

did not inspect but rather filed a false report finding no problems and that problems with the house were found after closing. In a multicount complaint, plaintiff alleged both negligent and intentional misrepresentation, breach of fiduciary duty, and consumer fraud against Effingham State Bank and negligent and intentional misrepresentation and statutory violations against Taylor. On motion, the circuit court dismissed all counts. For the reasons stated below, we affirm in part, reverse in part, and remand.

¶ 3

FACTS

¶ 4 On August 26, 2005, plaintiff filed a four-count complaint in the circuit court of Effingham County. The first two counts were respectively labeled "Compensatory Damages" and "Punitive Damages" and were directed against Effingham State Bank. The allegations in both of these counts were substantially similar except for the prayers for damages. Plaintiff alleged that Effingham State Bank, through its employee Kimberly Taylor, had hired defendant George Taylor to perform a home inspection and failed to disclose that Kimberly was married to George Taylor. Plaintiff alleged that Effingham State Bank represented to her that the inspection showed no defects in the property. Plaintiff also alleged that she "covered the cost of this home inspection." Numerous defects in the home were listed. Plaintiff alleged that had the inspection been done properly she "would have been placed on notice of certain defects which were not discovered until after the closing occurred."

¶ 5 The last two counts were against Taylor. As with the first two counts, the allegations in both counts were substantially similar, with one being labeled "Compensatory Damages" and the other "Punitive Damages."

¶ 6 Both defendants filed motions to dismiss. Effingham State Bank argued that the claims against it were barred by the *Moorman* doctrine. Effingham State Bank also argued that specific paragraphs in the complaint contained multiple allegations, failed to set forth sufficient facts, and were ambiguous and conclusory. Defendant Taylor also made numerous

arguments, including that plaintiff failed to allege either a duty or breach or a fraudulent statement with intent to induce by George Taylor.

¶ 7 On October 11, 2006, plaintiff filed an amended complaint. The amended complaint contained seven counts, the first four of which were directed against Effingham State Bank: count I "Negligence," count II "Breach of Fiduciary Duty," count III "Illinois Consumer Fraud & Deceptive Business Practices Act," and count IV "Fraud." Repeating many of the same allegations, plaintiff alleged "[t]hat the [d]efendants, by and through their employees, including but not limited to Kimberly Taylor, agreed to act as agent for the [p]laintiff for purposes of effectuating the closing in general and in more particularly for the purpose of employing a home inspector." Plaintiff alleged that "as agent for the plaintiff" defendants hired and paid George Taylor for a home inspection. In the count labeled "Negligence," plaintiff alleged that Effingham State Bank, as agent for plaintiff, had a duty to exercise ordinary care in the selection of a home inspector. The count labeled "Breach of Fiduciary Duty" alleged that Effingham State Bank had a duty not to put its interests ahead of plaintiff's. The count labeled "Fraud" alleged that Effingham State Bank stood to gain a financial advantage from selling a loan and intended that plaintiff "would rely upon the home inspection report and complete the purchase." The counts against Taylor were labeled "Conversion," "Negligence," and "Illinois Consumer Fraud & Deceptive Practices Act."

¶ 8 Both defendants filed motions to dismiss. On June 15, 2007, the court entered orders granting both motions. The court found that count I claimed economic loss of a type that should be addressed through contract and not tort and thus was barred by the *Moorman* doctrine. The court noted that plaintiff had made allegations of false representation but that "in order to successfully plead an action for negligent misrepresentation against a provider of information employed by a third party a plaintiff must allege the purpose and intent of the relationship was to benefit or influence the [p]laintiff."

¶ 9 The court found that plaintiff had failed to allege a fiduciary duty in count II. The court noted that a fiduciary duty requires an agent to act for the benefit of the principal, subordinating personal interests to that of the other. The court found that from the allegations of the complaint it could not be gleaned whether Effingham State Bank merely did a favor for plaintiff.

