2015 IL App (1st) 133809-U

No. 1-13-3809

Fifth Division
March 31, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

TIBERIU KLEIN, Plaintiff-Appellant, v. FIRST SECURITY TRUST AND SAVINGS BANK and RMK MANAGEMENT CORPORATION, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 12 M3 3109 The Honorable Thomas Roti, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed several counts of plaintiff's complaint that failed to state causes of action. However, the trial court erred in dismissing two counts of the complaint with prejudice where plaintiff's allegations could be sufficient to state causes of action if properly pleaded and erred in denying plaintiff leave to amend his complaint.

¶ 2 Plaintiff Tiberiu Klein was a tenant in a condominium unit owned by defendant First Security Trust and Savings Bank (First Security) and managed by defendant RMK

Management Corporation (RMK). One night in 2011, during a heavy rain, the building's parking lot flooded, allegedly due to a clogged sewer, and water entered the basement of the building. The water damaged the boiler, resulting in fumes including carbon monoxide spreading through the building's vent system and into plaintiff's unit, causing plaintiff injury from the inhalation of the fumes. Plaintiff filed suit against First Security and RMK, alleging that defendants were aware of the building's clogged sewer and history of flooding and that they were responsible for plaintiff's injuries because they did not address the problems. Defendants both filed combined motions to dismiss under section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2010)), and the trial court dismissed plaintiff's *pro se* complaint, finding that plaintiff had not sufficiently alleged any of the causes of action in his complaint. Plaintiff appeals, and we affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 I. Complaint

¶ 5 On September 10, 2012, plaintiff filed a *pro se* verified complaint against defendants; the complaint was amended twice and it is the verified second amended complaint that is the subject of defendants' motions to dismiss.

¶ 6 Count I of the verified second amended complaint is entitled "Wilfull and Reckless Conduct Personal Injury" and alleges that on or before January 14, 2011, RMK was hired by First Security to manage unit 206, in which plaintiff lived, and "the property-building, common areas and the premises" of 2206 South Goebbert in Arlington Heights (the Goebbert building). The complaint alleges that "[a]t all relevant times RMK and [First Security] proclaimed and advertised their complete ownership and management over the building and premises and common areas by spreading informational materials reflecting that [ownership

and management] to [plaintiff] and other tenants and occupants and also by taking concrete and physical steps in the eyes of tenants to put their own locks to all the access doors of the building, including the basement where the flooding occurred." This "agency-agent" relationship between RMK and First Security "continued for the entire year of 2011, before and after the flooding and still exist[s] until present."

¶ 7 The complaint alleges that on approximately January 14, 2011, First Security and RMK "sent letters to all the tenants and occupants in the said building, informing them that from that point forward First Security Trust and Savings Bank is the owner of that building, apartments and the premises and RMK has been hired as management company and acts on behalf of the owner First Security Trust And Savings Bank." Additionally, "RMK as agent of [First Security] has placed and maintained their own ciphered locks with the logo RMK to all the common areas, at the basement and on the administration doors located on the first floor." The complaint alleges that "by putting their locks RMK and [First Security] have retained and assumed exclusive control and access over the building, premises, common areas and the repair and maintenance of such, up until August 2011 and thereafter, until their management of the building have been replaced by another company Vanguard Management, sometime[] in 2012."

¶ 8 The complaint alleges that on the night of July 24, 2011, "a major flooding" occurred at the building, "completely flood[ing] and submerg[ing]" the boiler and valves inside the building's basement, resulting in "toxic fumes" including carbon monoxide and natural gas entering plaintiff's apartment while he was sleeping inside, injuring him. The complaint alleges that several instances of flooding had previously occurred when there was excessive water accumulation in the parking lot due to the sewers being clogged. These previous

occurrences "warned RMK that [there] is a problem with the sewer system and could have [led] them to take corrective action," but "[d]espite recurring flooding and knowing the sewers are clogged, RMK and [First Security] have turned a blind eye to it and have failed to take any corrective action." The complaint also alleges that there were warnings of abundant rain that night on the television and radio stations in the area, but First Security and RMK "turned a blind eye to it and have not sent any personnel [for] preventing the incident."

¶ 9 The complaint alleges that "[w]hen the incident [on] July 24[,] 2011[,] occurred, by placing their locks, RMK and [First Security] assumed total responsibility since only RMK and [First Security's] agents could have accessed the common areas, *** especially the basement room holding the boiler, where a timely intervention by them sending qualified personnel with drainage pumps could have avoided the incident." Further, "[w]hen the incident [of] July 24[,] 2011[,] occurred, it was the exclusive duty of RMK as agent of [First Security] who hired them to install and/or adequately maintain the equipment[] such [as] sewers [and] pumps, and hire qualified personnel for such maintenance and repair to avoid the danger of having a flooding in the basement area, because of knowing the danger of having the boiler flooded" and it was also the exclusive duty of First Security and its agent RMK "to have its building in compliance with all Arlington Heights village rules and ordinances that could have avoided the flooding of the basement."

¶ 10 Count I of the complaint alleges that RMK and First Security "recklessly caused the injury" to plaintiff in the following ways: (1) "Disobeying the village ordinance Chapter No. 22, 23 and 24 by not complying with the maintenance and adequacy of sewers [and] backup pumps to prevent flooding[]"; (2) "Selfishly and irresponsibly—in disregard of people's life and safety—keeping away others from exercising maintenance and intervention attributions

on the premises and common areas"; (3) "by intentionally keeping [the] sewer system severely clogged despite knowing of that being the cause of recurrent flooding problems in the parking lot, known when they sold the building in 2005 to [Luigi] Adamo and known by them *** after they acquired back the building in 2010"; (4) "failure to provide qualified personnel with suction[] pumps or [to] install such backup pumps permanently knowing the sewers are clogged, after being warned by weather channels that severe rain is heading to [the] area"; (5) "failure to maintain [a] 24 hour janitor [or] at least observers or monitors in the building despite knowing they had at least 160 people as occupants and tenants, and despite knowing the danger of flooding"; and (6) "failure to warn [plaintiff] about the danger that sewers are clogged and [that] they don't have equipment in place to take the sewer job in case of flooding."

