2015 IL App (1st) 133246-U

Nos. 1-13-3246, 1-13-3313 and 1-13-3314
(Consolidated)

Filed December 23, 2015

FIFTH DIVISION

IN THE APPELLATE COURT

OF ILLINOIS

FIRST JUDICIAL DISTRICT

KARL MILLS and ADA MILLS, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, v. MAC PROPERTY MANAGEMENT, LLC, and CORNELL 55 LLC, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, Chancery Division
DONNA MILLER, on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. MAC PROPERTY MANAGEMENT, LLC, 5300-5305 S HYDE PARK LLC and 5120 S HYDE PARK LLC, Defendants-Appellees.	)	Nos. 10 M1 212441 11 CH 25239 (Consolidated) Honorable Kathleen Pantle, Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We dismiss the Miller appeal for lack of jurisdiction as two of Miller plaintiffs' claims are still pending in the trial court. We affirm the trial court's orders dismissing the Mills second amended complaint, denying leave to file a third amended complaint on Mills counts I, IV and V and denying leave to add additional defendants via the third amended complaint. We reverse the court's order denying leave to file a third amended complaint on Mills counts II and III.

¶ 2 At issue are two consolidated landlord-tenant class action suits filed by plaintiffs Karl and Ada Mills (the Mills action) and plaintiff Donna Miller (the Miller action) against MAC Property Management LLC (MAC) and other corporate defendants. Plaintiffs were tenants in buildings managed by MAC and owned by defendants Cornell 55 LLC, 5300-5305 S Hyde Park LLC and 5120 S Hyde Park LLC. Plaintiffs alleged, *inter alia*, violations of the Chicago Residential Landlord Tenant Ordinance (RLTO) (Chicago Municipal Code § 5–12–010 *et seq.*)) and breach of the implied warranty of habitability. The trial court dismissed the five Mills counts, granted leave to replead four of the counts but subsequently denied Mills plaintiffs leave to file a proposed third amended complaint. The court dismissed five Miller counts with prejudice, one Miller count without prejudice and left two Miller counts unresolved.

¶ 3 Both Mills plaintiffs and Miller plaintiffs appeal, filing three appeals which we have consolidated. Mills plaintiffs argue the court erred in dismissing their counts I (failure to provide a summary of the RLTO), II (failure to maintain the property as required by the RLTO) and III (breach of the implied warranty of habitability). They also argue the court erred in denying them leave to replead counts II and III. Miller plaintiffs argue the court

erred in dismissing their action *sua sponte* and then challenge the dismissal of their counts II through V (claims based on the "move-in" fee they were charged).

¶ 4 We dismiss the Miller appeal for lack of jurisdiction. We affirm the trial court's orders dismissing the Mills second amended complaint, denying leave to file a third amended complaint on Mills counts I, IV and V and denying leave to add additional defendants via the third amended complaint. We reverse the court's order denying leave to file a third amended complaint on Mills counts II and III.

¶ 5 BACKGROUND

¶ 6 I. The Mills Action

¶ 7 Karl Mills and his mother, Ada, leased an apartment at 1613 East 55th Street in Chicago. They moved in on December 1, 2010, and vacated the apartment in September 2011. MAC managed the apartment building for owner Cornell 55 LLC. On December 20, 2010, Mills filed a *pro se* complaint against MAC in the municipal division of the circuit court of Cook County seeking compensation for "last month['s] rent and pain and suffering." He alleged that the apartment had no heat for 14 days, his mother was "freezing," heat was included in his lease and he had reported the lack of heat to the City of Chicago.

¶ 8 Mills then filed an amended complaint against MAC "on behalf of himself and all others similarly situated," stating claims for violations of the RLTO, breach of the implied warranty of habitability and breach of contract. He also filed a motion for class certification. On Mills' motion, the court transferred the case to the chancery division.

¶ 9 MAC filed a motion to dismiss the amended complaint. Mills then filed a second amended complaint, adding Ada as a plaintiff and Cornell 55 LLC as a defendant.

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Plaintiffs asserted the following five claims:

Count I - violation of RLTO section 5-12-070 for failing to provide a copy of the RLTO summary with the lease agreement,

Count II - violation of RLTO section 5-12-070 for failing to maintain the property and correct "a number of latent, hazardous, defective, unsafe, unsanitary, and uninhabitable conditions, including but not limited to inadequate heat,

Count III - breach of the implied warranty of habitability in every residential lease agreement for failing to correct the "defective, unsafe, unsanitary, and uninhabitable conditions" of the property, "including but not limited to inadequate heat,"

Count IV - breach of the lease agreement for failing to provide heat, and

Count V - "illegal lease provisions/unjust enrichment" such as requiring payment of a "move-in" fee.

Mills defendants filed a combined motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2012)).

¶ 10 II. The Miller Action

¶ 11 Miller leased an apartment at 5300 South Hyde Park Boulevard in Chicago from November 2009 to April 2011. She then leased an apartment at 5120 South Hyde Park Boulevard in Chicago from May 2011 to May 2012. MAC managed both apartment buildings for owners 5300-5305 S Hyde Park LLC and 5120 S Hyde Park LLC. In July 2011, Miller filed a class action suit in the chancery division against MAC, 5300-5305 S

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Hyde Park LLC and 5120 S Hyde Park LLC "on behalf of herself and all others similarly situated." She asserted claims for violations of the RLTO, breach of contract, breach of fiduciary duty, unjust enrichment and breach of the implied warranty of habitability.

¶ 12 Miller then filed the amended class action complaint at issue here, asserting the following eight claims:

> Count I - violation of RLTO section 5-12-070 for failing to provide a copy of the RLTO summary with the lease agreement,
>
> Counts II, III, IV, V and VI - violation of the RLTO and federal regulations, breach of the lease agreement, breach of fiduciary duty and unjust enrichment for collecting a security deposit in the guise of a "move-in fee," failing to return the fee upon termination of the lease and failing to pay interest on the fee,
>
> Count VII - violation of RLTO section 5-12-070 for failing to maintain the property and correct "unsanitary, unsafe and uninhabitable conditions," specifically mouse and cockroach infestations, leaking ceiling, low water pressure, inoperable elevators and unusable plumbing, and
>
> Count VIII - breach of the implied warranty of habitability for failing to correct the above conditions.

Miller defendants moved to dismiss under sections 2-615 and 2-619 of the Code.

¶ 13 III. Trial Court Proceedings

¶ 14 In November 2011, by agreed order, the trial court consolidated the Mills and Miller cases. On June 4, 2012, it entered two orders, granting Mills defendants' motion to dismiss in full and Miller defendants' motion to dismiss in part.

