

No. 1-14-3326

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

CLEO BRIDGES,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant)	Cook County
)	
)	
)	
v.)	No. 13 L 14069
)	
7303 INCORPORATED, d/b/a START REHAB, INC.,)	
HAMMOND AVENUE, INC., GREGORY BINGHAM,)	
ANN KANN, TOM "DOE," J REHAB, JUAN)	
MARQUEZ, FARAH HOGAN, and BARCLAY BUTLER)	Honorable
FINANCIAL, INC.,)	Eileen M. O'Neill Burke,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing plaintiff's complaint.

¶ 2 Plaintiff Cleo Bridges appeals from an order of the circuit court granting defendants' 7303 Incorporated d/b/a Start Rehab, Greg Bingham, Hammond Avenue, Inc., and Ann Kann's motion to dismiss her complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)) and defendants' Barclay Butler Financial, Inc. and

Farah Hogan's motions to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). On appeal, plaintiff argues that the trial court erred when it granted defendants' motions to dismiss where: (1) the complaint stated sufficient facts to state a cause of action for common law fraud and a violation of the Illinois Consumer Fraud Act (Act) (815 ILCS 505/2 (West 2012)); (2) her claims were not barred by the statute of limitations; (3) defendants Barclay Butler, Inc., and Farah Hogan were involved as fiduciaries and are therefore barred from claiming that they lacked direct involvement. Plaintiff also argues that the trial court erred in dismissing her complaint with prejudice and denying her request to amend her complaint. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 For purposes of this appeal we recite and accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from these facts in favor of plaintiff. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003).

¶ 5 On December 12, 2013, plaintiff filed a two-count complaint against defendants alleging common law fraud in count I and violations of the Act in count II. 815 ILCS 505/2 (West 2012). Plaintiff alleged that after receiving a Start Rehab flyer about owning a newly rehabbed home for about \$300 a month, senior citizens Cleo Bridges and her husband William Bridges called Start Rehab and obtained a list of available properties. After they viewed a few of the properties, the Bridges chose a home at 330 West 102nd Place in Chicago. At the time they viewed this property, work was being done to the home.

¶ 6 In September 2009, the Bridges visited Start Rehab's offices and spoke to "Tom." Annie or Ann Kahn, another Start Rehab representative, told them that they would have to make

payments of \$250 per month to start the process. Tom told them that after those payments were made Mr. Bridges would be able to obtain a reverse mortgage on the property. They would also be required to make a \$1,500 down payment on the home. The Bridges decided to go forward and paid the \$1,500 down payment and signed some paperwork that was required to start the purchase of the home "through Start Rehab's reverse mortgage senior home buying program." They did not receive copies of all of the documents that they signed. "Tom" also informed the Bridges that they would have to live in the home and make monthly payments for seven or eight months before they would be able to obtain the reverse mortgage and title to the property. Plaintiff asked "Tom" if she would be able to get a reverse mortgage in her own name at a later date. "Tom" told her that at the closing her name would be included on the deed so that she would be able to get her own reverse mortgage in the future if her husband passed away.

¶ 7 The Bridges moved into the home in October 2009 and began making the monthly payments. On or about October 26, 2009, Start Rehab along with Gregory Bingham, the beneficiary of the trust, recorded a trustee's deed dated September 22, 2009, with the Cook County Recorder of Deeds, that conveyed title to the property in Mr. Bridges' name only. The Bridges were unaware of the existence of the deed. The trust controlled by Bingham had purchased the property at 330 West 102nd Place in Chicago after foreclosure on March 3, 1999, for \$16,000. Defendants sold the property to Mr. Bridges six months later for \$134,000. Also, on October 26, 2009, Start Rehab and Bingham recorded a mortgage dated September 9, 2009, for \$34,590. The mortgagor was Hammond Avenue, Inc. Hammond Avenue, Inc.'s place of business was a single family home operated by a limited liability company owned and controlled by Bingham. The Bridges were unaware of the existence of this mortgage.

¶ 8 According to the complaint, Hammond Avenue was not a licensed lender or mortgage company and was not a registered corporation in the State of Illinois. Plaintiff further alleged that Hammond Avenue is a fictitious entity controlled by Bingham and used to skim equity out of the properties he purports to sell pursuant to his reverse mortgage senior home buying program.

¶ 9 According to plaintiff, about June 2, 2010, Start Rehab and Bingham recorded a \$69,886 mechanic's lien on behalf of Juan Marquez of J Rehab against the property for the performance of work and delivery of material. Because the work on the property was nearly complete at the time the Bridges moved in, they were unaware of the mechanic's lien. Plaintiff further alleged that J Rehab is a fictitious entity controlled by Bingham. The mechanic's lien was notarized by Ann Kahn, a Start Rehab representative.

¶ 10 The Bridges made their initial "mortgage billing" payments of \$250 to Hammond Avenue, Inc., at a south Wabash address. After plaintiff visited that address and found a vacant, boarded-up single family home, plaintiff called Start Rehab for clarification. She was told by an employee to send payments to "Western Sites" at an "Avondale address." However, subsequent billing statements directed the Bridges to make payments to Hammond Avenue at "the Avondale address." In mid-2010, the payments increased to \$453, which included "accrued/prorated property tax & insurance escrow." The Bridges made the payments as required.