¶ 11 Count II of the complaint is entitled "Emotional Distress Placing in Zone of Danger Risk of Being Killed" and alleges that in 2005, First Security entered into a $4 million contract with Luigi Adamo "to entrust him this building and its apartments for making profit from rent or sale of the apartments and for modernization-upgrades." Plaintiff, as well as the building's other tenants, paid rent to Adamo, who made payments on his loan. At the time First Security entered into the contract, First Security "knew that the building posses[sed] a high risk of flooding and does not have adequate equipment[] and protection against it as required by the Village of Arlington Heights Codes and Ordinances, Chapters 22, 23 and 24, [which] regard the sewer system, backup and [sump] pumps in order to prevent flooding[]." Additionally, First Security "knew that Adamo would do nothing to remedy the building problems in regard to sewers and the pumps, because they knew their vice-president of the

Bank together with Adamo performed a fraud to get the $4 million from the Bank for the building."[1]

¶ 12 Count III of the complaint is entitled "Product Liability & Failure to Warn" and alleges that "[k]nowing their apartment is located in an unsafe building, over the basement area, with sewers clogged and missing pumps which could anytime cause a flooding of the basement where the boiler and gas system [were] present and could disperse fumes in the apartments," RMK and First Security were "recklessly negligent" in failing to warn plaintiff of the known defects and risks of flooding.

¶ 13 Count IV of the complaint is entitled "Unfair and Deceptive Practice" and alleges that "[b]y knowing in anticipation what they had in mind to set up the building for a flooding by keeping the sewer clogged and without necessary pumps, knowing about recurrent flooding problems and putting their locks on the access doors and prohibiting access to Broad Shoulder Company, [First Security] and RMK were deceptive to [plaintiff] when advertising and asking him to contract for rent in their apartment, knowing it was dangerous and if [plaintiff] knew he would not have contracted with them." Further, the complaint alleges that First Security "was unfair and deceptive to [plaintiff] in not disclosing the federal conviction and guilty plea against their vice-president from 2010 in regard [to] the fraudulent loan issued for the acquisition of the building, knowing that would shake the confidence and trust of [plaintiff] in entering in a deal with them." The complaint alleges that "[h]ad those disclosures enunciated above [been] made to [plaintiff], he would never [have] chosen to stay in the Bank's apartment and/or under their ownership and management of RMK as their

[1] The record contains a plea agreement from a federal court case in 2010 in which a First Security vice president pled guilty to bank fraud involving loans issued by First Security.

agent, and would never [have] had to pay any rent to them and he would not have been injured."

¶ 14 II. Motions to Dismiss

¶ 15 On April 23, 2013, First Security filed a combined motion to dismiss plaintiff's second amended complaint pursuant to section 2-619.1 of the Code. First Security argued that all four counts should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) because First Security did not control the common areas of the property from which the complained-of conduct originated. First Security also argued that all four counts should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) because they did not plead necessary facts to establish a cause of action. Finally, First Security argued that counts II and IV should be dismissed under section 2-619(a)(9) because plaintiff lacked standing to claim fraud, as he was not a party to the alleged fraudulent transaction and First Security never made any statements to plaintiff.

¶ 16 In support of its motion, First Security filed the affidavit of Thomas J. Schnell, dated April 23, 2013. In the affidavit, Schnell stated that he was the senior vice president of operations of First Security and had personal knowledge of the facts of the case. "For a period of time," First Security owned certain condominium units at the Goebbert building that it acquired via foreclosure, including unit 206. "However, when First Security acquired title, it did not control the Property's common areas. This was true when the flood took place that allegedly caused a boiler in the Property's basement to emit fumes that Plaintiff claims to have inhaled."

¶ 17 Schnell stated that the property's common areas were "at all times controlled by Shalamar East Condominium Association" (Shalamar), which hired Broad Shoulders

Management, Inc. (Broad Shoulders), to manage the common areas of the property, including the parking lot and basement. Broad Shoulders was owned by Luigi Adamo, the foreclosed borrower from whom First Security acquired title to plaintiff's unit.

¶ 18 Schnell stated that "First Security did not have any representation on the association's board until August 23, 2011, *i.e.*, 1 month after the flood that allegedly caused Plaintiff's injuries. Even after First Security elected board members to the association, it still did not control the Property's common areas. Rather, Shalamar continued to control the common areas, and Broad Shoulders continued to manage the Property, including its common areas, until Broad Shoulders abandoned its duties on or around January, 2012." Finally, Schnell stated that "First Security never made, or intended to make, any statements or representations of any kind to Plaintiff, or to any other person, which Plaintiff could have relied upon."