¶ 15 In the Mills case, the court dismissed Mills count I (failure to provide RLTO

summary) with prejudice, finding Mills defendants had complied with the RLTO requirement that a summary of the RLTO be provided with every lease. It struck Mills counts II through V, finding the allegations in the complaint were insufficient to support causes of action for failure to maintain (count II), breach of the implied warranty of habitability (count III), breach of contract (count IV) and "illegal lease provisions/unjust enrichment" (count V). The court granted Mills plaintiffs 28 days to replead the four stricken counts.

¶ 16 In the Miller case, the court dismissed Miller counts II through V regarding the "move-in fee" with prejudice but allowed Miller counts I, VI, VII and VIII to stand. Miller defendants filed a motion to clarify the court's rulings on counts I and VI as the court had dismissed similar counts in the Mills action. The court granted the motion on August 16, 2012, and, to maintain consistency with its rulings in the Mills case, dismissed Miller count I (failure to provide RLTO summary) with prejudice and Miller count VI (unjust enrichment/restitution) without prejudice.

¶ 17 In July 2012, Mills plaintiffs filed a motion to reconsider the dismissal of its claims. The court denied the motion on November 1, 2012. Mills plaintiffs then moved in July 2013 for leave to file a third amended class action complaint. The court denied the motion with prejudice on October 4, 2013, finding the proposed complaint did not cure any defects in the previous pleadings and was not an attempt to remedy the defects in the prior complaint but rather was an attempt to obscure the facts. The court also found the allegations in the proposed complaint were insufficient to pierce the corporate veil in order to add four additional defendants. It further held that the motion was not timely despite plaintiffs claim that the seven-month delay in filing the motion was due to Karl's

battle with cancer and the death of his son. The court held: "This is a final Order disposing of all litigation in this matter."

¶ 18 IV. Notices of Appeal

¶ 19 The Mills and Miller plaintiffs filed three notices of appeal. They filed their first appeal jointly, appeal No. 1-13-3246. In this appeal, they challenge:

(1) the June 4, 2012, order dismissing counts II through V of the Miller first amended class action complaint,

(2) the June 4, 2012, order dismissing count I and striking counts II through V of the Mills second amended complaint and

(3) the October 4, 2013, order denying the Mills plaintiffs leave to file a third amended complaint and, to quote the wording in the notice of appeal, "disposing of all litigation in both matters."

Miller plaintiffs then filed appeal No. 1-13-3313, raising the same challenges as in paragraphs (1) and (3) of the joint appeal. The Mills plaintiffs filed appeal No. 1-13-3314, raising the same challenges as in paragraphs (2) and (3) of the joint appeal. We consolidated the three appeals on March 7, 2014.

¶ 20 ANALYSIS

¶ 21 I. Jurisdiction

¶ 22 As a preliminary matter, we lack jurisdiction to consider plaintiffs' arguments regarding the trial court's orders in the Miller case. Plaintiffs argue that the trial court erred in dismissing the Miller case *sua sponte* and then challenge the court's findings on assorted Miller claims. However, the court did not dismiss the Miller case and, on this record, Miller counts VII and VIII are still pending in the trial court. As discussed fully

below, we therefore have no jurisdiction to consider the appeals from the court's orders in the Miller action.

¶ 23 Plaintiffs assert that, in the last sentence of the October 4, 2013, order denying the Mills' plaintiff's leave to file a third amended complaint, the court dismissed the Miller case. The sentence reads: "This is a final order disposing of all litigation in this matter." Plaintiffs argue that, as the Mills and Miller cases were consolidated and the court had captioned the order with both case names, this language operated to dismiss not only the Mills case but the Miller case as well.

¶ 24 The combined caption on the October 4, 2013, order notwithstanding, our review of the 14-page decision establishes that the court dismissed only the Mills case. It opened its decision with the phrase "This matter coming on to be heard on Plaintiffs Karl and Ada Mills' Motion for Leave to File a Third Amended Complaint" and addressed the order solely its denial of that motion. The Miller plaintiffs were not party to the motion. The court's order did not address any matter related to the Miller case and Miller counts VII and VIII had not previously been dismissed. Accordingly, taking the sentence "This is a final order disposing of all litigation in this matter" in context, it was a final dismissal of only the Mills case, not of the Miller case.

¶ 25 The trial court did not specifically dismiss the Miller case in its October 4, 2013, order. The clerk of the circuit court, however, entered the order into the electronic docket as a dismissal of Miller counts VII and VIII, the two remaining Miller claims. Defendants concede that this was a clerical error as these two counts are unresolved. The clerk is directed to correct the entry.

¶ 26 Our jurisdiction is limited to reviewing appeals from final judgments, subject to

statutory or supreme court rule exceptions. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). A judgment is final for appeal purposes if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof such that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *In re Marriage of Gutman*, 232 Ill. 2d 145, 151 (2008); *Verdung*, 126 Ill. 2d at 553. The court's October 4, 2013, "final order disposing of all litigation in this matter" disposed of the Mills case in its entirety and was, therefore, final as to the Mills case. *Gutman*, 232 Ill. 2d at 151. However, the Mills and Miller cases were consolidated and two of the Miller claims remain pending. Therefore, the court's order disposing of the Mills case did not dispose of all the claims raised in the consolidated actions. Nor did the order contain an Illinois Supreme Court Rule 304(a) finding.[1] "Absent a Rule 304(a) finding, a final order disposing of fewer than all of the claims is not an appealable order and does not become appealable until all of the claims have been resolved." *Gutman*, 232 Ill. 2d at 151.

¶ 27 Rule 304(a) language is not required, however, "[w]here a consolidation concerns several actions involving an inquiry into the same event in its general aspects and is limited to a joint trial, with separate docket entries, verdicts and judgments." *Nationwide Mutual Insurance Co.*, 285 Ill. App. 3d at 532. In such a consolidated case, an order dismissing one of the actions is deemed final and immediately appealable as

[1] Illinois Supreme Court Rule 304(a) provides that “[i]f multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal.” Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010). A claim is " 'any right, liability or matter raised in an action.' " *Marsh v. Evangelical Covenant Church of Hinsdale,* 138 Ill. 2d 458, 465 (1990)).

to that action without Rule 304(a) language. *Id*. In contrast, where several actions do merge into one action, thereby losing their identity, they are disposed of as one suit and Rule 304(a) language is required before we have jurisdiction to consider an appeal of dismissal of less than all counts. *Id*.