¶ 10 The court found regarding count III that the deceptive practices alleged by plaintiff were not alleged to have happened in the ordinary course of trade, nor that Kimberly Taylor acted deceptively or knew that the inspection was deceptive. As for count IV, the court noted Effingham State Bank had argued that it did not knowingly make false statements and stated:

"If in fact, the agent theory can be shown by the plaintiff this argument would fail. However, as stated in the [c]ourt's ruling in regards to [c]ount III, the amended complaint fails to allege that the agent, Kimberly Taylor, in fact acted deceptively or knew about the deception."

¶ 11 The court also dismissed the counts directed against defendant Taylor. The court dismissed count VI, finding that plaintiff had failed to allege that defendant Taylor owed a duty to plaintiff. The court dismissed count VII, finding that plaintiff had not alleged that defendant Taylor intended for plaintiff to rely on a deceptive practice.

¶ 12 On January 24, 2008, plaintiff filed her second amended complaint. Defendants objected that the filing was untimely and without leave. After the court granted leave, defendants filed motions to dismiss. A docket entry of September 14, 2010, indicates that the court heard argument and granted the motions to dismiss, giving plaintiff time to file a third amended complaint.

¶ 13 On October 14, 2010, plaintiff filed a third amended complaint. Plaintiff directed the first five counts against Effingham State Bank, labeling them: count I "Negligence," count II "Breach of Fiduciary Duty," count III "Intentional Misrepresentation of Fact," count IV

"Consumer Fraud and Deceptive Practices Act," and count V "Fraud." The final three counts were directed against defendant Taylor and were labeled: count VI "Negligent Misrepresentation," count VII "Intentional Misrepresentation," and count VIII "Deceptive Practice." Many of the paragraphs were repeated for each count.

¶ 14 Both defendants filed motions to dismiss. On August 25, 2011, the court made a docket entry stating the order of dismissal. Plaintiff filed a motion for certification or in the alternative for final order. The third amended complaint was then dismissed with prejudice and plaintiff appealed.

¶ 15

ANALYSIS

¶ 16 The third amended complaint was dismissed for insufficiency of the allegations pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)). A motion to dismiss brought under section 2-615 tests the legal sufficiency of the complaint. On review, this court inquires whether the allegations of the complaint, when construed in the light most favorable to plaintiff, and considering all well-pleaded facts and all reasonable inferences that may be drawn from those facts, are sufficient to establish a cause of action upon which relief may be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004). Because Illinois is a fact-pleading jurisdiction, a plaintiff is required to allege facts, not mere conclusions, to establish her claim as a viable cause of action. *Vernon v. Schuster*, 179 Ill. 2d 338, 344, 688 N.E.2d 1172, 1176 (1997). A claim should not be dismissed pursuant to section 2-615 unless no set of facts can be proved which would entitle the plaintiff to recover. *Iseberg v. Gross*, 227 Ill. 2d 78, 86, 879 N.E.2d 278, 284 (2007). Dismissal is reviewed *de novo*. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305, 891 N.E.2d 839, 845 (2008).

¶ 17 We first turn to the counts against Effingham State Bank. In each count, plaintiff repeats paragraphs asserting that Effingham State Bank was plaintiff's agent. These counts

follow the first count against Effingham State Bank which, in addition to claiming agency, attempts to state a claim of negligent misrepresentation. As the first count is for negligent misrepresentation, and the entire complaint could be viewed as an attempt to avoid *Moorman*, this is where our analysis begins.

¶ 18

I.

¶ 19

NEGLIGENT MISREPRESENTATION & *MOORMAN*

¶ 20 In *Moorman*, our supreme court held that a "plaintiff cannot recover for solely economic loss under the tort theories of strict liability, negligence and innocent misrepresentation." *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 91, 435 N.E.2d 443, 453 (1982); *Rasgaitis v. Waterstone Financial Group, Inc.*, 2013 IL App (2d) 111112, ¶ 53, 985 N.E.2d 621. The bar of *Moorman* has three exceptions: (1) where a plaintiff has sustained damage as a result of a sudden or dangerous occurrence, (2) where the claimed damages are proximately caused by the defendant's intentional, false representation, such as fraud, and (3) where the damages are proximately caused by the negligent misrepresentation of a defendant engaged in the business of supplying information for the guidance of others in their business transactions. *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 404 Ill. App. 3d 611, 618, 936 N.E.2d 1093, 1100 (2010).

