or ceilings and all

portions of perimeter doors and all portions of windows in perimeter walls shall be deemed part of the common elements.

(3) If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns, or any other apparatus lies partially within and partially outside of the designated boundaries of a unit, any portions thereof serving only that unit shall be deemed a part of that unit, while any portions thereof serving more than one unit or any portion of the common elements shall be deemed a part of the common elements."

¶ 9 Plaintiffs alleged that in reliance on the square footage of the Unit as set forth in the Plan and Report, as well as the language of section 3.1 of the Declaration and section 4.1 of the Act, they entered into a contract with defendant on March 15, 2006, to purchase the Unit along with a separate deeded parking space for a total of \$743,900. A copy of the contract was attached to the amended complaint.

¶ 10 In pertinent part, the contract provides that defendant "has constructed or will construct the Purchased Unit substantially in accordance with" the Plan and in accordance with "the preliminary plans and specifications *** on file in the office of the Seller," provided that "the boundaries of the Purchased Unit shall be as finally depicted in the plat of survey" attached to the Declaration. The contract further provides that the seller reserved the right to make changes to the Plan and other specifications "on the terms set forth herein." Those provisions, in turn, provided that: (a) absent the purchaser's consent, no change would reduce the gross square footage of the Unit by more than 5%; and (b) any change necessitated by structural or mechanical elements of the Development or by codes or regulations would not "materially adversely affect the rights of the Purchaser hereunder or the value of the Purchased Unit."

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¶ 11 Plaintiffs alleged that after signing the contract, they remitted a \$5,000 reservation deposit and a separate \$70,051.20 earnest money check to defendant insuring performance of their obligations under the terms of the contract. On August 14, 2007, plaintiffs increased the amount of their earnest money deposit by \$24,082.

¶ 12 Plaintiffs alleged that on or about August 7, 2009, Equity notified them that the Unit was substantially complete, that the closing was scheduled for October 12, 2009, and that a pre-closing inspection of the Unit was scheduled for September 28, 2009. Plaintiffs then contacted their mortgage loan officer at JPMorgan Chase Bank (JPMorgan) and advised him of the scheduled closing. On or about September 17, 2009, an appraiser retained by JPMorgan arrived at the Legacy to prepare an appraisal of the Unit. Following an inspection of the Unit, the appraiser prepared an appraisal which reflected that the "as-built" size of the Unit was 1,435 square feet or approximately 4% smaller than the size reflected by the Plan. A copy of the appraisal was attached to the amended complaint.

¶ 13 Plaintiffs alleged they were provided a copy of the appraisal prior to visiting the Unit for the inspection. Upon entering the residence, plaintiffs "readily perceived a disparity between the square footage reflected by the Plan and the 'as-built' size of the Unit, especially in those rooms featuring an external wall and load-bearing columns." Plaintiffs voiced their concern regarding the "as-built" size of the Unit to Equity, and provided a company representative with a copy of the appraisal. Following a review of the appraisal, Equity denied the existence of any deviation between the Plan and the "as-built" size of the Unit.

¶ 14 Plaintiffs alleged they retained a structural engineer, Charles Anderson of C.E. Anderson & Associates, P.C., to review the Plan and calculate an "as-built" square footage of the Unit. Mr. Anderson subsequently met with defendant's architects and was informed that the architects had

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calculated the square footage of the unit as 1,491 square feet as represented in the Plan "based upon dimensions commencing on the exterior surface of the building-literally from the exposed outside walls and glass of the Structure-instead of inside the Unit where [plaintiffs] would have physical access to the space." In addition, "contrary to the terms of Section 3.1 of the Declaration and Section 4.1 of the Act," the architects had overstated the square footage by including seven structural concrete columns located within the confines of the Unit. On August 24, 2010, defendants granted Mr. Anderson access to the Unit for the purpose of preparing his own "as-built" square footage calculation. According to Mr. Anderson's calculations, which *excluded* the seven structural concrete columns, the "as-built" square footage of the Unit totals 1,377 square feet, or 7.65% less than that represented by the Plan. Plaintiffs alleged they had not consented to any change in the Plan.

¶ 15 In count I of their amended complaint, labeled "Rescission," plaintiffs alleged that: defendant intentionally misrepresented the square footage of the Unit to entice prospective purchasers; plaintiffs were unaware of the misrepresentation at the time they entered into the contract and reasonably relied on the square footage reflected in the Plan when entering into the contract and remitting the deposit and earnest money; alternatively, to the extent defendant did not intentionally misrepresent the square footage of the Unit, plaintiffs reasonably yet mistakenly believed the size of the Unit had been calculated in accordance with "customary standards" as well as in conformance with the Declaration and Act; and that rescinding the contract and refunding the deposit and earnest money would return defendant to the *status quo* inasmuch as it remains in possession of the Unit and is currently marketing and selling other premises in the building.

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¶ 16 In count II of their amended complaint, labeled "Fraudulent Misrepresentation," plaintiffs alleged: the square footage of the Unit as reflected by the Plan and the Report was a material factor in plaintiffs' decision to enter into the contract; the square footage of the Unit as reflected by the Plan and the Report is false and defendant knew that it was false at the time those documents were presented to plaintiffs; despite knowledge of the falsity, defendant presented the Plan and the Report to plaintiffs with the intent that they would rely on the misrepresentation and enter into the contract; plaintiffs relied on the square footage reflected by the Plan and Report in entering into the contract and in remitting the deposit and earnest money; and plaintiffs have suffered damages of at least \$99,133.20.