¶ 28 Plaintiffs do not challenge defendants' assertion that the consolidation here is of the first type, *i.e.*, done only for convenience and economy. The record bears out this characterization as the Mills and Miller cases retained their separate complaints and original docket numbers after the consolidation, the Miller defendants and the Mills defendants filed separate motions to dismiss and the court entered separate orders deciding those motions to dismiss. The consolidation did not merge the Mills and Miller actions into a single suit, change the rights of the parties or make the parties to one suit parties in the other suit. Since the Mills and Miller actions retained their distinct identities, the October 4, 2013, final judgment dismissing the Mills case was appealable without a Rule 304(a) finding, notwithstanding the fact that two of the claims in the consolidated but distinct Miller case remained pending. *Nationwide Mutual Insurance Co. v. Filos*, 285 Ill. App. 3d 528, 532 (1996). We have jurisdiction to consider plaintiff's arguments regarding the Mills case.[2] *Id*.

¶ 29 We do not have jurisdiction to consider plaintiffs' arguments regarding the court's orders in the Miller case. First, Miller counts VII and VIII remain unresolved and are,

[2] The notices of appeal from the trial court's orders in the Mills case were timely filed 11 days (appeal No. 1-13-3246) and 14 days (appeal No. 1-13-3314) after entry of the October 4, 2013, "final order disposing of all litigation" in the matter. IL S.Ct. R. 303 (eff. May 30, 2008) (notice of appeal must be filed within 30 days after entry of a final judgment or, if applicable, an order disposing of the last post-trial motion pending in a case).

therefore, not final and appealable. *Gutman*, 232 Ill. 2d at 151. Second, although the court did dismiss Miller counts I through VI, counts VII and VIII are still pending and the court did not make an express written finding that there is no just reason for delaying enforcement or appeal of its dismissal of the other Miller counts. Therefore, even if the court's orders on counts I through VI were final, those orders are not appealable as they disposed of fewer than all of the Miller claims and the court made no Rule 304(a) finding. *Id*. at 156. We have no jurisdiction to consider plaintiffs' arguments regarding the court's orders in the Miller case. *Id.*

¶ 30 The parties request remand of counts VII and VIII to the trial court. However, as we have no jurisdiction to consider plaintiffs' arguments regarding the Miller case, dismissal of their appeals from the orders entered in that case is the appropriate remedy. *Gutman*, 232 Ill. 2d at 156. To that end, we dismiss for lack of jurisdiction:

(1) Miller plaintiffs' appeal No. 1-13-3313,

(2) paragraph 1 of joint appeal No. 1-13-3246 and

(3) paragraph 3 of joint appeal No. 1-13-3246 to the extent that it relates to the alleged dismissal of the Miller case.

The clerk of the circuit court is directed to correct its entry of the October 4, 2013, order to reflect that Miller counts VII and VIII were not dismissed and remain pending.

¶ 31 II. The Mills Action

¶ 32 Mills plaintiffs raise three arguments regarding the trial court's orders on their second amended complaint. They assert the court erred in: (1) dismissing count I (failure to provide a summary of the RLTO) as there is no *de minimus* or materiality requirement in the RLTO, (2) dismissing counts II (failure to maintain) and III (breach of

the implied warranty of habitability) as the complaint pled facts sufficient to support the claims and (3) denying them leave to replead counts II and III.

¶ 33 Plaintiffs have not argued for reversal of the trial court's orders striking counts IV and V of their second amended complaint and denying their motion for leave to file a third amended complaint as to those counts. Nor do they challenge the court's order denying them leave to add additional defendants in the proposed third amended complaint. Any issues as to these orders are, therefore, forfeited. Ill. S.Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Steenes v. MAC Property Management, LLC*, 2014 IL App (1st) 120719, ¶ 14.

¶ 34 The trial court dismissed counts I through III of plaintiffs' second amended complaint on defendants' section 2-619.1 motion to dismiss. Pursuant to section 2-619.1 of the Code, a party may file a combined motion to dismiss under both sections 2-615 (735 ILCS 5/2-615 (West 2010)) and 2-619 (735 ILCS 5/2-619 (West 2010)). *Faison v. RTFX, Inc.,* 2014 IL App (1st) 121893, ¶ 26. While a section 2-615 motion to dismiss challenges the legal sufficiency of the nonmovant's pleadings, a section 2-619 motion to dismiss admits the legal sufficiency of the nonmovant's pleadings but asserts certain defects or defenses. *Id*. Under both section 2-615 and section 2-619, our standard of review is *de novo. Id.* Under this standard, we review the judgment of the trial court, not its reasoning, and may affirm on any ground in the record, no matter whether the court relied on that ground or whether its reasoning was correct. *Id*.

¶ 35 1. Dismissal of Mills Count I

¶ 36 Plaintiffs first challenge the trial court's dismissal of count I of the Mills second amended complaint pursuant to section 2-619 of the Code. In count I, plaintiffs had

argued that defendants violated section 5-12-170 of the RLTO (Chicago Municipal Code § 5-12-170 (amended Nov. 17, 2010)) by failing to provide them with a copy of the 2010 RLTO summary. Plaintiffs asserted that, although a summary of the RLTO was integrated into the lease, that summary was the 2000 version of the summary and that they should have received a copy of the 2010 summary. They also claimed that the summary should have been attached to the lease rather than integrated into it. Defendants moved to dismiss, arguing they had complied with the ordinance as they had included an RLTO summary in the lease and section 5-12-170 did not require attachment of the most recent summary. The trial court agreed and dismissed count I with prejudice, finding there were few differences between the summary received by plaintiffs and the 2010 summary, any differences were immaterial and defendants had complied with the ordinance by providing a summary with the lease.

¶ 37 On appeal, plaintiffs argue that the trial court erred in dismissing count I because there is no *de minimus* requirement in the RLTO and the court should not have departed from the clear and unambiguous language of section 5-12-170, which they claim requires that the specific summary prepared by the commissioner, *i.e.*, the latest summary, must be attached to the lease.

¶ 38 In a section 2-619 motion to dismiss, the movant admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Faison,* 2014 IL App (1st) 121893, ¶ 28. In deciding a section 2-619 motion, we view the pleadings and supporting documentary evidence in the light most favorable to the nonmoving party and review the decision of the trial court *de novo*. *Id.* ¶¶ 26, 28

¶ 39 The issue at bar is whether section 5-12-170 requires that a tenant be provided

with the most current version of the RLTO summary. The interpretation of municipal ordinances presents a question of law that we review *de novo*. *Id*. ¶ 29. We interpret municipal ordinances using the general rules of statutory interpretation. *Id*.

> " 'The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. [Citation.] The best indicator of the legislature's intent is the language in the statute, which must be accorded its plain and ordinary meaning. [Citation.] Where the language in the statute is clear and unambiguous, this court will apply the statute as written without resort to extrinsic aids of statutory construction. [Citation.]' " Id. (quoting *Landis v. Marc Realty, L.L.C*., 235 Ill. 2d 1, 6-7 (2009)).