¶ 21 In order to assert a claim for negligent misrepresentation, a plaintiff must plead the essential elements: (1) a false statement of material fact, (2) carelessness or negligence in ascertaining the truth of the statement by the party making the statement, (3) the intention to induce the plaintiff to act, (4) the plaintiff's action in reliance on the truth of the statement, (5) damages resulting from the reliance, and (6) the party making the statement is under a duty to communicate accurate information. *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 334-35, 843 N.E.2d 327, 332 (2006). This exception has been applied to information providers such as accountants, brokers, and termite inspectors. See

Congregation of the Passion, Holy Cross Province v. Touche Ross & Co., 159 Ill. 2d 137, 636 N.E.2d 503 (1994) (accountants); (*Duhl v. Nash Realty, Inc.*, 102 Ill. App. 3d 483, 429 N.E.2d 1267 (1981) (real estate broker); *Penrod v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Ill. App. 3d 75, 385 N.E.2d 376 (1979) (stockbrockers); *Perschall v. Raney*, 137 Ill. App. 3d 978, 484 N.E.2d 1286 (1985) (termite inspector).

¶ 22 In order for this exception to the *Moorman* doctrine to apply, the defendant must be engaged in the business of supplying information for the guidance of others. *1324 W. Pratt Condominium Ass'n*, 404 Ill. App. 3d at 618, 936 N.E.2d at 1100. The information must be central to the transaction. *Tolan & Son, Inc. v. KLLM Architects, Inc.*, 308 Ill. App. 3d 18, 25, 719 N.E.2d 288, 294 (1999). The exception does not apply when the information "supplied is merely ancillary." *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 168, 679 N.E.2d 1197, 1201 (1997). The exception has not been applied when the information that constitutes a misrepresentation relates to tangible or noninformational goods offered by the defendant. *First Midwest Bank, N.A.*, 218 Ill. 2d at 339, 843 N.E.2d at 334.

¶ 23 A plaintiff must plead specific facts to support this exception. Whether a party is in the business of supplying information rests on the precise facts of the situation. *First Midwest Bank, N.A.*, 218 Ill. 2d at 334, 843 N.E.2d at 332; *Fox Associates, Inc. v. Robert Half International, Inc.*, 334 Ill. App. 3d 90, 95-96, 777 N.E.2d 603, 608 (2002). As stated in *Fox*:

"The allegation that a defendant is in the business of providing information for the guidance of others is a legal conclusion that must be supported by well-pled factual allegations. *Tolan & Son*, 308 Ill. App. 3d at 28[, 719 N.E.2d at 296]. To determine whether a party is in the business of supplying information, the precise facts of the specific case must be analyzed. *Tolan & Son*, 308 Ill. App. 3d at 27[, 719 N.E.2d at 296]. The determination is dependent upon the nature of the information

at issue and its relation to the kind of business being conducted. *Tolan & Son*, 308 Ill. App. 3d at 28[, 719 N.E.2d at 296]. ' "The critical question *** is whether the information is an important part of the product offered. [A] business[] will be deemed to be in the business of supplying information if the information furnished along with the non-informational goods or services is central to the business transaction. [Citation.]" ' *Tolan & Son*, 308 Ill. App. 3d at 29[, 719 N.E.2d at 297-98]." *Fox Associates, Inc.*, 334 Ill. App. 3d at 95-96, 777 N.E.2d at 608.

¶24 In certain circumstances, financial institutions may be held liable under this exception to the *Moorman* doctrine. The test for whether a financial institution is liable is the same as for any other business—the misrepresentation must be of information that the institution is engaged in the business of providing for the guidance of others. See *First Midwest Bank, N.A.*, 218 Ill. 2d at 335, 843 N.E.2d at 332; *DuQuoin State Bank v. Norris City State Bank*, 230 Ill. App. 3d 177, 185, 595 N.E.2d 678, 683 (1992). The allegations in plaintiff's third amended complaint, however, fail to support such a claim against Effingham State Bank.