¶ 17 In count III of their amended complaint, plaintiffs alleged that defendant's misrepresentation of the square footage of the Unit constituted a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). 815 ILCS 505/1 *et seq.* (West 2010).

¶ 18 On November 22, 2010, defendant filed its answer and affirmative defense to the amended complaint. Defendant denied that the square footage of the Unit was improperly calculated, denied that it intentionally misrepresented the square footage of the Unit, and denied that the square footage of the Unit as reflected in the floor plan attached to the amended complaint was incorrect. Defendant alleged as an affirmative defense that the area of the Unit was calculated in accordance with industry standards, and that the floor area of the Unit satisfied the requirements of the contract.

¶ 19 A discovery schedule was entered, and discovery depositions were taken of Robert Rayford, Charles Anderson, Peter Noone (the architect), and Stephen Weiss (defendant's expert). In addition, Sharon Jones filed an affidavit.

¶ 20 In her affidavit, Mrs. Jones attested that in their initial visit to Equity's sales office, plaintiffs were provided with the Plan for the Unit which stated the square footage was to total 1,491 square feet. Equity also provided them with the Report that "confirmed the square footage of the Unit by including a diagram depicting the same shown in the Plan." The Report incorporated a *pro forma* contract indicating that: (a) absent the purchasers' consent, no change would reduce the gross square footage of the Unit by more than 5%; and (b) any change necessitated by structural or mechanical elements of the Development, or by codes or regulations, would not materially adversely affect the rights of the purchasers, or the value of the purchased unit. The Report also included a copy of the Declaration, which provided in pertinent part that: (a) "[e]ach Unit consists of the space enclosed and bounded by the horizontal and vertical planes *** excluding all structural components of the Building"; and (b) "[s]tructural columns located within the boundaries of a Unit shall be part of the Common Elements."

¶ 21 Mrs. Jones attested that the introductory materials to the Report urged every prospective purchaser to carefully read the Report. Based on this introductory exhortation and her habits acquired during her 32 years as an employee of the Internal Revenue Service, Mrs. Jones read the Report as well as the contract in their entirety. In reliance on the square footage of the Unit as set forth in the Plan and Report, plaintiffs executed a contract on February 27, 2006, to purchase the Unit and a separate deeded parking space for a total of \$743,900. Plaintiffs, ultimately, paid a total of \$99,133.20 in earnest money.

¶ 22 Mrs. Jones attested that on or about September 17, 2009, an appraiser retained by JPMorgan performed an appraisal and determined that the "as-built" size of the Unit was 1,435 square feet, or approximately 4% smaller than the size reflected by the Plan and Report.

¶ 23 Mrs. Jones attested that upon entering the Unit for the first time, she "could immediately discern that there was a substantial difference between the as-built size of the Unit in comparison to the size represented by the Plan and Report." She further attested that "[t]he Unit as represented by the Plan and Report was roughly comparable to two floors of our multi-level home on West 86th Place that we were vacating. Our decision to purchase the Unit was based in part on our expectation that the Unit would be the size represented to us. The Unit as built, however, was significantly smaller than that."

¶ 24 Mrs. Jones attested plaintiffs retained the services of a structural engineer, Charles Anderson, to determine the actual as-built square footage of the Unit. After gaining access to the Unit, Mr. Anderson "completed calculations reflecting that the as-built size of the Unit is actually 1,377 square feet after all structural and common elements within the Unit were removed from the calculation."

¶ 25 Mrs. Jones attested that had plaintiffs known defendant's measuring conventions overstated the size of the Unit by 114 feet, they would not have entered into the contract. Due to the "material difference in the size of the Unit as built versus the size of the Unit represented in the Plan and Report," plaintiffs refused to close on the purchase of the Unit and requested a return of all earnest money paid to Equity. Equity refused their request and "took the position that [plaintiffs] forfeited the earnest money by refusing to close on the Unit."

¶ 26 Robert Rayford testified in his deposition that he was currently 64 years old and had formerly been employed at the Chicago Transit Authority for almost 35 years as a motor man. He and his wife contracted to buy the Unit in February 2006 for \$689,900. They were shown the Plan before signing the contract; the Report was given to them after they signed the contract. He

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had no "recollection of anyone saying that the Unit was a certain size other than what was on the Plan."

¶ 27 Mr. Rayford testified that prior to signing the contract, he never asked anyone how the square footage shown on the Plan had been calculated. He never asked whether the 1,491 square feet represented in the Plan included the columns in the living and dining room and master bedroom.

¶ 28 Mr. Rayford further testified:

"Q. If you look now at [the amended complaint], it says, '[defendant] was aware that the square footage of the Unit as reflected by the Plan and Report was false at the time the documents were presented to [plaintiffs]. My question is who at [defendant] was aware that the square footage of the Unit as reflected by the Plan and Report were false?

A. I don't know exactly who."

¶ 29 Peter Noone, an architect with the firm of Solomon Cordwell Buenz (SCB), testified he was involved in the design of the Legacy high-rise building, specifically, he "was the principal in charge of project management for the [Legacy] project." Mr. Noone testified that SCB published internal standards for the methodology of calculating building area. The SCB standards were developed from the past experiences of SCB architects and from standards set forth by the Building Owners and Management Association (BOMA). Since the construction of the Legacy, BOMA has published standard guidelines for the measurement of multi-unit residential buildings consistent with the SCB standards. In pertinent part, the SCB and BOMA standards provide that when measuring square footage, the structural components of the building are included in the measurement.