A statute must be viewed as a whole. *Id*. ¶ 30. We interpret words and phrases in light of other relevant provisions of the statute, not in isolation. *Id*. ¶ 30. Only where a statute is ambiguous, where it is susceptible to more than one reasonable interpretation, may we resort to extrinsic aids of statutory construction. *Id*.

¶ 40 Section 5-12-170 provides as follows:

> "The commissioner of the department of housing and economic development shall prepare a summary of this chapter, describing the respective rights, obligations and remedies of landlords and tenants hereunder, and shall make such summary available for public inspection and copying. The commissioner shall also, after the city comptroller has announced the rate of interest on security deposits on the first business day of the year, prepare a separate summary describing the respective rights, obligations and remedies of landlords and tenants with respect to security deposits, including the new interest

> rate as well as the rate for each of the prior two years. The commissioner shall also distribute the new rate of security deposit interest, as well as the rate for each of the prior two years, through public service announcements to all radio and television outlets broadcasting in the city. *A copy of such summary shall be attached to each written rental agreement when any such agreement is initially offered to any tenant or prospective tenant by or on behalf of a landlord and whether such agreement is for a new rental or a renewal thereof.* Where there is an oral agreement, the landlord shall give to the tenant a copy of the summary.
>
> The summary shall include the following language:
>
> 'The porch or deck of this building should be designed for a live load of up to 100 pounds, per square foot and is safe only for its intended use. Protect your safety. Do not overload the porch or deck. If you have questions about porch or deck safety, call the City of Chicago non-emergency number, 3-1-1.' "[3] (Emphasis added.) Chicago Municipal Code § 5-12-170 (amended Nov. 17, 2010).

If a landlord acts in violation of section 5-12-170, the tenant may terminate the rental agreement by written notice. *Id*. A tenant in a civil legal action against his landlord is entitled to recover $100.00 in damages if the violation is proven. *Id*.

¶ 41 Plaintiffs argue that the ordinance clearly requires that the latest summary prepared by the commissioner must be attached to a lease, not just any copy, and that defendants did not comply with this requirement.

¶ 42 Looking to the plain language of section 5-12-170, the ordinance requires that a

[3] The current version of the ordinance requires that "[t]he commissioner of planning and development" prepare the summaries. Chicago Municipal Code § 5-12-170 (amended Nov. 26, 2013).

landlord must attach two separate summaries to a lease. One is a general summary of the RLTO (RLTO summary). The other is "a separate summary" describing landlord and tenant rights, responsibilities and remedies regarding security deposits and the interest paid thereon (security deposit summary).

¶ 43 Section 5-12-170 requires that the security deposit summary be updated yearly to reflect the new interest rate set by the city comptroller for that year as well as the interest rate for the prior two years. Necessarily, since the security deposit summary is to be updated yearly, a landlord must provide a tenant with the most recent security deposit summary. To read the ordinance otherwise would render the legislature's requirement that this summary be updated yearly superfluous. We "must not read a statute so as to render any part inoperative, superfluous, or insignificant." *People v. Ellis*, 199 Ill. 2d 28, 39 (2002).

¶ 44 Defendants complied with section 5-12-170 by providing Karl and Ada with a copy of the then-current security deposit summary for 2010. They in fact provided them with two copies of the security deposit summary, one as an attachment to the lease and the other incorporated into the "Chicago's Residential Landlord and Tenant Ordinance Summary" integrated into the lease. Accordingly, this requirement of section 5-12-170 has been satisfied.

¶ 45 Defendants also complied with the requirement that tenants be provided with a copy of the RLTO summary. Unlike the security deposit summary, the RLTO summary need not be updated yearly. Section 5-12-170 does not require the commissioner to update the RLTO summary yearly and, in fact, does not require that the RLTO summary be updated at all. By its plain language, all section 5-12-170 requires regarding the

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RLTO summary is that the commissioner prepare an RLTO summary, which he did, and that landlords provide tenants with a copy of the summary with each lease, which defendants did here by integrating the RLTO summary into the Mills November 2010 lease. It appears that the commissioner periodically updates the RLTO summary, presumably when changes to the RLTO occur which he deems necessary to include in the RLTO summary, but section 5-12-170 does not specifically require these updates. Since section 5-12-170 does not require that the RLTO summary be updated, we cannot read into the ordinance a requirement that a landlord must provide a tenant with a copy of the most recent update.

¶ 46 Plaintiffs argue that the purpose of section 5-12-170 is to inform tenants of their rights under the RLTO and, if some tenants receive a current summary while others receive an obsolete summary, this purpose will not be consistently accomplished, resulting in uneven application of the RLTO between tenants. The RLTO summary is nothing more than a three-page summation of the entire RLTO ordinance, designed as a preliminary source of information for tenants. It informs tenants of their rights under the RLTO in brief and specifically includes the admonition "IMPORTANT: IF YOU SEEK TO EXERCISE RIGHTS UNDER THE ORDINANCE, OBTAIN A COPY OF THE ENTIRE ORDINANCE TO DETERMINE APPROPRIATE REMEDIES AND PROCEDURES." It then directs tenants to where a copy of the RLTO can be obtained. It is up to a tenant to obtain an copy of the ordinance to determine what his or her rights actually are under the RLTO. Accordingly, any differences between summaries provided to tenants do not result in an uneven application of the RLTO.

¶ 47 We note that the RLTO summary defendants integrated into the lease under the

heading "Chicago's Residential Landlord and Tenant Ordinance Summary" is not purely a copy of the 2000 RLTO summary as plaintiffs claim. Rather, it is a hybrid of the 2000 and 2010 RLTO summaries. The summary indicates that it was approved by the Chicago city council in January 2000 and it is, for the most part, the 2000 summary. However, it also includes the required section 5-12-170 quote regarding porch safety, which was added to the RLTO in 2004 and included in the 2010 RLTO summary. Thus defendants complied with section 5-12-170 in this regard.

¶ 48 The RLTO summary in the lease also incorporates the then-current 2010 security deposit summary, which is not part of the 2010 RLTO summary as it is generally an entirely separate summary. Defendants complied with section 5-12-170 by providing this summary.

¶ 49 Two other main differences exist between the 2000 RLTO summary in the lease and the 2010 RLTO summary. First, the 2010 summary lists several new responsibilities of landlords regarding security deposits and prepaid rent that are not in the 2000 summary in the lease. As the trial court found, these differences were immaterial as plaintiffs had not paid a security deposit. Thus the information regarding security deposits was irrelevant to plaintiffs' tenancy. Second, the 2010 summary contains a provision, added to section 5-12-170 in 2008, requiring a landlord or owner to disclose to a tenant that a foreclosure action has been filed against the landlord/owner. This information also appears irrelevant to the tenancy at issue here. Moreover, as discussed above, the RLTO summary is for general information purposes only. It was for plaintiffs to investigate their rights and remedies by obtaining a copy of the RLTO. They could not rely on the RLTO summary to assert their rights under the RLTO.