¶ 19 In support of its motion, First Security also filed a document entitled "Unanimous Written Consent of the Board of Directors of Shalamar East Condominium Association." The document was dated August 24, 2011, and provided that the members of the Board of Directors of Shalamar, acting pursuant to a special meeting called by the unit owners of Shalamar, consented to and adopted the following resolutions:

> "WHEREAS, on August 5, 2011, First Security Real Property, LLC-1, a unit owner owning more than fifty percent (50%) of the units and holding more than fifty percent (50%) of the votes called for a special meeting of the Association to be held on August 23, 2011 (the 'Meeting') for the purpose of determining the make-up of the current Board of Directors of the Association and to further discuss the state of affairs of the Association;

WHEREAS, it was determined at the Meeting that, in fact, there is not a current Board of [D]irectors in place an[d] that the purported Board of Directors was made up of individuals who were no longer Unit owners at the property;

WHEREAS, it is in the best interests of the Association to elect a Board of Directors;

WHEREAS, it was determined prior to the Meeting that the Association is currently not in good standing with the Illinois Secretary of State's office;

RESOLVED, a quorum of Unit Owners attended the Meeting and the following people were elected as Board of the Association in accordance with the Declaration of Condominium Ownership:

Drew Dammeier

Thomas Schnell

Agata Opoka

RESOLVED, that the Board named the following officers:

Drew Dammeier—President

Thomas Schnell—Treasurer

Agata Opoka—Secretary"

¶ 20 On May 21, 2013, RMK filed a combined motion to dismiss plaintiff's second amended complaint under section 2-619.1 of the Code. RMK admitted that it "managed the condominium dwelling units comprising the Property for First Security Trust & Savings Bank *** on July 24, 2011." However, it argued that "RMK did not manage or control common areas of the condominium dwelling units comprising the Property. Rather, such common areas were at all times controlled by Shalamar East Condominium Association ***

and were at all times managed for Shalamar by Broad Shoulders Management, Inc." RMK argued that all counts of plaintiff's complaint should be dismissed under section 2-619(a)(9) of the Code because RMK did not manage or control any part of the common areas from where plaintiff alleged the flood occurred. Additionally, RMK argued that counts II and IV should be dismissed under section 2-619(a)(9) because they were predicated upon a purported fraud between First Security and its borrower and not RMK. Finally, RMK argued that all four counts of plaintiff's complaint should be dismissed under section 2-615 of the Code, as "[n]one of plaintiff's four counts plead necessary facts to state a cause of action against RMK for willful and reckless conduct, emotional distress, product liability, and unfair and deceptive practice"; with regard to count III, RMK also argued that plaintiff could not state a cause of action since a building was not a "product" as a matter of law.

¶ 21 On June 18, 2012, plaintiff filed a response to the motions to dismiss and, in the alternative, asked for leave to amend his second amended complaint. In his response, plaintiff claimed that the building involved in the flood was "a separate building having its own 40 units arranged on four floors, having its own separate common areas, its own basement, its own boiler and pumps, from which 37 units of the building the defendant First Security Trust and Savings Bank owned entirely," as demonstrated by a court order of judicial sale attached to the response.

¶ 22 On July 26, 2013, the trial court issued a written memorandum opinion and order on defendants' motions to dismiss. In its recitation of the facts, the court stated that "First Security was the Mortgagee of some of the units in the Condominium and eventually the owner by way of foreclosure. RMK appears to be the management agent for the condominium association on behalf of First Security. Both defendants claim that Shalamar

East Condominiums [*sic*] Association maintained and controlled the common areas. Plaintiff claims otherwise based on his assumptions, theories, speculations and thoughts, with not provable facts." The court's entire analysis of plaintiff's complaint consisted of the following paragraph:

> "Plaintiff's Complaint is replete with allegations but lacks facts to support any of them. Both defendants support their motions with the affidavit of Mr. Thomas J. Schnell who is the Senior Vice President of the [*sic*] First Security. Plaintiff only advances his unsupported allegations. That is insufficient. After all, Illinois is a fact pleading state. [Citation.]"

Accordingly, the trial court dismissed plaintiff's complaint in its entirety with prejudice.

¶ 23 On August 26, 2013, plaintiff filed a "Motion for Reconsideration or in [the] Alternative to Vacate the Order Dismissing the Case With Prejudice and to Reinstate the Case for Transfer[r]ing the Case to Another Venue Based on the Limit of Amount Requested in the Complaint, Leave to Amend Complaint or in [the] Alternative for Voluntary Dismissal with Leave to Refile Under 735 ILCS 5/2-1009."

¶ 24 On November 6, 2013, the trial court entered an order "grant[ing] the reconsideration aspect of the motion" but "denie[d] the requested relief." The instant appeal follows.

¶ 25 ANALYSIS

¶ 26 On appeal, plaintiff argues that the trial court erred in dismissing his verified second amended complaint with prejudice. Additionally, plaintiff argues that the trial court erred in denying plaintiff leave to either amend or voluntarily dismiss his complaint. We consider each argument in turn. We note that RMK has not filed an appearance or appellee's brief in

the instant case. However, as First Security has filed an appellee's brief, the propriety of the trial court's order has been fully briefed by both sides.

¶ 27 I. Dismissal of Complaint

¶ 28 Plaintiff first argues that the trial court erred in dismissing his verified second amended complaint with prejudice. In the case at bar, defendants each filed a combined motion to dismiss pursuant to section 2-619.1 of the Code, alleging defects to the complaint pursuant to both sections 2-615 and 2-619 of the Code. A section 2-615 motion to dismiss "tests the legal sufficiency of a complaint," while a section 2-619 motion to dismiss "admits the sufficiency of the complaint, but asserts affirmative matter that defeats the claim." *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. "In ruling on motions to dismiss pursuant to either section 2-615 or 2-619 of the Code, the trial court must interpret all pleadings in the light most favorable to the nonmoving party" (*Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004)), and a cause of action should not be dismissed under either section unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief (*Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009) (section 2-615 motion); *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003) (section 2-619 motion)). Our review of a motion to dismiss under either section is *de novo* (*Carr v. Koch*, 2012 IL 113414, ¶ 27), and we may affirm the dismissal of a complaint on any ground that is apparent from the record (*Golf v. Henderson*, 376 Ill. App. 3d 271, 275 (2007)). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 29 A. Section 2-615

¶ 30 The trial court did not specify whether it was dismissing plaintiff's complaint based on section 2-615 or section 2-619. However, both parties agree that one of the bases for the trial court's dismissal was its conclusion that "Plaintiff's Complaint is replete with allegations but lacks facts to support any of them."