¶ 30 Mr. Noone testified that following plaintiffs' refusal to close, Mr. Noone was asked by defendant in October 2009 to confirm that the area of the Unit, as constructed, did not change from the original plans and specifications. Mr. Noone confirmed that the Unit's square footage was 1,491 square feet and that the Unit, as constructed, did not change from the original plans and specifications.

¶ 31 Charles Anderson, a structural engineer and architect who is the president of C.E. Anderson & Associates (CEA&A), testified that in 2009, he was asked by plaintiffs' counsel to verify the square footage of the Unit. Mr. Anderson determined that the methodology used by Mr. Noone and SCB for calculating the Unit's square footage as 1,491 square feet was "very similar" to the BOMA standard for calculating net areas. Mr. Anderson asked one of his employees, Amanda Featherstone, to calculate the square footage of the Unit. Using roughly the same BOMA methodology utilized by Mr. Noone and SCB, which measures square footage by including structural components, such as the columns located in the living room and master bedroom, Ms. Featherstone determined that the square footage was 1,494.5 square feet. Ms. Featherstone and Mr. Anderson also made other calculations of the Unit's square footage, using slightly different methodologies (but always including the structural components in the measurements); said calculations were all within 95% of the 1,491 square footage listed in the Plan.

¶ 32 On October 25, 2010, CEA&A conducted a new measurement of the Unit, which, at plaintiffs' counsel's request, *excluded* the concrete columns and other structural components. That calculation resulted in a square foot area of 1,377 square feet, which is 7.65% less than the area set forth in the Plan. On April 11, 2011, CEA&A conducted another measurement of the Unit, which, at plaintiffs' counsel's request, further excluded shafts, air ducts, and pipe chases.

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This calculation yielded a floor area of 1,270 square feet, which is approximately 15% less than the square footage set forth in the Plan.

¶ 33 Mr. Anderson testified he was familiar with the Chicago Zoning Ordinance requirements for "measuring a building" and that those requirements do *not* exclude structural components from the measurement. Mr. Anderson testified he was also familiar with the American Institute of Architect standards for the measurement of the floor area of multi-story buildings, and that said standard does not exclude structural components from the measurement.

¶ 34 Mr. Anderson further testified he was *not* expressing any professional opinion that the exclusion of structural components from the measurement of the floor area of a unit in a multiunit residential building is in accord with engineering or architectural standards in the Chicago area. Mr. Anderson testified he was not aware of any standards generally used by architects or engineers in the Chicago area that exclude structural components from the measurement of the floor area of multiunit residential buildings.

¶ 35 Stephen Weiss, an architect with Weiss Architects, LLC, was retained by defendant as an expert witness. Mr. Weiss testified that "certainly every time we calculate floor area, it's based on the BOMA standards, at least initially. If a developer or owner wants some other calculation, we can do it. But typically it's the BOMA standard. *** [T]he BOMA standard *** is widely recognized as the standard to use." Mr. Weiss did not perform any square footage calculations for the Unit at issue here.

¶ 36 The record on appeal contains a letter dated December 8, 2011, from Mr. Weiss to defendant's attorney. In the letter, Mr. Weiss stated:

"I have been involved in the design of many multi-story, multi-unit condominium buildings. In all cases, the method used to provide floor areas of individual units for

developers and unit purchasers has been consistent. It is based on the standards promulgated by the Building Owners and Managers Association International (BOMA). These standards are widely known and used in the industry for this purpose. They are adopted as American National Standards by the American National Standards Institute (ANSI)."

¶ 37 In the letter, Mr. Weiss further states that he was asked to review, in pertinent part, CEA&A's October 25, 2010, and April 11, 2011, measurements of the Unit's square footage. After conducting the review, Mr. Weiss concluded:

"The [CEA&A] drawing dated 10/25/2010 lists a floor area of 1,377 square feet. It appears to subtract the structural columns and shear walls from the floor area, which is an incorrect methodology. The BOMA standard is very specific as to these elements not being subtracted.

The [CEA&A] drawing dated 04/11/2011 lists a floor area of 1,270 square feet. It purports to subtract the structural columns, shear walls and all interior walls and partitions from the floor area. This method does not conform to any standard of calculation with which I am familiar."

¶ 38 On March 6, 2012, defendant filed a motion for summary judgment as to all counts of plaintiffs' amended complaint. On March 7, 2012, plaintiffs filed their own motion for summary judgment as to count I of the amended complaint. On June 4, 2012, the circuit court granted defendant's motion for summary judgment as to count II and count III, and as to count I "to the extent it relies on allegations of fraud." The circuit court denied plaintiffs' motion for summary judgment on count I but granted plaintiffs leave to amend count I "to the extent it alleges a cause of action based upon mistake."

¶ 39 On June 23, 2012, plaintiffs filed their second-amended complaint, which repeated the allegations in their amended complaint as to how they signed the contract for the purchase of the Unit, and remitted the deposit and earnest money in reliance on the square footage of the Unit (1,491 square feet) set forth in the Plan. Plaintiffs alleged they subsequently hired Mr. Anderson to calculate the "as-built" square footage of the Unit. Mr. Anderson learned that the Plan's measurement of the Unit as 1,491 square feet included "seven structural concrete columns and chutes serving more than one unit in the Legacy located within the confines of the Unit." Plaintiffs alleged that Mr. Anderson's calculations of the Unit's square footage (*excluding* said concrete columns and chutes) revealed that it totaled 1,377 square feet, which was 7.65% less than that represented by the Plan.