¶ 50 Section 5-12-170 does not require proof that a landlord's failure to provide a copy of the RLTO summaries was knowing or willful. A landlord's duty to comply with section 5-12-170 is, therefore, absolute. *Lawrence v. Regent Realty Group Inc.*, 197 Ill. 2d 1, 9 (2001). Defendants met their duty to comply with section 5-12-170 here by providing the 2010 version of the security deposit summary and a copy of an RLTO summary prepared by the commissioner which included the required quote regarding porch safety. The trial court did not err in dismissing count I of the Mills second amended complaint with prejudice.

¶ 51 2. Dismissal of Mills Counts II and III

¶ 52 Plaintiffs next challenge the trial court's dismissal of counts II and III of the Mills second amended complaint pursuant to section 2-615 of the Code. In count II, Mills plaintiffs alleged that Mills defendants' failure to maintain the property and correct property defects violated section 5-12-070 of the RLTO. In count III, they alleged that Mills defendants' failure to correct these conditions breached the warranty of habitability implied in all residential rental leases. In both counts, they claimed they and like class members suffered damages by paying more in rent than the apartments were worth. The trial court struck both counts, finding plaintiffs failed to plead sufficient facts to support their claims. Plaintiffs argue that they sufficiently alleged that there was no heat in their apartment during their tenancy or, alternatively, that the heat was below that required to be maintained by the Chicago Municipal Code.

¶ 53 On a section 2-615 motion to dismiss, the court examines whether the allegations of the complaint, construed in the light most favorable to the plaintiff and taking all well-pleaded facts and reasonable inferences therefrom as true, are sufficient

to establish a cause of action upon which relief may be granted. *Faison*, 2014 IL App (1st) 121893, ¶ 27. " 'Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2–615 motion to dismiss.' " *Id*. (quoting *Ranjha v. BJBP Properties, Inc.,* 2013 IL App (1st) 122155, ¶ 9). Illinois is a fact-pleading jurisdiction. *Id*. ¶ 87. Therefore, although a plaintiff need not set forth evidence in the complaint, he must allege facts sufficient to bring a claim within a legally recognized cause of action, not merely conclusions. *Id.*

¶ 54 In the absence of ultimate facts supporting a cause of action, the general factual allegations in a complaint are mere conclusions and are insufficient to state a cause of action. *Id*. ¶ 87-88. " 'Conclusory allegations of fact or law are not admitted in a section 2-615 motion. [Citation.] If, after deleting such, there are not sufficient facts alleged to support a claim, the pleading is properly stricken.' " *Id.* (quoting *Shaker & Associates, Inc. v. Medical Technologies Group, Ltd.,* 315 Ill. App. 3d 126, 133-34 (2000)). We review the trial court's decision on a section 2-615 motion to dismiss *de novo*. *Id*. ¶ 26. The court did not err in dismissing counts II and III.

¶ 55 (a) Count II - Failure to Maintain

¶ 56 In count II, plaintiffs claimed defendants violated sections 5-12-070 and 5-12-110 of the RLTO by failing to maintain the property and correct property defects. Section 5-12-070 requires a landlord to "maintain the premises in compliance with all applicable provisions of the municipal code and *** promptly make any and all repairs necessary to fulfill this obligation." Chicago Municipal Code § 5-12-070 (amended Nov. 6, 1991). Section 5-12-110 provides that "material noncompliance" with section 5-12-070 includes "[f]ailure to provide heat or hot water in such amounts and at such levels and times as

required by the municipal code" and "[f]ailure to maintain the dwelling unit and common areas in a fit and habitable condition." Chicago Municipal Code § 5-12-110 (amended Nov. 6, 1991).

¶ 57 Plaintiffs made the following allegations. The lease required the landlord to provide heat at no additional cost to the tenants. "[T]hroughout" plaintiffs' tenancy, the property "contained a number of latent, hazardous, defective, unsafe, unsanitary, and uninhabitable conditions, including but not limited to inadequate heat." They made "numerous" complaints to MAC and three complaints to City of Chicago regarding the inadequate heat. Defendants failed to "completely properly ameliorate any of the unsafe, unsanitary, and uninhabitable conditions." "As a result of Defendants' failure to correct the defective, unsafe, unsanitary, and uninhabitable conditions of the subject matter property, Plaintiff has suffered damages, including but not limited to being forced to purchase a space heater in an attempt to keep warm." Plaintiffs attached a copy of a letter Karl sent to MAC on December 9, 2010, informing MAC that he was terminating his lease as the apartment was unlivable as, in violation of the lease agreement, there had been no heat for three days. Karl also reported that he had notified the City on December 6, 7 and 8, 2010, regarding the lack of heat and listed the three complaint reference numbers.

¶ 58 Plaintiffs did not set forth any facts supporting their allegations regarding the "unsafe, unsanitary, and uninhabitable conditions." They did not specify where or when the "unsafe, unsanitary, and uninhabitable conditions" existed, let alone what those conditions actually were besides the unspecified "inadequate heat." Plaintiffs' allegations are general and conclusory. They are insufficient to support plaintiffs' claim

that defendants failed to maintain the property and make the necessary repairs as required by RLTO section 5-12-070. Accordingly, as the allegations were insufficient to state a cause of action for violation of section 5-12-070, the trial court properly dismissed count II of the second amended complaint.

¶ 59 (b) Count III - Breach of the Implied Warranty of Habitability

¶ 60 The court also properly dismissed count III of the second amended complaint. In count III, plaintiffs claimed defendants breached the implied warranty of habitability in their lease. The implied warranty of habitability applies to all leases of residential real estate. *Glasoe v. Trinkle*, 107 Ill. 2d 1, 10 (1985). It requires that a dwelling be fit for its intended use, *i.e.*, "it should be habitable and fit for living," and that it "will remain habitable throughout the term of the lease." *Id.* at 13. To constitute a breach of the implied warranty of habitability, a defect "must be of such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy." *Id*.

¶ 61 "In determining whether there has been breach of the implied warranty, the courts have considered various factors, including the nature of the deficiency, its effect on habitability the length of time for which it persisted, the age of the structure, the amount of the rent, the area in which the premises are located, whether the tenant waived the defects, and whether the defects resulted from abnormal or unusual use by the tenant." *Id*. at 14. "In addition to the guidelines stated, there, of course, must be notice of the alleged defects given by the tenant to the landlord and the landlord must have had a reasonable time within which to correct the alleged deficiencies." *Id*.