¶25 *DuQuoin* illustrates how a bank may engage in negligent misrepresentation. *DuQuoin* involved a suit between two banks. The plaintiff bank alleged that it offered a loan based on false information supplied by the defendant bank about a borrower's assets and potential collateral. *DuQuoin* held that the defendant bank clearly supplied the information in order to guide the plaintiff bank on whether to offer a loan to the borrower. Moreover, the "[d]efendant was in the business of supplying information since it routinely gave out credit information to other banks." *DuQuoin State Bank*, 230 Ill. App. 3d at 185, 595 N.E.2d at 683.

¶26 Unlike in *DuQuoin*, here, plaintiff did not allege facts supporting a conclusion that Effingham State Bank engaged in the business of providing information about the physical condition of mortgaged property in order to guide residential lenders. Unlike *DuQuoin*,

plaintiff never alleged that providing inspections for the guidance of residential lenders was part of Effingham State Bank's routine business. Likewise, the allegations of count I go no further than to describe the home inspection as ancillary, and not central, to plaintiff's relationship with Effingham State Bank. *Fireman's Fund Insurance Co.*, 176 Ill. 2d at 168, 679 N.E.2d at 1201. The circuit court properly found that count I did not plead an exception to the *Moorman* doctrine.

¶ 27 Count V, which plaintiff labels "Fraud," is substantially similar to the first count for negligent misrepresentation. This count also fails to avoid the bar of *Moorman*. Although plaintiff placed a different label on this count, plaintiff alleged here neither that Effingham State Bank was engaged in the business of providing inspection for the guidance of customers nor that Effingham State Bank knew the inspection report to be false. Instead, plaintiff alleged in this count that she "had a right to rely upon the statement as having been required by the United States Government."

¶ 28 II.

¶ 29 AGENCY & FIDUCIARY DUTY

¶ 30 Negligent misrepresentation does not require a defendant to knowingly deceive a plaintiff. Instead, the requirement that the defendant provides the information as part of a business of guiding the plaintiff forms a relationship that is the basis for a duty. As with the other counts against Effingham State Bank that do not allege that the misrepresentation was intentional, plaintiff rests on an enhanced relationship between her and Effingham State Bank. In order to support these claims, plaintiff alleges her relationship with Effingham State Bank as one of agency. Several paragraphs repeated in each count of plaintiff's complaint aver that Effingham State Bank was plaintiff's agent. The claims of agency were not sufficiently alleged.

¶ 31 The circuit court found that the assertion of agency was not supported by factual

allegations, and struck the allegations as conclusory. On appeal, plaintiff argues that the motion to dismiss the third amended complaint did not attack the pleadings as conclusory and that the circuit court, therefore, erred by striking the allegations.

¶ 32 Plaintiff's contention that the circuit court went beyond the motion to dismiss the third amended complaint is not supported by the record. In successive dismissals, the trial court repeatedly informed plaintiff that the pleadings lacked factual allegations to support conclusory assertions. Plaintiff does not illustrate how the third amended complaint provided factual allegations to support a conclusion of agency. Moreover, the striking of the allegations was not essential to the dismissal of the complaint. In order to survive dismissal, plaintiff needed to present sufficient factual allegations to support the conclusion of agency, and the third amended complaint simply does not contain such factual allegations. On appeal, plaintiff fails to cite to any precedent where a lending bank became an agent for a residential borrower.

¶ 33 In Illinois, a plaintiff relying on a theory of agency must plead specific facts establishing a principal-agent relationship and not plead the legal conclusion that such a relationship exists. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 497, 675 N.E.2d 584, 592 (1996). Merely pleading the legal conclusion of agency is insufficient. *Knapp v. Hill*, 276 Ill. App. 3d 376, 382, 657 N.E.2d 1068, 1072 (1995).

¶ 34 The requirement of pleading facts describing any agency relationship is essential. As explained in *Weidner*:

"Likewise, no facts are pleaded that, if proved, establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498, 675 N.E.2d 584, 592 (1996). Again, it is fundamental that facts, and not conclusions, are to be pleaded, no matter how many such conclusions are set forth and regardless of whether they inform

defendants in a general way of the nature of the claim against them. *Adkins*, 129 Ill. 2d at 519-20, 544 N.E.2d at 744. A court is bound to consider only those facts well pleaded, and with no facts giving rise to any duty between the parties being alleged, the court had no choice but to dismiss plaintiffs' second amended complaint for the failure to state a cause of action. See *Hanson*, 196 Ill. App. 3d at 623, 554 N.E.2d at 397." *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1060-61, 767 N.E.2d 815, 819-20 (2002).