¶ 40 In count I of their second-amended complaint, labeled "Rescission-Mutual Mistake," plaintiffs alleged that the square footage of the Unit (1,491 square feet) set forth in the Plan was calculated using the BOMA standard. Plaintiffs alleged that none of the materials provided to them by defendant referred to BOMA in any way or indicated that the square footage of the Unit was calculated under the BOMA standard. Plaintiffs further alleged:

"46. [Plaintiffs] reasonably but mistakenly believed that the square footage of the Unit was calculated consistent with the materials provided to them, including the Contract, the Declaration, the Report, and the Plan. In this regard, receipt of a Unit that included 1,491 square feet calculated in accordance with the Declaration and Act was a material term of the Contract for [plaintiffs].

47. [Plaintiffs] reasonably relied on this belief when they entered into the Contract and remitted the Deposit and earnest money.

48. Upon information and belief, [defendant] mistakenly calculated the floor area of the Unit consistent with a BOMA standard not suitable for the purpose and then inaccurately represented the size of the Unit to [plaintiffs] based on that calculation and without identifying the method of measurement within the Contract or within any of the other materials provided to [plaintiffs]."

¶ 41 Plaintiffs sought rescission of the contract and a refund of the deposit and earnest money based on the mutual mistake.

¶ 42 Count II of the second-amended complaint, labeled "Rescission-Unilateral Mistake," alleged that plaintiffs reasonably but mistakenly believed that the square footage of the Unit, which was represented to be 1,491 square feet in the Plan, was calculated "consistent with the materials provided to them, including the Contract, the Declaration, the Report, and the Plan." Plaintiffs alleged that instead of being calculated consistent with the materials provided to them, the square footage was calculated pursuant to the BOMA standard. Plaintiffs sought rescission of the contract and a refund of the deposit and earnest money based on their unilateral mistake as to how the square footage had been calculated.

¶ 43 In counts III, IV, and V of the second-amended complaint, plaintiffs pleaded their claims of intentional misrepresentation, fraudulent misrepresentation, and Consumer Fraud Act violations, in order to preserve the dismissal of those claims for appellate review.

¶ 44 Defendant moved to dismiss the second-amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). With respect to count I of plaintiffs' second-amended complaint, which alleged a cause of action for rescission of the contract based on mutual mistake, defendant contended it was not mistaken about the area of the Unit and therefore any mistake was non-mutual. With respect to count II (unilateral mistake),

defendant argued that plaintiffs' expectation that the area of the Unit would be calculated in a manner consistent with the contract, the Declaration, and the Act, rather than the BOMA standard, constituted a mistake of law, rather than fact, for which the remedy of rescission did not apply. Defendant also argued that the unconscionability necessary for rescission was lacking.

¶ 45 Defendant made no arguments with respect to the remaining counts, III, IV, and V, which had been repleaded solely to preserve appellate review of their dismissal.

¶ 46 The circuit court rejected defendant's arguments, that the alleged mistake at issue, was one of law, rather than fact, and that unconscionability was lacking. The court further stated:

"The dispute between the parties is in significant measure as far as the court can discern a wrangle over gross square footage as opposed to net square footage or usable square footage ***. As an example of the distinction, it is not uncommon for condominium declarations to say [that] with regard to an exterior wall, the unit owner's ownership goes halfway through that wall. Now, *** let's assume *** the unit owner owns six inches in from the wallpaper and the other six inches which are in from the outside of the building are the domain of the association and the common elements. *** The six inches between the wallpaper and the middle of the wall are not usable square footage from the standpoint of the unit owner. I defy you to put a couch in the middle of the wall. On the other hand, if one were doing a gross square footage calculation of the metes and bounds of the unit, those six inches would be included. So there is a difference between gross square foot calculations and usable square foot calculations.

* * *

[A]s the defendant points out, anybody who looks at the floor plan can see that there are within the overall dimensions of the unit various blacked out things, which are obviously indications that the blacked out area is not free floor space. The short way of saying that is, this unit wasn't a loft. It was rather a unit which had things in it.

* * *

What all of this has me wondering is, what exactly did [plaintiffs] have in mind? They cannot have had in mind that they were going to get a blank space with nothing in it. That's not something they could have had in mind because they saw the floor plan and the floor plan has lots of things within the outer boundaries of the blank space.

If [plaintiffs] concluded that the [1,491] square foot calculation ***which appears at the bottom of the floor plan was meant as a net usable square foot calculation, that is something that [plaintiffs] don't really offer me much of a basis for.

* * *

I have a suspicion that somebody who is looking for a net usable square foot calculation normally shows up with their own tape measure because the mathematical and mechanical effort necessary to do a net usable square foot calculation is not the sort of thing that can be shown by a single number on a floor plan."

¶ 47 The circuit court concluded that plaintiffs had failed to plead "materiality and reliance [on the 1,491 square footage listed in the Plan] with the specificity that *** they need to plead in order to overcome the often-expressed judicial reluctance, not to say skepticism, about unilateral and mutual mistake claims of this kind." The court found that "the proper course here is *** to strike counts I and II of the second-amended complaint with leave to replead and instructions to the plaintiffs when they do so to spell out in factual detail the nature and circumstances of their

reliance and the nature and circumstances of the materiality they now discern in the square foot difference."