¶ 62 Count III incorporated and restated the same factual allegations made in count II. As in count II, plaintiffs failed to provide factual support for their allegations that the

property "contained a number of latent, hazardous, defective, unsafe, unsanitary, and uninhabitable conditions, including but not limited to inadequate heat" and that defendants failed to correct the "defective, unsafe, unsanitary, and uninhabitable conditions." They failed to set forth facts demonstrating what the alleged uninhabitable conditions were, how long those conditions lasted or that the conditions were of such a substantial nature as to render the premises unsafe or unsanitary and thus unfit for occupancy. Plaintiffs' allegations were general and conclusory and insufficient to state a cause of action for breach of the implied warranty of habitability. Accordingly, the trial court did not err in dismissing count III of the second amended complaint.

¶ 63 3. Denial of Leave to Replead Mills Counts II and III

¶ 64 Mills plaintiffs lastly argue that the trial court erred in denying their motion for leave to file a third amended complaint as to counts II and III of the third amended complaint.

¶ 65 Leave to amend is generally freely granted, as we construe a complaint liberally and dismiss only when it appears that the plaintiff cannot recover under any set of facts. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 74 (2010). However, a plaintiff does not have an absolute and unlimited right to amend a complaint. *Hayes Mechanical, Inc. v. First Industries, L.P.*, 351 Ill. App. 3d 1, 6 (2004). The decision to deny leave to amend rests in the sound discretion of the circuit court and we will not reverse such a decision absent an abuse of that discretion. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 74 (2010); *Hayes Mechanical, Inc., L.P.*, 351 Ill. App. 3d at 6.

¶ 66 In determining whether the trial court abused its discretion in denying plaintiffs

leave to amend their complaint, we must consider the following four *Loyola Academy* factors: " '(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.' " *Hayes Mechanical, Inc., L.P.*, 351 Ill. App. 3d at 7 (quoting *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)). A proposed amendment must meet all four factors. *Sheffler*, 399 Ill. App. 3d at 74. Where a proposed amendment does not state a cognizable claim, *i.e.*, it fails to satisfy the first factor, we need not consider the other factors. *Hayes Mechanical, Inc., L.P.*, 351 Ill. App. 3d at 7.

¶ 67 Plaintiffs first argue that, in denying their motion for leave to file the proposed third amended complaint, the court improperly "withdr[ew] leave already given" in the June 4, 2012, order. The court did not "withdraw" leave to amend the complaint. In the June 4, 2012, order, the court had dismissed counts II through V without prejudice and granted plaintiffs 28 days in which to replead the counts. It had not guaranteed that it would allow the proposed amendments to be filed. Plaintiffs had no absolute and unlimited right to amend their complaint. *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 6. Unless their proposed amendments met the four factors of the *Loyola Academy* test, the court would not allow the amended complaint to be filed.

¶ 68 Plaintiffs next argue that, in denying them leave to file the proposed third amended complaint, the court improperly relied on facts stated in an affidavit attached to Mills defendants' motion to dismiss the first amended complaint. In its order denying plaintiffs' motion for leave to file their third amended complaint, the court had referenced

the affidavit of Donna Chorney, which defendants had attached to and relied on in their motion to dismiss the first amended complaint.

¶ 69 In her affidavit, Chorney, MAC's regional property manager, stated that Mills made his first service request regarding lack of heat on December 8, 2010, but that Mills "refused to allow anyone access to his unit in order to address the problem." Mills next delivered a note to MAC's office on December 9, 2010, informing MAC that he wanted to vacate his unit because of heat problems. Chorney stated that MAC advised Mills that he could vacate without penalty but Mills never vacated the unit, continued paying rent and, as of June 23, 2011, still resided in the building. When Mills made another service request regarding the heat on December 14, 2010, and informed MAC that he had purchased a space heater, Chorney authorized a credit to his account for the cost of the heater. Mills complained of the heat again on December 21, 2010, but refused to allow anyone into his unit to investigate or correct the problem. Chorney stated that Mills threatened that, if someone entered the unit, "he will shoot them in the head." MAC filed a police report as a result of the threat. Later the same day, Mills called back and reported the heat was working. Mills made his last service request regarding the heat on January 15, 2011.[4]

¶ 70 Plaintiffs argue that the court should not have relied on Chorney's affidavit as the

[4] In a second affidavit attached to defendants' motion to dismiss the first amended complaint, Larry Sirridge, the MAC maintenance director, stated Mills had made four service requests and Sirridge's employees had responded to the requests. On December 8, 2010, his employees found the radiators to be "all hot." On December 14, 2010, Mills refused access to his apartment but Sirridge's staff checked the apartment building's boiler and found it "was working fine." On January 15, 2011, Sirridge's employee bled the radiators in Mill's apartment and "after that the radiators were working fine." Service logs attached to the affidavit supported Sirridge's statements.

first amended complaint to which the affidavit was directed had been superceded by the second amended complaint and proposed third amended complaint. They also argue that, if the affidavit was to be considered, Ada's affidavit and Karl's sworn statements regarding the lack of heat and defendants' failure to repair the heat raised questions of fact that could not be decided on a section 2-615 motion to dismiss.

¶ 71 Contrary to plaintiffs' characterization, the court did not rely on the facts in Chorney's affidavit as true. In its order denying plaintiffs leave to file a third amended complaint, the court cited to the affidavit and defendants' motion to dismiss the first amended complaint to illustrate that plaintiffs were being disingenuous in their third amended complaint.

¶ 72 Mills had attached to his first amended complaint a copy of the December 9, 2010, note from Mills to MAC notifying it that he intended to vacate the apartment if the heat was not fixed. He had also attached a handwritten log listing the morning, afternoon and evening temperatures in the Mills' apartment for 29 days in December 2010. The temperatures listed for December 1 through 13 ranged from 52 degrees to 62 degrees and, next to these temperatures, Mills had written "NO HEAT." The December 14 through 19 notations listed no temperatures and, instead, stated "fix heat" next to the December 14 notation and "heat" next to the December 15 through 19 notations. Mills had written "no heat" next to the temperatures listed for December 20 and 21. The temperatures listed for December 22 through 29 ranged from 68 degrees to 82 degrees.

¶ 73 In their motion to dismiss count II of the first amended complaint (failure to maintain and correct in violation of RLTO sections 5-12-070 and 5-12-110), defendants had argued the count should be dismissed as, besides the insufficiency of the factual

allegations regarding "inadequate heat," plaintiffs' complaint showed that defendants had remedied any heating issues within the 14-day cure period allowed by the RLTO.[5] They claimed the heat log showed the heat was fixed on December 14, 2010, five days after he had given MAC notice regarding the lack of heat. Defendants also argued that Mills' claims under section 5-12-110 were barred as Chorney's affidavit showed Mills had refused to allow MAC's staff to access his apartment to remedy the heat complaints.[6] Defendants claimed that, by refusing entry to his apartment, Mills caused the condition to persist, and he was barred from pursuing relief under section 5-12-110. Rather than address these challenges, plaintiffs filed a second amended complaint which did not include the heat log.