¶ 35 Plaintiff did not allege facts supporting a conclusion that Effingham State Bank was given legal authority as an agent to bind plaintiff. Plaintiff pled that Effingham State Bank "agreed to act as [p]laintiff's agent" and that "while acting as agent for the [p]laintiff, [Effingham State Bank] agreed to secure an inspector" (paragraphs 8 and 11).

¶ 36 The assertion of an agency relationship is contained in several paragraphs repeated in each count of plaintiff's third amended complaint. The conclusory nature of plaintiff's assertions is best illustrated, however, by her count labeled fiduciary duty.

¶ 37 The second count of plaintiff's third amended complaint is labeled as a breach of fiduciary duty. A claim for breach of fiduciary duty is governed by the substantive laws of agency, contract, and equity. *Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 174, 906 N.E.2d 599, 613-14 (2009). Essentially, a fiduciary relationship derives from the dominance of one party over the other. *Benson v. Stafford*, 407 Ill. App. 3d 902, 913, 941 N.E.2d 386, 398 (2010). A fiduciary duty may exist as a matter of law from the type of relationship between the parties, such as an attorney-client relationship, or be found based on "special circumstances." *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1149, 832 N.E.2d 843, 854 (2005). "[A] fiduciary relationship is recognized to exist when a special confidence [is] reposed in one who, by reason of such confidence, must act in good faith and with due regard to the interests of the person reposing such confidence." (Internal

quotation marks omitted.) *Doe v. Brouillette*, 389 Ill. App. 3d 595, 613, 906 N.E.2d 105, 121-22 (2009). Regardless of the level of trust one party places in another, a fiduciary relationship requires a superior position and degree of dominance of one party over the other. *Crichton*, 358 Ill. App. 3d at 1149, 832 N.E.2d at 854.

¶ 38 Parties to a contract are rarely each other's fiduciaries. *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 164, 815 N.E.2d 911, 915 (2004). As a general rule, where parties capable of handling their own business affairs deal with each other at arm's length, and there is no indication that the alleged fiduciary agreed to exercise its judgment on behalf of the alleged servient party, no fiduciary relationship exists. *Benson*, 407 Ill. App. 3d at 913, 941 N.E.2d at 398. As *Crichton* explains:

"A fiduciary relationship might also arise as a result of the special circumstances of the parties' relationship, where one party places trust in another so that the latter gains superiority and influence over the former. [Citations.] The plaintiff concedes that his relationship with [defendant] did not give rise to a fiduciary duty as a matter of law.

The relevant factors to determine whether a fiduciary relationship existed based on 'special circumstances' include the degree of kinship between the parties, the disparity in age, health, mental condition, education, and business experience between the parties, and the extent to which the servient party entrusted his business affairs to the dominant party and placed trust and confidence in it. [Citations.]" *Crichton*, 358 Ill. App. 3d at 1149, 832 N.E.2d at 854.

¶ 39 As with the paragraphs on agency repeated in each count, the count for fiduciary duty fails to allege facts giving rise to such a relationship. In count II, plaintiff alleged that the defendants, "in their role as agent for [p]laintiff, became a fiduciary for the purpose of that transaction." The failure to allege facts supporting such a relationship is fatal to the count for fiduciary duty.

¶ 40

III.