¶ 48 On October 11, 2012, plaintiffs filed their third-amended complaint which again contained counts for mutual mistake, unilateral mistake, intentional misrepresentation, fraudulent misrepresentation, and violation of the Consumer Fraud Act. In response to the circuit court's instructions to plead in more detail the materiality of the 1,491 square feet listed in the Plan and plaintiffs' reliance thereon, plaintiffs alleged:

"34. [Plaintiffs'] expectations concerning the size of the Unit included an expectation that the Plan's reference to a unit size of 1,491 square feet was a representation as to the area to be conveyed to them for their exclusive possession and use. [Plaintiffs] understood and expected that the representation of 1,491 square feet constituted a measure of 'gross' area, in the sense that: (a) the area was measured from the interior surface of perimeter walls; and (b) no deduction would be made for unusable space, such as the area consumed by interior partition walls, to the extent that such area was subject to [plaintiffs'] exclusive possession and use. In the language of the Contract, [plaintiffs] expected that 1,491 square feet referred to the size of the Unit itself, as distinct from 'Unit Ownership.'

35. The Plan contained only approximated and incomplete room dimensions for rooms within the Unit, and, therefore, [plaintiffs] could not verify the dimensions or total square footage of the yet to be built Unit. The Plan also displayed interior walls, non-windowed perimeter walls, load-bearing columns, and flues as blacked-out areas.

36. The blacked-out areas of the Plan made no distinction between areas under [plaintiffs'] exclusive control, such as interior walls that could be moved or eliminated,

and common elements that were not owned exclusively by [plaintiffs] or subject to their exclusive possession and use."

¶ 49 On October 31, 2012, defendant filed a section 2-619 motion to dismiss plaintiffs' third-amended complaint, contending that plaintiffs failed to meet their burden of proving materiality. Defendants also argued that any mistake was a unilateral mistake of law that did not give rise to unconscionability and was not subject to rescission.

¶ 50 On January 14, 2013, the circuit court dismissed plaintiffs' third-amended complaint with prejudice. Plaintiffs filed this timely appeal.

¶ 51 On appeal, plaintiffs contend the circuit court erred by granting summary judgment for defendant on their intentional misrepresentation, fraudulent misrepresentation, and Consumer Fraud Act claims in counts I through III of their amended complaint, and by denying plaintiffs' motion for summary judgment on the intentional misrepresentation and mistake claims in count I. Plaintiffs also contend the circuit court erred by granting the section 2-619 motion to dismiss their unilateral mistake and mutual mistake counts in their third-amended complaint.

¶ 52 II. Plaintiffs' Appeal From the Summary Judgment Order

¶ 53 A. The Intentional Misrepresentation and Fraudulent Misrepresentation Counts

¶ 54 First, we address the circuit court's order granting summary judgment in favor of defendant on plaintiffs' claims in counts I and II of their amended complaint for intentional misrepresentation and fraudulent misrepresentation and denying plaintiffs' motion for summary judgment on the intentional misrepresentation claim in count I.

¶ 55 "Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there is no genuine issue of material fact and that the moving party is

entitled to judgment as a matter of law." *County of Cook v. Village of Bridgeview*, 2014 IL App (1st) 122164, ¶ 10. "As in this case, where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law." *Id.* "Our review of the trial court's order granting summary judgment is *de novo*." *Id.*

¶ 56 In addressing whether the circuit court properly granted defendant's motion for summary judgment on the intentional and fraudulent misrepresentation claims in counts I and II of the amended complaint and denied plaintiffs' motion for summary judgment on the intentional misrepresentation claim in count I, we begin our analysis by addressing defendant's motion.

¶ 57 A "defendant moving for summary judgment bears the initial burden of production." *Nedzveckas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). Defendant may satisfy this "burden of production in two ways: (1) by affirmatively showing that some element of the case must be resolved in his favor [citation], or (2) by establishing 'that there is an absence of evidence to support the nonmoving party's case.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). When defendant has met this initial burden, the burden shifts to plaintiffs "to present a factual basis which would arguably entitle [them] to a favorable judgment." *Id.* Plaintiffs are not required to prove their case in response to defendant's motion for summary judgment, but they must present evidentiary facts to support the elements of the cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009).

¶ 58 The causes of action at issue here, intentional and fraudulent misrepresentation, required plaintiffs to show a knowing misrepresentation on the part of defendant. See *Smith v. Kurtzman*, 176 Ill. App. 3d 840, 846 (1988); *Simmons v. Champion*, 2013 IL App (3d) 120562, ¶ 35. Plaintiffs here attempted to plead this element in their amended complaint by alleging that SCB improperly included certain structural components (*i.e.*, seven structural concrete columns) when

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calculating the square footage of the Unit as 1,491 square feet, which calculations defendant used when marketing the Unit, and that the actual square footage, as measured by Mr. Anderson without including said columns, was over 5% smaller in violation of the contract.

¶ 59 Defendant met its burden of production on its summary judgment motion by establishing an absence of evidence of such a knowing misrepresentation on the part of defendant. Specifically, defendant established via the deposition testimony of its architect, Mr. Noone, as well as plaintiff's expert, Mr. Anderson, that the methodology used by defendant's architectural firm, SCB, to calculate the area as 1,491 square feet as set forth in the Plan was based on the BOMA standard. The BOMA standard requires that the structural components of the Unit be included in the measurement. Defendant's expert, Mr. Weiss, explained that the BOMA standard is the standard to use when performing square footage calculations of multi-unit residential buildings; Mr. Anderson did not dispute this. When performing their own measurement of the Unit using roughly the same BOMA standard utilized by SCB, Mr. Anderson's firm came up with a square footage calculation that was essentially the same as SCB's calculation (1,494.5 square feet). Mr. Anderson explained that his firm arrived at the other calculations of the Unit's square footage as being more than 5% smaller than the 1,491 square feet listed in the Plan only when, at plaintiffs' counsel's request, they used a non-BOMA standard which excluded the structural components from the measurement. Mr. Anderson specifically stated that such a measurement using the non-BOMA standard did not comply with the Chicago Zoning Ordinance requirements or the American Institute of Architect standards for the measurement of the floor area of multi-story buildings, and that he was not expressing any professional opinion that the exclusion of such structural components from the measurement of the floor area was in accord with architectural or engineering standards in the Chicago area.