¶ 31 As noted, a section 2-615 motion attacks the legal sufficiency of the complaint. *DeHart v. DeHart,* 2013 IL 114137, ¶ 18 (citing *Bajwa v. Metropolitan Life Insurance Co.,* 208 Ill. 2d 414, 421 (2004)). When ruling on a section 2-615 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may be drawn from those facts. *DeHart,* 2013 IL 114137, ¶ 18 (citing *Doe v. Chicago Board of Education,* 213 Ill. 2d 19, 28 (2004)). In the case at bar, it appears that this *pro se* plaintiff is not able to set forth well-pleaded facts. A trial court should dismiss a count or cause of action under section 2-615 only if it is readily apparent from the pleadings that there is no possible set of facts which would entitle plaintiffs to the requested relief. *DeHart,* 2013 IL 114137, ¶ 18 (citing *Bajwa,* 208 Ill. 2d at 421). The question for the court is whether the allegations of the complaint, when construed in the light most favorable to the plaintiffs, are sufficient to establish the cause of action. *DeHart,* 2013 IL 114137, ¶ 18 (citing *Bonhomme v. St. James,* 2012 IL 112393, ¶ 34).

¶ 32 Additionally, in the case at bar, the trial court's dismissal was with prejudice. "We review for an abuse of discretion a trial court's decision to dismiss a complaint with prejudice." *Razor Capital v. Antaal,* 2012 IL App (2d) 110909, ¶ 28; *Stoelting v. Betzelos,* 2013 IL App (2d) 120651, ¶ 11; *Holzrichter v. Yorath,* 2013 IL App (1st) 110287, ¶ 109; *Bruss v. Przybylo,* 385 Ill. App. 3d 399, 405 (2008). "When doing so, we consider whether the trial

court, before dismissing with prejudice, took into account the unique and particular circumstances of the case before it; if so, the court did not abuse its discretion." *Razor Capital*, 2012 IL App (2d) 110909, ¶ 28.

¶ 33 However, our supreme court has also emphasized that Illinois is a fact-pleading jurisdiction and that plaintiffs are required to allege sufficient facts to bring a claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30, (2006). Although plaintiffs are not required to set forth evidence in a complaint, they also cannot set forth "simply conclusions." *Marshall*, 222 Ill. 2d at 430. "[M]ere conclusory allegations unsupported by specific facts will not suffice." *Primax Recoveries, Inc. v. Atherton*, 365 Ill. App. 3d 1007, 1010 (2006).

¶ 34 In the case at bar, it is readily apparent from the facts stated in plaintiff's complaint that he may have a cause of action in several counts of the complaint. As a result, the trial court erred in dismissing the entire complaint under section 2-615 without giving plaintiff leave to refile.

¶ 35 Count I of the verified second amended complaint is entitled "Wilfull and Reckless Conduct Personal Injury." There is no such cause of action known as "Wilfull and Reckless Conduct Personal Injury." However, there may be a cause of action for negligence or willful and wanton negligence. "To state a legally sufficient cause of action in either simple or willful and wanton negligence, plaintiff must have alleged sufficient facts to show defendant had a duty to plaintiff, that he breached such duty, and that an injury proximately resulted from that breach." *Topps v. Ferraro*, 235 Ill. App. 3d 43, 47 (1992). In addition, to state a cause of action for willful and wanton negligence, the complaint "must [also] allege either a deliberate intention to harm or an utter indifference to, or conscious disregard for, the welfare

of the plaintiff." *OnTap Premium Quality Waters, Inc. v. Bank of Northern Illinois, N.A.*, 262 Ill. App. 3d 254, 260-61 (1994); see also *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 61 ("In order to state a claim for willful and wanton misconduct, there must be allegations that a defendant breached some duty with a particularly malicious intent.").

¶ 36 In the case at bar, count I of plaintiff's complaint alleges that First Security, through its agent RMK, managed unit 206, the unit in which plaintiff resided, as well as the "building and premises and common areas." This allegation was supported by further allegations concerning First Security's demonstration of exclusive control over the premises, including informational materials distributed to tenants and the physical action of placing its own locks on all access doors of the building, including the basement common area. The complaint expressly alleges that "RMK and [First Security] assumed total responsibility" of the common areas through the placement of the locks and that "it was the exclusive duty of RMK as agent of [First Security]" to maintain those common areas. Count I of plaintiff's complaint then alleges that despite this duty, First Security, through its agent RMK, failed to maintain the boiler and sump pumps and failed to unclog the sewer lines in the parking lot. Finally, Count I of plaintiff's complaint alleges that as a result of First Security's failure to act in accordance with its duty, the basement flooded and plaintiff was injured by toxic fumes, including carbon monoxide, entering his apartment while he was sleeping. Count I of the complaint also alleges "an utter indifference to, or conscious disregard for, the welfare of the plaintiff" (*OnTap Premium Quality Waters, Inc.*, 262 Ill. App. 3d at 261) through its allegations that First Security chose not to resolve the problem, even after complaints of tenants, previous flooding as a result of the clogged sewer, and the weather forecast of rain.