¶ 41

INTENTIONAL MISREPRESENTATION

¶ 42 Count III of the third amended complaint is for intentional misrepresentation. The elements that must be alleged for intentional misrepresentation are: (1) that the defendant made a statement, (2) of a material nature, as opposed to an opinion, (3) that was untrue, (4) and known by the defendant to be untrue, (5) which was relied upon by the plaintiff to her own detriment, (6) made for the purpose of inducing reliance, and (7) such reliance led to the plaintiff's injury. *Richmond v. Blair*, 142 Ill. App. 3d 251, 255, 488 N.E.2d 563, 566 (1985). Intentional misrepresentation is a claim for fraud that, unlike negligent misrepresentation, does not rest on a duty owed by the defendant to the plaintiff. Negligent misrepresentation may be invoked when a defendant should have know of the falsity of a statement, but, as an action in negligence, the plaintiff must assert a duty deriving from the relationship between the plaintiff and defendant. *Lyons v. Christ Episcopal Church*, 71 Ill. App. 3d 257, 260, 389 N.E.2d 623, 625 (1979). In contrast, intentional misrepresentation requires the defendant to make a statement known to be untrue. *Richmond*, 142 Ill. App. 3d at 255, 488 N.E.2d at 566.

¶ 43 In count III of the third amended complaint, plaintiff alleged:

"18. That the [d]efendant Effingham State Bank by and through its agent Kimberly Taylor intentionally misrepresented to the [p]laintiff that the condition of the premises were as outlined in the report prepared by George Taylor.

19. That the purpose of this misrepresentation was to persuade the [p]laintiff to complete the transaction allowing the bank to earn its fees and interest.

20. That as a direct result of the intentional misrepresentation made by the [d]efendant Effingham State Bank by and through its agent Kimberly Taylor, the [p]laintiff was injured in that the inspection failed to disclose the following defects:"

¶ 44 The first question is whether plaintiff alleged the elements with enough specificity.

In particular, did plaintiff sufficiently allege: (1) that the statements were known to be false, (2) that the statements were made with the intent of inducing the plaintiff to act, and (3) that as a direct result plaintiff was induced to buy the defective property.

¶45 Underlying this, again, is the relationship between plaintiff and Effingham State Bank. The lack of specificity could be excused if an agency relationship could be imputed, but such a relationship was not sufficiently pled. On appeal, Effingham State Bank makes several assertions that might defeat the claim for intentional misrepresentation before a fact finder. In particular, Effingham State Bank asserts that plaintiff had already contracted to purchase the house by the time of the inspection such that plaintiff had no justifiable reliance on an inspection provided by its lender. Effingham State Bank, however, fails to explain how this is a legal bar and not a factual issue.

¶46 Intentional misrepresentation requires more than silence. *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1006, 618 N.E.2d 1013, 1018 (1993). At a minimum, intentional misrepresentation requires active concealment. From this, courts could assume that the focus on a claim of intentional misrepresentation is the intentionality of defendant's misrepresentation. And, allowing the count to stand would require this court to emphasize this intentionality.

¶47 The problem is that defendant's intention is only half the story. The justification of plaintiff's reliance is the other half. *Mitchell* sets the contours of this dilemma. *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1006, 618 N.E.2d 1013, 1018 (1993). *Mitchell* involved fraudulent concealment of defects in a house, and supports the proposition that defendant's intent is a critical question. *Mitchell* also explains that the home purchaser must be able to justify her reliance.

¶48 Put simply, a home purchaser may not subrogate her duty to inspect the premises. Liability will not be imposed where a purchaser was aware of defects or could have

discovered them through a diligent inspection. *Mitchell*, 248 Ill. App. 3d at 1005, 618 N.E.2d at 1017; *Fleisher v. Lettvin*, 199 Ill. App. 3d 504, 510, 557 N.E.2d 383, 387 (1990). A potential buyer may not turn her eyes from the obvious and later claim she was deceived. *Mitchell*, 248 Ill. App. 3d at 1007, 618 N.E.2d at 1019. Again, plaintiff's reliance could be justified if defendant had a heightened duty, such as from agency, but this is not sufficiently alleged.

¶ 49

IV.

¶ 50

CONSUMER FRAUD

¶ 51 Count IV of the third amended complaint is labeled consumer fraud and deceptive practices. Under the Consumer Fraud and Deceptive Business Practices Act (the Act) (815 ILCS 505/1 to 12 (West 2010)), a plaintiff must prove: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely upon the deception, (3) the deception must take place in the course of trade or commerce, (4) proximately caused by the deception, and (5) actual damage to the plaintiff. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 148, 776 N.E.2d 151, 160 (2002).