¶ 60 Further, Mr. Rayford, one of the plaintiffs here, admitted he could not specifically identify anyone in defendant's company who was aware that the square footage listed in the Plan was false.

¶ 61 On all these facts, defendant met its burden of production by establishing an absence of evidence of an essential element of plaintiffs' case, specifically, that defendant knowingly misrepresented the size of the Unit as 1,491 square feet. The burden then shifted to plaintiffs to present evidentiary facts supporting the element of defendant's knowing misrepresentation; plaintiffs failed to present any such evidentiary facts. Accordingly, we affirm the grant of summary judgment in favor of defendant on plaintiffs' claims of intentional and fraudulent misrepresentation in counts I and II of their amended complaint and the denial of plaintiffs' motion for summary judgment on the intentional misrepresentation claim in count I.

¶ 62 Plaintiffs argue on appeal, though, that the summary judgment order should be reversed because the contract unambiguously provided that the structural components should not be included in the square footage measurement of the Unit and, therefore, the circuit court erred in applying parol evidence regarding the BOMA standard to alter the terms of the contract so as to include the structural components in the measurement. When a written agreement is complete and unambiguous on its face, parol evidence cannot be used to vary the express terms of the agreement. *Farmers Automobile Insurance Ass'n v. Wroblewski*, 382 Ill. App. 3d 688, 697 (2008). Plaintiffs have failed to cite any clear, unambiguous provision in the contract regarding how the square footage of the Unit was to be calculated, and our review of the contract reveals no such provision; accordingly, parol evidence regarding the BOMA standard for calculating square footage was admissible on this issue. Moreover, the evidence considered on this issue, specifically, the deposition testimony of the architect and experts, is the type of evidence that

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properly may be considered on a motion for summary judgment. See 735 ILCS 5/2-1005(c) (West 2012). As discussed earlier in this order, said evidence supported the circuit court's order granting summary judgment in favor of defendant on plaintiffs' claims of intentional and fraudulent misrepresentation in counts I and II of their amended complaint and denying plaintiffs' motion for summary judgment on their claim of intentional misrepresentation in count I.

¶ 63 Plaintiffs also argue on appeal that the summary judgment order should be reversed because there is evidence in the record that defendant committed intentional and fraudulent misrepresentation by failing to disclose to plaintiffs that SCB was using the BOMA standard when measuring the square footage of the Unit. In support, plaintiffs cite to one page of a document contained in the record on appeal entitled "Multi Residential Buildings Standard Methods of Measurement," which states that it was developed by BOMA, the Institute of Real Estate Management, the National Association of Home Builders, and the National Multi Housing Council. In his deposition testimony, Mr. Weiss identified this document as the 2009 version of the BOMA standard for measuring multi-unit residential buildings (hereinafter referred to as the 2009 BOMA measurement standard). The page of the 2009 BOMA measurement standard contained in the record on appeal discusses two different methods (Method A and Method B) for measuring floor area and states in pertinent part:

"Users of this standard must clearly and prominently identify which measurement method is employed as part of any presentation of the results of its application. Likewise, any reference to this standard in any context, such as a lease, appraisal, declaration, prospectus or other marketing materials and databases, must cite Method A or Method B in order to be unambiguous."

¶ 64 Plaintiffs here argue that the disclosure requirements contained in the 2009 BOMA measurement standard provides evidentiary support for their argument that defendant committed intentional and fraudulent misrepresentation by failing to identify in the declaration or other marketing materials that the Unit was being measured pursuant to the BOMA methodology. We disagree. The marketing materials were presented to plaintiffs in 2006. Plaintiffs entered into the contract in 2006, *not* 2009. There is no evidence in the record that the BOMA measurement standard in existence in 2006 contained the same or similar disclosure requirements as the 2009 BOMA measurement standard. Accordingly, the 2009 BOMA measurement standard contained in the record on appeal does not satisfy plaintiffs' burden of presenting evidentiary facts supporting their causes of action for intentional and fraudulent misrepresentation.

¶ 65 B. The Consumer Fraud Act Count

¶ 66 Next, we address the granting of summary judgment for defendant on plaintiffs' Consumer Fraud Act claim in count III of their amended complaint. "The elements of a cause of action brought pursuant to the Consumer Fraud Act are: (1) a deceptive act or practice by defendant, (2) an intent on the defendant's part that plaintiff rely on the deception, and (3) the deception occurred in the course of conduct involving trade or commerce." *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 73 (quoting *Nilsson v. NBD Bank of Illinois*, 313 Ill. App. 3d 751, 764 (1999)).

¶ 67 Plaintiffs alleged that defendant's deceptive act here was its knowing misrepresentation of the square footage of the Unit as being 1,491 square feet. As discussed earlier in this order, though, the experts' testimony indicates that defendant's architectural firm, SCB, correctly adhered to the BOMA standards when measuring the Unit as being 1,491 square feet and thus defendant committed no misrepresentation to plaintiffs. Accordingly, defendant met its burden of

production on its summary judgment motion by establishing the absence of evidence of an essential element of plaintiffs' case, specifically, that defendant committed a deceptive act when it stated in the Plan that the Unit measured 1,491 square feet. The burden then shifted to plaintiffs to present evidentiary facts supporting the element of a deceptive act committed by defendant; plaintiffs failed to present any such evidentiary facts. Therefore, we affirm the grant of summary judgment for defendant on plaintiffs' Consumer Fraud Act claim in count III of their amended complaint.