¶ 74 The proposed third amended complaint included neither the heat log nor a copy of the December 9 letter in which Mills informed MAC he intended to vacate due to lack of heat. Instead, as the trial court noted, it included a chart "that omit[ted] previously pleaded information, *i.e.*, when the heat was fixed and when it was working" and did not contain "any acknowledgment that the heat was fixed and was working on certain dates." The court found:

> "It is clear from the history of this case that, rather than try to fix the defects in the pleadings, Plaintiffs are attempting to evade responding to a

[5] Under RLTO section 5-12-110(a), a landlord has 14 days to remedy a "material noncompliance" with a lease or section 5-12-070 from the date a tenant notifies the landlord of an intent to vacate due to the noncompliant condition. Chicago Municipal Code, § 5-12-110(a) (amend. Nov. 6, 1991).

[6] Section 5-12-110(f) provides: "[t]he tenant may not exercise his rights under this subsection [for failure to provide essential services such as heat] if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent." Chicago Municipal Code, § 5-12-110(f) (amend. Nov. 6, 1991).

> motion similar to the Section 2-619.1 Motion to Dismiss the First Amended Complaint ***. Apparently Plaintiffs do not wish to file a counter-affidavit contesting Chorney's affidavit or admit that the heat was fixed within the 14-day cure period, so they filed a vague and conclusory Second Amended Complaint alleging 'inadequate heat' and seek to file a Third Amended Complaint that contains a few more factual allegations, but which purposefully evades issues raised by defendants by omitting critical details from the pleadings.
>
> This type of pleading cannot be countenanced by the Court."

The court stated plaintiffs were "driving up the cost of litigation by filing evasive pleadings" and their pleadings subsequent to the first amended complaint were not attempts to remedy defects but rather "attempts to obscure the issues by manipulation of facts contained in exhibits created by Plaintiffs." The court also found that plaintiffs failed to remedy one of the defects raised in the motion to dismiss the first amended complaint, specifically Mills' possible breach of the RLTO by his refusal to allow MAC's service personnel into the apartment to investigate and fix the heat and his threat to "shoot them in the head" should they try to enter his unit.

¶ 75 "The test to be applied in determining whether the trial court's discretion was properly exercised is whether allowance of the amendment furthers the ends of justice." *Trans World Airlines, Inc. v. Martin Automatic, Inc.,* 215 Ill. App. 3d 622, 628 (1991)). Arguably, it would not further the ends of justice to allow plaintiffs to pursue an action on the basis of an amended pleading that purposely obscures facts that would have defeated the cause of action had the case proceeded on defendants' motion to dismiss the first amended complaint. However, as plaintiffs correctly point out, the exhibits

attached to their first amended complaint were evidentiary admissions, not judicial admissions, and as such, "must be offered into evidence and are always subject to contradiction or explanation." *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005).

¶ 76 Generally, a statement of fact admitted in a pleading is a judicial admission and binding on the party making the admission. *Id*. at 557. A judicial admission is not evidence and need not be introduced as evidence at trial. *Id*. Instead, it is a formal concession in the pleadings by a party or its counsel that had the effect of withdrawing a fact from issue or dispensing entirely with the need for proof of the fact. *Id*. at 557-58. Mills' first amended complaint was an unverified pleading signed by his attorney. Any admissions in that unverified pleading would be binding on Mills as a judicial admission. *Id*. at 558. However, Mills' unverified first amended complaint was amended by the filing of the second amended complaint.

¶ 77 "[O]nce a pleading is amended, an admission made in an *unverified* original pleading can only be used as an evidentiary admission and not as a judicial admission." (Emphasis in original.) *Id*. In contrast to a judicial admission, an evidentiary admission must be offered into evidence and is always subject to contradiction or explanation. *Id*. Accordingly, the heat log and May 9, 2010, note attached to Mills' unverified first amended complaint lost their status as judicial admissions once that pleading was amended. *Id*. They were evidentiary admissions and, therefore, plaintiffs may contradict or explain them. The trial court erred in denying plaintiffs leave to file the third amended complaint on the basis that the complaint omitted facts that had been included in the first amended complaint. As plaintiffs argue here, the fact that the heat was fixed for a few days, does not mean that the heat was permanently fixed. Accordingly, we disagree

with the trial court's finding that plaintiffs should be denied the opportunity to fully present their case on the basis that they omitted the temperature log and December 2012 note to MAC from their proposed third amended complaint.

¶ 78 Further, in plaintiffs' response to defendants' motion to dismiss the second amended complaint in which defendants again referred to the heat log and Chorney's affidavit, plaintiffs had submitted affidavits by Karl and Ada to rebut defendants' assertions that the heat had been fixed and that Mills had refused to allow anyone into the apartment and made a threat to shoot anyone who tried to enter the unit. In the affidavits, Karl and Ada averred that they were "without any and/or insufficient heat for numerous days" throughout their tenancy and listed some of those dates. They asserted that Karl reported the lack of heat to MAC and "311" 5 to 10 times in December and it was so cold in the apartment that they had to sleep in their clothes and robe and wear a hat indoors day and night.

¶ 79 Karl stated he never refused to allow a maintenance worker into his home when he was present and only requested that service be performed while he was home. He stated he did not have any weapons in the apartment, was a peaceable person and would never knowingly hurt anyone. Karl also stated that, when MAC sent someone to repair the heat on December 8, 2010, the apartment remained "very cold." Ada stated that she was home when various maintenance people came to the apartment, she saw Karl admit the workers and never saw him refuse entry to them. She also stated her health suffered due to the cold in the apartment.

¶ 80 At a minimum, Karl and Ada's affidavits created a question of fact regarding whether the heat was permanently repaired and whether Karl obstructed any repairs.

Credibility issues are not to be decided on a section 2-615 motion to dismiss and a complaint should not be dismissed under this section unless it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief. *Yu v. International Business Machines Corp*., 314 Ill. App. 3d 892, 897 (2000). Accordingly, since questions of fact exist regarding whether the heat was permanently fixed and whether Karl obstructed any repair efforts, plaintiffs should be granted leave to file their third amended complaint as to counts II and III if those counts meet the requirements of the four-factor *Loyola Academy* test,

¶ 81 (a) Count II - Failure to Maintain

¶ 82 To be allowed, a proposed amendment must meet the following four factors: (1) it would cure the defective pleading; (2) other parties would not sustain prejudice or surprise by virtue of the proposed amendment; (3) the proposed amendment was timely; and (4) there were no previous opportunities to amend the pleading. *Sheffler*, 399 Ill. App. 3d at 74; *Loyola Academy*, 146 Ill. 2d at 273. Count II of the proposed third amended complaint satisfies the four factors.