Despite the trial court's conclusion otherwise, these allegations are not "assumptions, theories, speculations and thoughts, with not provable facts." Each of these allegations is a fact that can be proven if true.

¶ 37 In order to allege a duty, a plaintiff must allege that a defendant either owns, manages, or controls a property. See *Conway v. Epstein*, 49 Ill. App. 2d 290, 294 (1964) ("injuries due to the negligent maintenance of property give rise to a right of recovery *** against the party in control and possession of the premises"). It is possible for plaintiff to properly plead this allegation. In order to allege a breach of that duty, plaintiff could allege facts that would illustrate that defendants had knowledge of the likelihood of flooding and its consequences and did nothing to prevent it. In order for plaintiff to allege that the conduct of a defendant was negligent, the plaintiff would have to allege facts that would illustrate that plaintiff carelessly and negligently did something or carelessly and negligently failed to do something that caused plaintiff injury or damage. In order for plaintiff to allege that the conduct of defendants was willful and wanton negligence, plaintiff must allege facts that show that the conduct of defendant was either intentional or was in utter disregard for the safety of the residents of the building or the plaintiff, as the case may be. There does not appear to be facts that could show an intentional act; however, there are facts if pleaded properly that could show that defendants had notice and knowledge of the flooding problem and an utter disregard for the safety of the residents and did nothing to prevent it.

¶ 38 At this early stage of the litigation, there are facts here which show that plaintiff could state a cause of action for negligence or willful and wanton negligence. Accordingly, count I of plaintiff's complaint should not have been dismissed with prejudice under section 2-615 of the Code. Plaintiff should be given leave to amend his complaint.

¶ 39 Count II of the complaint is entitled "Emotional Distress Placing in Zone of Danger Risk of Being Killed" and concerns alleged emotional distress caused by defendants in furtherance of a fraudulent scheme to obtain insurance money from flooding of the premises while still collecting rent from tenants. This count appears to be alleging intentional infliction of emotional distress. Our supreme court has set forth three elements necessary to state a cause of action for intentional infliction of emotional distress: " 'First, the conduct involved must be truly extreme and outrageous. Second, the actor must either *intend* that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause *severe* emotional distress.' " (Emphases in original.) *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 269 (2003) (quoting *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988)).

¶ 40 In the case at bar, we cannot find that, from the facts contained in plaintiff's verified second amended complaint, all the elements required to state a cause of action for intentional infliction of emotional distress can be found. As noted, count II of the complaint alleges that First Security sold the building to Luigi Adamo as part of a fraudulent scheme to obtain insurance money from the flooding of the building that they knew was likely to occur. This scheme was not disclosed to the building's tenants because they wanted to continue obtaining rent payments from them. Regardless of whether this conduct could be considered " 'truly extreme and outrageous' " (*Feltmeier*, 207 Ill. 2d at 269 (quoting *McGrath*, 126 Ill. 2d at 86)), the complaint does not allege that First Security intended that its conduct would cause severe emotional distress or knew that there was a high probability that its conduct would cause severe emotional distress. At most, the complaint alleges that First Security knew that

the building would sustain damage from flooding. Accordingly, we cannot find that the trial court erred in dismissing count II of plaintiff's complaint under section 2-615.

¶ 41 Count III of plaintiff's verified second amended complaint is entitled "Product Liability & Failure to Warn." Our supreme court has instructed that "[t]o recover in a product liability action, a plaintiff must plead and prove that the injury resulted from a condition of the product, that the condition was an unreasonably dangerous one, and that the condition existed at the time the produce left the manufacturer's control." *Soliami v. Eaton*, 201 Ill. 2d 1, 7 (2002). "A product may be found unreasonably dangerous by virtue of a physical flaw, a design defect, or a failure of the manufacturer to warn of the danger or instruct on the proper use of the product as to which the average consumer would not be aware." *Soliami*, 201 Ill. 2d at 7.

¶ 42 In the case at bar, we cannot find that plaintiff's complaint stated a cause of action for product liability. Plaintiff's complaint alleges that the purportedly defective "product" was the apartment in which he lived. However, "courts have consistently held that buildings and indivisible component parts of the building structure itself, such as bricks, supporting beams and railings, are not deemed products for the purpose of strict liability in tort." *Martens v. MCL Construction Corp.*, 347 Ill. App. 3d 303, 320 (2004); see also *Heller v. Cadral Corp.*, 84 Ill. App. 3d 677, 680 (1980) (holding that "a condominium such as involved in the present case is not a product within the ambit of strict products liability"). Accordingly, the trial court did not err in dismissing count III of plaintiff's complaint under section 2-615.

¶ 43 Finally, count IV of plaintiff's verified second amended complaint is entitled "Unfair and Deceptive Practice" and alleges violations of "the Illinois Consumer Fraud and Deceptive [Business] Practices Act [(the Consumer Fraud Act)] (815 ILCS 505/1 *et seq.* (West 2010))

and *** the general deceptive practice and Illinois Public Policies." "In order to adequately plead a cause of action under the Consumer Fraud Act, a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) that the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 24 (citing *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002)). We note that "[t]he Consumer Fraud and Deceptive Business Practices Act has been applied to landlord-tenant relationships." *Petrauskas v. Wexenthaller Realty Management, Inc.*, 186 Ill. App. 3d 820, 831 (1989) (citing *Duncavage v. Allen*, 147 Ill. App. 3d 88 (1986), and *Carter v. Mueller*, 120 Ill. App. 3d 314 (1983)).