¶ 68

C. The Mistake Count

¶ 69 Next, we address the denial of plaintiffs' motion for summary judgment on their mistake claim in count I of their amended complaint. In count I of their amended complaint, plaintiffs alleged that "to the extent [defendant] did not intentionally misrepresent the square footage of the [U]nit, [plaintiffs] reasonably yet mistakenly believed the size of the premises had been calculated in accordance with customary standards as well as in conformance with the Declaration and Act" and they requested rescission of the contract.

¶ 70 In their summary judgment memorandum and in their argument on appeal, plaintiffs contend that in count I of their amended complaint they were alleging *mutual* mistake of both plaintiffs and defendant with regard to how the square footage of the Unit was measured. To establish a mutual mistake warranting rescission of a contract, plaintiffs must plead and prove that "(1) both parties were mistaken regarding a material feature of the contract; (2) this matter is of such grave consequence that enforcement of the contract would be unconscionable; (3) the plaintiff's mistake occurred despite the exercise of reasonable care; and (4) the other party can be placed in the *status quo*." *Stewart v. Thrasher*, 242 Ill. App. 3d 10, 18 (1993). Parol evidence is

admissible to establish the fact of mistake. *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 391 (1992).

¶ 71 Plaintiffs argue SCB mistakenly calculated the floor area of the Unit consistent with a BOMA standard and then defendant inaccurately represented the size of the Unit to plaintiffs based on that calculation and without identifying the method of measurement within the contract or within any of the other materials provided to plaintiffs. Plaintiffs further argue that plaintiffs reasonably but mistakenly believed that the square footage of the Unit was calculated consistent with the materials provided to them, including the contract, the Declaration, the Report, and the Plan.

¶ 72 As discussed earlier in this order, though, all of the evidence showed that the BOMA standard was the established standard for measuring the floor area of the Unit, that defendant's architects correctly measured the Unit's floor area pursuant to the BOMA standard, and that defendant accurately represented the size of the Unit to plaintiffs under said standard. Accordingly, plaintiffs have failed to show any mistake on the part of defendant in its calculation and representation of the Unit's floor area. In the absence of any mistake on the part of defendant, plaintiffs' claim of mutual mistake fails as a matter of law. See *Village of Oak Park v. Schwerdtner*, 288 Ill. App. 3d 716, 718 (1997). Accordingly, we affirm the denial of plaintiffs' summary judgment motion on their mutual mistake claim in count I of their amended complaint.

¶ 73 We note that in its order denying plaintiffs' motion for summary judgment on their mutual mistake claim in count I of their amended complaint, the circuit court granted plaintiffs leave to amend their complaint to more fully plead their mistake claim. Plaintiffs subsequently filed a second-amended complaint alleging mutual mistake and unilateral mistake, which the circuit court struck with leave to replead. Plaintiffs then filed their third-amended complaint,

again alleging mutual and unilateral mistake. In the next section of this order, we address the circuit court's dismissal with prejudice of the mutual mistake and unilateral mistake counts in plaintiffs' third-amended complaint.

¶ 74 III. Plaintiffs' Appeal From The Dismissal Order

¶ 75 The circuit court granted defendant's section 2-619 motion to dismiss plaintiffs' mutual mistake and unilateral mistake counts in their third-amended complaint. Defendant's section 2-619 motion to dismiss attacked the legal sufficiency of the allegations in the third-amended complaint with evidence beyond the pleadings (*e.g.*, the deposition testimony of the experts). Such an attack on the legal sufficiency of the complaint with extrinsic evidence is appropriate in a summary judgment motion (735 ILCS 5/2-1005 (West 2012)), but is inappropriate in a section 2-619 motion where a complaint's allegations are accepted as true and legally sufficient and are only defeated by extrinsic information otherwise defeating the claim. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 891 (2005). However, we note that a section 2-619 motion " 'amounts essentially to a summary judgment procedure' " (*id.* (quoting *Palmisano v. Connell*, 179 Ill. App. 3d 1089, 1097 (1989))), because, like a summary judgment motion, "[i]n ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id.* at 185-86 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). As a summary judgment motion here would have been subject to the same basic analysis and disposition as the section 2-619 motion, we discern no prejudice to plaintiffs in addressing the arguments that defendant incorrectly raised in a section 2-619 motion to dismiss

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as if presented in a section 2-1005 motion for summary judgment. See *Turner*, 355 Ill. App. 3d at 893 (where, as here, the appellate court opted to address an argument that the defendants incorrectly raised in a section 2-619 motion to dismiss as if presented in a section 2-1005 motion for summary judgment, noting that the plaintiff suffered no prejudice by the appellate court's doing so).

¶ 76 A. The Mutual Mistake Count

¶ 77 As in the amended complaint, the mutual mistake count in the third-amended complaint pleads for rescission of the contract based on: defendant's mistake in inaccurately representing the size of the Unit to plaintiffs as 1,491 square feet based on a calculation of the Unit's floor area under the BOMA standard; and plaintiffs' mistake in thinking that the square footage was calculated pursuant to a non-BOMA standard set forth in the contract, Plan, Declaration and Report. As discussed earlier in this order, though, the expert testimony showed that SCB made no mistake in calculating the square footage of the Unit pursuant to the BOMA standard and, thus, that defendant was not mistaken in representing the size of the Unit to plaintiffs based on that calculation. In the absence of a mistake by defendant, plaintiffs' claim of mutual mistake fails as a matter of law. See *Village of Oak Park v. Schwerdtner*, 288 Ill. App. 3d at 718. Therefore, we affirm the order dismissing plaintiffs' mutual mistake count.