¶ 52 Ironically, in this count, plaintiff makes allegations she fails to assert elsewhere in her complaint. Plaintiff asserts that Effingham State Bank "intended that the [p]laintiff would rely upon the false and deceptive report in making her decision to close the transaction." In contrast to the rest of the complaint, in this count plaintiff also made specific factual allegations of actual reliance, proximate cause, and damages. Plaintiff alleged that Effingham State Bank "is in the business of acting as agents for home purchasers to conduct such tasks as ordering title, ordering home inspection reports, and otherwise performing the duties of the home buyer as agent for the home buyer and charge fees for said services and earns interest upon the mortgage that closes after having acted as agent for the home buyers."

¶ 53 We do not agree with the trial court's rationale for dismissing this count. The trial

court dismissed counts III, IV, and V on the grounds that plaintiff was already legally bound to close and never advised Effingham State Bank that closing was dependent on the condition of the property. Plaintiff asserts that a purchaser is not obligated to complete the purchase if substantial defects are found in an inspection. See *Mitchell*, 248 Ill. App. 3d at 1007, 618 N.E.2d at 1019. Furthermore, plaintiff pled here that Effingham State Bank "knew that the [p]laintiff would not have closed on the transaction had she known that the building was in a state of disrepair."

¶ 54 This does not mean that the count for consumer fraud was free from defect. Plaintiff labels the count as one for consumer fraud. As it is based in fraud, the Act requires specific allegations. And, despite being more specific in most of the allegations of this count than throughout the rest of her complaint, plaintiff rests her claim that the conduct was consumer fraud on the conclusory allegation that "the deception occurred within the ordinary course of trade and commerce undertaken by the [d]efendant."

¶ 55

V.

¶ 56

GEORGE TAYLOR

¶ 57 The counts against defendant Taylor are a clear contrast with the claims against Effingham State Bank and should stand. Count VI is against Taylor for negligent misrepresentation. Unlike the count for negligent misrepresentation against Effingham State Bank, plaintiff alleged that Taylor was in the business of providing information as guidance for homeowners. The circuit court dismissed the count on the basis that plaintiff failed to allege that Taylor had a duty to provide information that was accurate. This, however, ignores the fact that plaintiff couched the providing of information as a matter of ordinary care and described the misrepresentations in the home inspection report. The count against Taylor alleges that, "as a business which undertakes to provide information, the [d]efendant George Taylor had a duty to use ordinary care to perform the inspection and provide

information to the [p]laintiff concerning the condition of the premises." This placed the claim in line with similar inspections that involved negligent misrepresentations. See, e.g., *Perschall*, 137 Ill. App. 3d at 983, 484 N.E.2d at 1289 (termite inspector).

¶ 58 The two other counts against Taylor are susceptible to similar defects found in the claims against Effingham State Bank, but the relationship between plaintiff and Taylor is different. Instead, the court found that Taylor was hired by Effingham State Bank and that plaintiff failed to allege a reason for Taylor to induce action by plaintiff. Plaintiff again pled in generalities and failed to cite precedent for its appeal. Nonetheless, an argument could be made for allowing the count for intentional misrepresentation to stand. Plaintiff alleged that "the purpose of the misrepresentation was to persuade the [p]laintiff to complete the transaction and be paid a fee from the [p]laintiff to the [d]efendant George Taylor."

¶ 59 The final count, count VIII, was labeled "Deceptive Practice." Plaintiff alleges that "there was at all times relevant herein the statute known as the Illinois Consumer Fraud & Deceptive Practices Act." The plaintiff, however, neither cites to any statutory provision nor alleges how any provision is violated. One cannot say, however, upon examination of this count that no cause could be pled of a violation of a specific section of the Act. We determine, accordingly, that plaintiff is allowed to replead count VIII on remand.

¶ 60 **CONCLUSION**

¶ 61 Based on the above, we affirm the circuit court's dismissal of counts I, II, III, IV, and V. We reverse the circuit court's dismissal of counts VI, VII and VIII. As to count VIII, we direct the circuit court to allow plaintiff to replead; counts VI and VII are remanded for further proceedings.

¶ 62 Affirmed in part and reversed in part; cause remanded with directions.