¶ 83 First, the factual deficiencies in counts II of the second amended complaint were cured in the proposed third amended complaint. As discussed above, count II of the second amended complaint was defective because the general and conclusory allegations in the complaint were insufficient to state a cause of action for failure to maintain the property in violation of RLTO sections 5-12-070 and 5-12-110. In the third amended complaint, plaintiffs remedied these defects by adding sufficient facts and allegations to, at a minimum, create a question of fact regarding whether defendants properly repaired the heat such that the heat provided to plaintiffs' apartment met the

requirements of the ordinance.

¶ 84 Plaintiffs alleged that they moved into their apartment on December 1, 2010. Throughout their tenancy, the apartment "contained several unsafe, latent, unsanitary, and uninhabitable conditions, including but not limited to inoperable or absent heat." The apartment contained no independent heating apparatus and was heated by a central heating plant. Throughout plaintiffs' tenancy, the heat remained "inoperable" in their apartment for all but 13 days.

¶ 85 Plaintiffs alleged that, between December 1, 2010, to March 1, 2011, the temperature in the apartment was at least 68 degrees between 8:30 a.m. and 10:30 p.m. and 66 degrees between 10:30 p.m. and 8:30 a.m. for only 13 days. They bought a space heater in December 2010, complained by phone and in person to MAC throughout their tenancy about the temperature and inoperable heat and complained to the City of Chicago on three specific dates in December 2010. Plaintiffs sent a letter to MAC on December 9, 2010, informing MAC that the apartment had no heat. MAC "took little or no action to repair the heating system." Plaintiffs included a chart showing the morning, noon and evening temperatures in the apartment for 15 days in December 2010.

¶ 86 Plaintiffs cited to RLTO sections 13-196-400 and 13-196-410. Section 13-196-400 requires that owners of apartment buildings provide heating facilities capable of maintaining interior dwelling temperatures of at least 65 degrees Fahrenheit when the outside temperature is 10 degrees below zero. Chicago Municipal Code § 13-196-400 (1990). RLTO section 13-196-410 requires that, from September 15 to June 1, owners of rental apartments heat each dwelling to a minimum temperature of 68 degrees

between 8:30 a.m. and 10:30 p.m. and 66 degrees between 10:30 p.m. and 8:30 a.m. Chicago Municipal Code § 13-196-410 (amended March 9, 2005).

¶ 87 Plaintiffs alleged that defendants failed to maintain the property as required by RLTO sections 5-12-070 and 5-12-110 as, between December 1, 2010, and March 1, 2011, the temperature in their apartment met municipal code sections 13-196-400 and 13-196-410 for only 13 days. They claimed "[t]he insufficient heat" in their apartment "during their tenancy was caused by th[e] central heating plant being damaged and/or inoperable." Plaintiffs sought the difference between the value of the unit had it conformed to the RLTO and the value of the unit as it was actually provided to them as damages. Overall, we find the allegations of third amended count II sufficient to show that, even if defendants repaired the heat periodically, they may not have repaired the heat permanently such that the heat provided to plaintiffs' apartment met the temperature requirements of the ordinance.

¶ 88 Second, defendants would suffer no prejudice or surprise from the proposed amendments. Discovery had not begun and the count II claim was generally the same as it had been in the earlier complaints: defendants violated the RLTO by failing to maintain adequate heat in the apartment and repair the heat. The only differences between the second and third amended complaints were the addition of factual allegations to support the claim that the heat was inadequate and that defendants failed to permanently fix the heat such that the landlord's duty to supply heat to the apartment complied with the RLTO. Defendants would not be surprised by third amended count II.

¶ 89 Further, notwithstanding defendants' argument to the contrary, they would not suffer prejudice from the filing of the third amended complaint merely because their

employees with knowledge of the Mills' tenancy had left their employment during the delay in filing the motion for leave to file that complaint. A subpoena will easily remedy any issues of access to these witnesses.

¶ 90 Third, the proposed amendment to count II was timely. Plaintiffs filed their motion for leave to file the third amended complaint two-and-one-half years after Mills filed his original complaint and seven months after the court denied their motion to reconsider the dismissal of their second amended complaint. We find Karl's battle with cancer and the death of his son a sufficient excuse for the seven month delay in filing after denial of the motion to reconsider, especially given that defendants will suffer no prejudice from that delay. Any doubts regarding whether allowing the amendment would further the interests of justice should be resolved in favor of allowing the motion to amend. *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 748 (2009).

¶ 91 Lastly, this was the first opportunity plaintiffs had to amend count II subsequent to the trial court's ruling that the previous pleading was insufficient.

¶ 92 Count II of plaintiffs' proposed third amended complaint satisfied the four *Loyola Academy* factors. Accordingly, the trial court's order denying Mills plaintiffs' motion for leave to file a third amended complaint is reversed as to count II of the proposed third amended complaint.

¶ 93 (b) Count III - Breach of the Implied Warranty of Habitability

¶ 94 For the same reasons, count III of the proposed third amended complaint satisfied the four *Loyola Academy* factors. In count III, plaintiffs incorporated all the allegations made in count II, made the statement that Illinois included an implied warranty of habitability in every residential lease agreement and asserted they were

entitled to the difference in market value between the property as delivered and the property had it been delivered as warranted.

¶ 95 Given the allegations that the heat met the requirements of the municipal code for only 13 days during a four month period and Ada's previous affidavit asserting that her health suffered as a result of the inadequate heat in the apartment, plaintiffs set forth sufficient facts demonstrating what the uninhabitable conditions were, how long those conditions lasted and that the conditions were of such a substantial nature as to render the premises unfit for occupancy. The allegations in count III were sufficient to state a cause of action for breach of the implied warranty of habitability and thus cured the defect in count III of the second amended complaint. Further, as above, defendants would suffer no prejudice from the proposed amendment as the claim was the same as in the second amended complaint, the proposed amendment was timely and this was plaintiffs' first opportunity to amend after the dismissal of the second amended complaint.

¶ 96 As count III of plaintiffs' proposed third amended complaint satisfied the four *Loyola Academy* factors, the trial court's order denying Mills plaintiffs' motion for leave to file a third amended complaint is reversed as to count III of the proposed third amended complaint.

¶ 97 CONCLUSION

¶ 98 For the reasons stated above, we dismiss the appeals from the trial court's orders in the Miller action for lack of jurisdiction. We affirm the court's orders dismissing the Mills action, denying Mills plaintiffs leave to file a third amended complaint as to Mills counts I, IV and V and denying Mills plaintiffs leave to add additional defendants

via a third amended complaint. We reverse the court's order denying leave to file a third amended complaint as to counts II and III.

¶ 99 Affirmed in part; reversed in part; dismissed in part.