¶ 78 B. The Unilateral Mistake Count

¶ 79 To establish a unilateral mistake warranting rescission of a contract, plaintiffs must plead and prove: "(1) the mistake is related to a material feature of the contract; (2) it occurred notwithstanding the exercise of reasonable care; (3) it is of such grave consequence that enforcement of the contract would be unconscionable; and (4) the other party can be placed in *statu quo*." *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 273 (1999).

¶ 80 The evidentiary materials indicate there is some evidence supporting each element of plaintiffs' cause of action for unilateral mistake. With respect to the first element, that the mistake is related to a material feature of the contract, Mrs. Jones' affidavit and Mr. Rayford's deposition testimony indicate that plaintiffs were mistaken as to how defendant's architectural firm had calculated the Unit's floor area as being 1,491 square feet as listed in the Plan. Plaintiffs believed the Unit had been measured without including the structural components. Plaintiffs' mistaken belief was at least arguably supported by the Declaration's definition of a unit as excluding the structural components. According to Mr. Anderson's calculations, when the structural components are excluded from the measurement, the Unit is more than 5% smaller than the 1,491 square feet listed in the Plan. This court has held that the size and boundaries of the subject property are material factors in a purchaser's decision to buy the property. *Geist v. Lehmann*, 19 Ill. App. 3d 557, 560 (1974). In addition, the contract here, which was attached to and made a part of the third-amended complaint, also evidences the materiality of plaintiffs' mistake, as it expressly provides that, absent the purchasers' consent, no change would reduce the gross square footage of the Unit by more than 5%.

¶ 81 With respect to the second element, that the mistake occurred notwithstanding the exercise of reasonable care, Mrs. Jones attested that she read the Report (which included a copy of the Declaration) and contract in their entirety prior to entering into the contract.

¶ 82 With respect to the third element, that the matter is of such grave consequence that enforcement of the contract would be unconscionable, our supreme court has held that a contract is substantively unconscionable when it contains terms that oppress or unfairly surprise an innocent party. See *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 28 (2006). In support of this element, Mrs. Jones attested to plaintiffs' belief that the Unit would equal 1,491 square feet as

indicated in the Plan, which would be equivalent to the size of two floors of their multi-level home. Mrs. Jones attested to their unfair surprise when they discovered that the Unit had been measured pursuant to the BOMA standard, resulting in a square footage of about 7.65% less than what they thought they were receiving under the contract. Mr. Rayford similarly testified to his surprise that the Unit, as built, was more than 5% smaller than as represented in the Plan.

¶ 83 With respect to the fourth element, that the other party can be placed in the *status quo*, there is no dispute that defendant can be returned to the *status quo* in that it remains in possession of the Unit and is currently marketing and selling other premises in the Legacy.

¶ 84 As there is evidence supporting each element of plaintiffs' case, defendant has failed to show it is entitled to judgment as a matter of law. Accordingly, we reverse the order dismissing plaintiffs' unilateral mistake count and remand for further proceedings thereon.

¶ 85 Defendant argues on appeal that plaintiffs' mistake was one of law, rather than one of fact, for which rescission cannot be granted. See *Holbrook v. Tomlinson*, 304 Ill. 579, 585 (1922) (rescission cannot be granted for a "mistake of law, pure and simple"). We disagree. A mistake of fact is defined as "A mistake about a fact that is material to a transaction." Black's Law Dictionary 1017 (7th ed. 1999). A mistake of law is defined as "A mistake about the legal effect of a *known fact* or situation." (Emphasis added.) *Id.* Plaintiffs' alleged mistake here is that they were unaware as to how the square footage listed in the Plan and Report had been calculated; this was a mistake of fact, not law.

¶ 86

IV. CONCLUSION

¶ 87 The circuit court properly granted defendant's motion for summary judgment as to plaintiffs' claims in counts I, II, and III of their amended complaint for intentional misrepresentation, fraudulent misrepresentation, and violation of the Consumer Fraud Act, where

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defendant met its burden of production by establishing an absence of an essential element of plaintiffs' case with respect to each of these claims and where plaintiffs failed to present evidentiary facts supporting said elements. The circuit court properly denied plaintiffs' motion for summary judgment as to the mutual mistake claim in count I of their amended complaint, where the claim failed as a matter of law because plaintiffs did not show any mistake on the part of defendant. After plaintiffs repleaded their mutual mistake count in their third-amended complaint, the circuit court properly granted defendant's motion to dismiss with prejudice because the evidence showed that defendant committed no mistake and therefore plaintiffs' claim of mutual mistake failed as a matter of law. However, the circuit court erred in granting defendant's motion to dismiss plaintiffs' claim of unilateral mistake where there was some evidence supporting each element thereof.

¶ 88 For all the foregoing reasons, we: affirm the grant of summary judgment for defendant on plaintiffs' intentional misrepresentation, fraudulent misrepresentation, and Consumer Fraud Act claims in counts I through III of their amended complaint; affirm the denial of plaintiffs' summary judgment motion on the intentional misrepresentation and mutual mistake claims in count I of their amended complaint; affirm the dismissal of the mutual mistake count in count I of their third-amended complaint; and reverse the dismissal of the unilateral mistake count in count II of their third-amended complaint and remand for further proceedings thereon.

¶ 89 Affirmed in part; reversed in part; remanded.