¶ 44 Count IV of plaintiff's complaint identifies two examples of First Security's alleged "deceptive conduct." First, plaintiff alleges that First Security deceptively advertised plaintiff's apartment without disclosing the clogged sewers and history of flooding. Additionally, plaintiff alleges that First Security was deceptive in failing to disclose the guilty plea of First Security's vice president in a 2010 fraud action in federal court. In the case at bar, we find that plaintiff could state a cause of action under the Consumer Fraud Act for defendants' failure to disclose the clogged sewers and history of flooding. "A seller has a duty to disclose facts which materially affect the value or desirability of the property, are known or accessible only to him, and that he knows are not known or accessible to a diligent buyer." *Washington Courte Condominium Ass'n-Four v. Washington-Golf Corp.*, 267 Ill. App. 3d 790, 815 (1994). Failure to disclose the existence of a flooding problem in a building's basement has been found sufficient to constitute fraud. *Munjal v. Baird & Warner, Inc.*, 138 Ill. App. 3d 172, 180 (1985), *overruled on other grounds*, *Avery v. State Farm*

Mutual Automobile Insurance Co., 216 Ill. 2d 100, 192 (2005). See also *Board of Managers of Weathersfield Condominium Ass'n v. Schaumburg Ltd. Partnership*, 307 Ill. App. 3d 614, 624 (1999) ("This court has characterized the concealment of matters relating to water infiltration, prior repairs and other defects in a residential building sufficient to state a cause of action under the Consumer Fraud Act.").

¶ 45 Here, plaintiff has alleged that First Security was aware of the clogged sewers and the history of flooding, but knowingly chose not to disclose that information when advertising plaintiff's apartment. Plaintiff further alleges that had he been made aware of these facts, he would not have rented the apartment and therefore would not have sustained injury when the basement was flooded and released toxic fumes including carbon monoxide into his apartment. At this early stage of the proceedings, plaintiff's allegations, if placed properly in a complaint, could be sufficient to state a cause of action under the Consumer Fraud Act. We note that First Security argues that Schnell's affidavit refutes the suggestion that First Security intended for plaintiff to rely on any deception. However, "[i]n ruling on a section 2-615 motion, the court may not consider affidavits, products of discovery, documentary evidence not incorporated into the pleadings as exhibits, or other evidentiary materials." *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 29 (2003); *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 11. Thus, we do not consider Schnell's affidavit for purposes of determining whether plaintiff has stated a cause of action under section 2-615.

¶ 46 With respect to plaintiff's claim that First Security was deceptive in failing to disclose the guilty plea of First Security's vice president in a 2010 fraud action in federal court, however, we cannot find that plaintiff has stated a cause of action under the Consumer Fraud Act. There is no indication that such information would "materially affect the value or desirability

of the property" (*Washington Courte Condominium Ass'n-Four*, 267 Ill. App. 3d at 815), and, therefore, First Security would not have had a duty to disclose it. Accordingly, only the facts in that portion of count IV concerning the clogged sewer and history of flooding could state a cause of action under the Consumer Fraud Act, and the portion concerning the prior fraud action was properly dismissed under section 2-615 of the Code.

¶ 47 In sum, after considering all four counts of plaintiff's verified second amended complaint, we find that (1) count II and (2) count III were properly dismissed under section 2-615 for failure to state a cause of action, and (3) the facts in that portion of count IV concerning the prior fraud action are stricken. However, (1) count I and (2) the portion of count IV concerning the failure to disclose the clogged sewer and prior history of flooding could state causes of action if properly pleaded and, accordingly, should not have been dismissed with prejudice under section 2-615. Instead, they should have been dismissed without prejudice with leave to refile within 28 days.

¶ 48 B. Section 2-619

¶ 49 As noted, the trial court did not specify whether it was dismissing plaintiff's complaint based on section 2-615 or section 2-619. However, both parties agree that one of the bases for the trial court's dismissal was its conclusion that Shalamar, not defendants, supervised and/or controlled the common areas of the building. We note that our analysis of this issue is relevant to only count I of plaintiff's verified second amended complaint because the remaining portion of count IV only concerns First Security in its capacity as owner of plaintiff's unit and RMK as manager of plaintiff's unit, not as managers of the building as a whole.

¶ 50 "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). For a section 2-619 dismissal, our standard of review is *de novo*. *Solaia Technology*, 221 Ill. 2d at 579; *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). When reviewing "a motion to dismiss under section 2-619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz*, 231 Ill. 2d at 488. "In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). Even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. *Raintree*, 209 Ill. 2d at 261 (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 51 In the case at bar, First Security argues that plaintiff's complaint was properly dismissed under section 2-619 "because, as a matter of law and undisputed fact, First Security did not own or control the common areas of the Property, and thus First Security cannot be liable for [plaintiff's] alleged injuries." After closely examining the record, and bearing in mind the early stage of the proceedings, we do not find this argument persuasive.

¶ 52 The Goebbert building at issue in the instant case is governed by the Condominium Property Act (the Act). 765 ILCS 605/2.1 (West 2010) ("the provisions of this Act are applicable to all condominiums in this State"). Under the Act, "[t]he unit owners' association is responsible for the overall administration of the property through its duly elected board of managers." 765 ILCS 605/18.3 (West 2010). Every unit owner is a member of the association. 765 ILCS 605/18.3 (West 2010). The association's board of managers is responsible for "exercis[ing] for the association all powers, duties and authority vested in the association by law or the condominium instruments," including "[t]o provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." 765 ILCS 605/18.4 (West 2010). In the exercise of their duties, "the officers and members of the board, whether appointed by the developer or elected by the unit owners, shall exercise the care required of a fiduciary of the unit owners." 765 ILCS 605/18.4 (West 2010).

¶ 53 In the case at bar, Schnell's affidavit stated that the property's common areas were controlled by Shalamar, the property's unit owners' association. Thus, normally, it would be clear that Shalamar, not First Security, would be responsible for the maintenance of the common areas, including the basement where the flooding took place, especially in light of Schnell's statement that "First Security did not have any representation on the association's board until August 23, 2011, *i.e.*, 1 month after the flood that allegedly caused Plaintiff's injuries."

¶ 54 However, this is not the typical case. In support of its motion to dismiss, First Security filed a document entitled "Unanimous Written Consent of the Board of Directors of Shalamar East Condominium Association." The document was dated August 24, 2011, and

provided that the members of the Board of Directors of Shalamar, acting pursuant to a special meeting called by the unit owners of Shalamar, consented to and adopted the following resolutions:

"WHEREAS, on August 5, 2011, First Security Real Property, LLC-1, a unit owner owning more than fifty percent (50%) of the units and holding more than fifty percent (50%) of the votes called for a special meeting of the Association to be held on August 23, 2011 (the 'Meeting') for the purpose of determining the make-up of the current Board of Directors of the Association and to further discuss the state of affairs of the Association;

WHEREAS, it was determined at the Meeting that, in fact, there is not a current Board of [D]irectors in place an[d] that the purported Board of Directors was made up of individuals who were no longer Unit owners at the property;

WHEREAS, it is in the best interests of the Association to elect a Board of Directors;

WHEREAS, it was determined prior to the Meeting that the Association is currently not in good standing with the Illinois Secretary of State's office;

RESOLVED, a quorum of Unit Owners attended the Meeting and the following people were elected as Board of the Association in accordance with the Declaration of Condominium Ownership:

Drew Dammeier

Thomas Schnell

Agata Opoka

RESOLVED, that the Board named the following officers:

Drew Dammeier—President

Thomas Schnell—Treasurer

Agata Opoka—Secretary"

This document indicates that prior to August 23, 2011, Shalamar was not being governed by a board of managers. Thus, there was no board "[t]o provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." 765 ILCS 605/18.4 (West 2010).

¶ 55 The parties have not supplied any case law, and we have been unable to discover any after conducting our own research, concerning the duty to maintain the common areas in the absence of a board of managers. However, we find the case of *Glickman v. Teglia*, 388 Ill. App. 3d 141 (2009), to be instructive. There, we considered the responsibility for maintaining common areas prior to the election of the initial board of directors. The plaintiff in that case contended that the unit owners' association had a duty to maintain the common areas of the property despite the fact that the initial board of managers had yet to be elected, while the association argued that it had no duty until the developer turned control of the association over to the unit owners by way of a duly elected board. *Glickman*, 388 Ill. App. 3d at 144-45. The appellate court examined the language of the Act and concluded:

> "It is clear from the plain language of the Act, when looking at [sections 18.3, 18.2(a), and 18.4] together, that the condominium association is responsible for the overall administration of the property. This responsibility is ordinarily performed through the association's duly elected board of managers. However, during the interim period from the time of the declaration until the election of the initial board of managers, the Act provides that the rights, powers, privileges, duties and obligations

> of the board of managers are held and performed by the developer. The Act charges the board of managers with exercising all powers, duties and authority vested in the association *on behalf of the association*. This does not mean the duties of the association are imposed on the developer in the interim period and the association itself therefore has no duties. Rather, the duties of the association that would normally be performed by its duly elected board of managers are to be performed by the developer as the interim board on behalf of the association until the initial board of unit owners is elected. The duties of the board of managers include maintenance of the common elements and hiring of personnel as necessary for such maintenance, collecting and expending assessments, and obtaining adequate insurance, all on behalf of the association. Moreover, the members of the board have a fiduciary duty to the unit owners regardless of whether they are elected by the unit owners or appointed by the developer." (Emphasis in original.) *Glickman*, 388 Ill. App. 3d at 146-47.

Thus, the court concluded that "the Association had a duty to maintain the common elements of the property prior to the election of the initial board, and the developer acted as the interim board of managers to carry out that duty on behalf of the Association." *Glickman*, 388 Ill. App. 3d at 150.

¶ 56 Although the facts are slightly different than those of the instant case, *Glickman* makes clear that the duty to maintain the common areas rests with the association, whether represented by a duly elected board of managers or not. Additionally, *Glickman* involves a situation where there was an individual acting on behalf of the association because a duly elected board did not exist. Thus, by analogy, we may consider whether there was an entity

acting as an interim board of managers that carried out the duties of Shalamar in the case at bar.[2]

¶ 57 The record indicates that Shalamar was the association for unit owners of 96 units in two buildings, and that First Security held title to 54 of those units; of the 40 units in the building that was flooded, First Security held title to 37 of those units. Thus, First Security owned 56.25% of the units in the two buildings combined, and owned 92.5% of the units in the building that was flooded. Plaintiff alleges in his complaint that First Security represented to the tenants that it owned the property and was responsible for the common areas. Plaintiff also alleges that First Security prevented the previous management company from having access to the building, common areas, and premises through a court order.[3] Most significantly, plaintiff alleges that RMK, as First Security's agent, installed its own locks on the common areas of the building, including the basement, thereby preventing access by others to those areas. These allegations that First Security physically asserted control over the common areas give rise to the inference that First Security was, in fact, responsible for the upkeep of those areas and was acting as an interim board of managers, especially at this early stage of the proceedings. We note that Schnell's affidavit does not dispute plaintiff's allegations that First Security, through RMK, installed locks on the doors to the common

[2] This reasoning also applies in the general corporate context, where courts have found that "[c]orporate officers exercising the functions of their offices under color and claim and authority, even if unlawfully elected, are nevertheless *de facto* officers." *H&H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679 (1994); *Levin v. 37th Street Drug & Liquors, Inc.*, 103 Ill. App. 3d 248, 254 (1968); *Jack v. Oakbrook Terrace Community Park District*, 31 Ill. 2d 390, 391-92 (1964). See also *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 37 (upholding trial court's conclusion that two individuals served as *de facto* officers of the defendant, "effectively controlling its operations").

[3] First Security takes issue with the statement in its brief, arguing that neither Luigi Adamo nor Broad Shoulders, the former management company, were enjoined from entering the property. However, the court order referenced by plaintiff states that "Luigi P. Adamo, acting as an agent for the previous owner of the subject property[,] has represented to the tenants that he owns the property and that he has continued to collect rent from the tenants living at the subject building even after [First Security] became the owner of the building." The order then states that "2206 and 2210 Goebbert LLCs, Vincenzo Adamo *and anyone acting on their behalf* are prohibited from *** entering the property." (Emphasis added.) Thus, while Luigi Adamo is not mentioned by name in that part of the order, plaintiff's statement is not inaccurate.

areas. We further note that the record indicates that First Security, as owner of over 50% of the units in the association, had the power to call a special meeting and elect a board of managers at any time, but for whatever reason chose not to do so until August 2011, despite the fact that the order of judicial sale occurred in December 2010 and First Security was deeded the property in January 2011.

¶ 58 If First Security was acting as an interim board of managers, then, as *Glickman* notes, it owed a fiduciary duty to unit owners in discharging the association's responsibilities. However, plaintiff alleges in count I of his complaint that First Security acted willfully and wantonly. The record indicates that Shalamar was a not-for-profit corporation organized under the General Not For Profit Corporation Act of 1986 (the Not For Profit Act) (805 ILCS 105/101.01 *et seq.* (West 2010)). Under the Not For Profit Act, a director or officer serving without compensation is not liable for damages resulting from the exercise of judgment in connection with his duties "unless the act or omission involved willful or wanton conduct." 805 ILCS 105/108.70(a) (West 2010). Thus, if First Security was determined to be acting willfully or wantonly, as alleged in count I of plaintiff's complaint, First Security could be liable for plaintiff's damages.

¶ 59 We also note that the Act provides that "[a] unit owner shall be liable for any claim, damage or judgment entered as a result of the use of operation of his unit, *or caused by his own conduct*." (Emphasis added.) 765 ILCS 605/9.1(a) (West 2010). If plaintiff can prove the facts alleged in his complaint, which indicate that First Security barred access to the basement through the placement of its own locks, then this section could also possibly be implicated. At this early stage of the proceedings, we cannot say, as a matter of law, that First Security is not liable for plaintiff's injuries due to its lack of control over the common areas.

Accordingly, count I of plaintiff's complaint should not have been dismissed under section 2-619.

¶ 60 II. Plaintiff's Other Relief

¶ 61 Plaintiff also argues that the trial court erred in denying his request to amend the complaint or to voluntarily dismiss the action. The trial court's decision of whether to grant a motion to amend pleadings is within the discretion of the trial court, and the reviewing court will not reverse the trial court's decision absent an abuse of discretion. *Shutkas Electric, Inc. v. Ford Motor Co.,* 366 Ill. App. 3d 76, 82 (2006). "An abuse of discretion occurs when no reasonable person would take the view adopted by the court." *Trettenero v. Police Pension Fund,* 333 Ill. App. 3d 792, 801 (2002) (citing *In re Marriage of Blunda,* 299 Ill. App. 3d 855, 865 (1998)). In considering whether the trial court has abused its discretion in denying plaintiff's motion for leave to file a third amended complaint, we look to the following four factors: "whether (1) the proposed amendment would cure the defective pleading; (2) other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) the proposed amendment is timely; and (4) previous opportunities to amend the pleading could be identified. [Citation.]" *Shutkas Electric.,* 366 Ill. App. 3d at 82.

¶ 62 In the case at bar, as noted in our discussion of counts I and IV of plaintiff's verified second amended complaint, there are facts in plaintiff's verified second amended complaint that could state a cause of action for each of these counts if they were properly pleaded. Thus, a third amended complaint could cure the defective pleading. Additionally, plaintiff's request to amend his complaint was timely, as it was first raised in his response to defendants' motions to dismiss. We also note that while this would be plaintiff's third amendment, plaintiff is operating at a disadvantage, as his earlier complaints include

allegations that he has been given conflicting information as to ownership and control, including from defendants. Additionally, each of plaintiff's amendments has resulted in a clearer, more detailed complaint. While we recognize that defendants could claim prejudice by virtue of the lawsuit proceeding, the circumstances of this case indicate that plaintiff should have been permitted to amend his complaint.

¶ 63 CONCLUSION

¶ 64 The trial court properly dismissed counts II, III, and part of count IV of plaintiff's verified second amended complaint, where those counts did not state causes of action. However, the trial court should not have dismissed the portion of count IV concerning First Security's failure to disclose the clogged sewer and history of flooding with prejudice, as plaintiff's allegations could have stated a cause of action under the Consumer Fraud Act. Additionally, the trial court erred in dismissing count I of plaintiff's complaint with prejudice, as plaintiff alleged facts that could state a cause of action for negligence or willful and wanton negligence and also alleged that First Security's conduct demonstrated control over the common areas of the property. Finally, plaintiff should have been permitted to amend his complaint to cure the defects in the second amended complaint.

¶ 65 Affirmed in part and reversed in part; cause remanded.