¶ 11 The Bridges completed federally required counseling for obtaining a reverse mortgage in October 2010. The closing on the reverse mortgage took place on December 13, 2010. By this time, plaintiff was 63 years old and was qualified by age to obtain a reverse mortgage. Mr. Bridges was 10 years older than plaintiff. At the closing, plaintiff noticed that her name was not

on the mortgage papers. She inquired about why her name was left off the mortgage and was told by Farrah Hogan of Barclay Butler Financial that the loan papers needed to be in Mr. Bridges name "for everything to work." Plaintiff alleged that the "reason defendant engineered the loan to be in Mr. Bridges name alone is that he was about ten years older than [plaintiff] and therefore they could extract much more value from the reverse mortgage." Plaintiff also alleged that Hogan then told plaintiff that her name would be put on the deed so that she would be able to obtain her own reverse mortgage in the future. Plaintiff believed that her name was put on the deed at closing. Releases of the Hammond Avenue mortgage and the mechanic's lien were executed on January 4, 2011. The reverse mortgage "of nearly \$90,000" was executed on December 13, 2010, and recorded on January 24, 2011. Defendants "received at least \$85,467 of the mortgage proceeds."

¶ 12 When Mr. Bridges became ill two years later, plaintiff contacted the reverse mortgage company to inquire about getting her own reverse mortgage. Plaintiff was told that her name was not on title to the property so she would not be able to obtain a reverse mortgage if her husband passed away. She was told that she would have to refinance the entire balance due at that time in order to keep the home. The expected pay-off balance of the reverse mortgage was more than the value of the property and therefore it would be impossible for plaintiff to obtain a reverse mortgage after Mr. Bridges passed away. A conventional mortgage was unobtainable given plaintiff's income. Mr. Bridges passed away on September 25, 2013.

¶ 13 As to count I, plaintiff alleged that defendant made numerous material false representations and deceptive omissions that were false and misleading with the intent to deceive plaintiff and induce her to enter into the subject transaction to her detriment. Plaintiff further

alleged that Bingham and the entities controlled by him engaged in a pattern of deceiving elderly home buyers into believing that they were acquiring homes through a reverse mortgage program where they would only have to pay taxes, insurance and utilities and have a home they could live in for the rest of their lives. She also alleged that Bingham created a scheme to defraud individuals and financial institutions by using sham transactions, fictitious liens, and fraudulent appraisals to obtain the financing to pay off the false liens and thereby sell real estate for far greater than its actual market value.

¶ 14 As to count II, plaintiff alleged that defendants violated the Act when they made the following fraudulent misrepresentations and omissions of material fact:

- "a. Soliciting elderly consumers with misleading advertising;
- b. Misleading the Bridges into thinking that they could live in the home for the rest of their lives for only the cost of taxes, insurance, and utilities;
- c. Recording false liens to inflate the value of the property to make it appear that there were \$69,000 worth of improvements made;
- d. Misrepresenting and omitting the nature of documents signed by plaintiff and her husband;
- e. Misleading plaintiff as to the nature of services offered by Start Rehab;
- f. Acting as an unlicensed mortgage broker;
- g. Acting as an unlicensed mortgage lender; and
- h. Acting as an unlicensed real estate broker."

Plaintiff further alleged that these statements were material and were made with the purpose of inducing the Bridges to enter into the transaction.

¶ 15 Pursuant to section 2-619.1, defendants Start Rehab, Hammond Avenue, Inc., Greg Bingham and Ann Kann moved to dismiss plaintiff's complaint. 735 ILCS 5/2-619.1 (West 2012). These defendants argued that plaintiff failed to state a cause of action for common law fraud under count I pursuant to section 2-615 (735 ILCS 5/2-615 (West 2012)). They also argued that plaintiff's count II for violation of the Act should be dismissed pursuant to section 2-619 for being brought outside of the statute of limitations (735 ILCS 5/2-619 (West 2012)). Defendants Farrah Hogan and Barclay Financial moved to dismiss plaintiff's complaint pursuant to section 2-615 on the basis that plaintiff failed to allege the required element of common law fraud and a violation of the Illinois Consumer Fraud Act. 735 ILCS 5/2-615 (West 2012). Plaintiff generally opposed defendants' motions.

¶ 16 After a hearing, the circuit court dismissed plaintiff's complaint with prejudice. The court determined that count I for common law fraud must be dismissed because plaintiff failed to allege specific facts that stated an action for common law fraud, and she did not set forth any facts to bring such a claim where she was not a party to the real estate transaction involving her husband. 735 ILCS 5/2-615 (West 2012). In addition, the court dismissed count II for violations of the Illinois Consumer Fraud Act count because plaintiff failed to bring her claim within the applicable three-year statute of limitations. 735 ILCS 5/2-619 (West 2012). The court subsequently denied plaintiff's motion to reconsider and motion to file an amended complaint. It is from these orders that plaintiff now appeals.

¶ 17 ANALYSIS

¶ 18 Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2012)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section

2-619 (735 ILCS 5/2-619 (West 2012)) motion to dismiss based on certain defects or defenses. A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint and does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). In comparison, a section 2-619 motion to dismiss allows for an involuntary dismissal of a claim based on certain defects or defenses. The basis of the 2-619 motion must go to an entire claim or demand. *Id.* Section 2-619 provides that an action may be dismissed, on the motion of the defendant, based on various enumerated defenses (735 ILCS 5/2-619(a)(1)-(8) (West 2012)), including the defense that “the action was not commenced within the time limited by law” (735 ILCS 5/2-619(a)(5) (West 2012)). “It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,] to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party.” *Edelman, Combs and Lattuner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)). “Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619.” *Edelman*, 338 Ill. App. 3d at 164.

¶ 19 Plaintiff first claims that the trial court erred when it granted defendants' motions to dismiss her complaint where she alleged sufficient facts to state a cause of action for a violation of the consumer fraud act and common law fraud.

¶ 20 The elements of common law fraud are: (1) false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induces the plaintiff to act; (4) plaintiff's reliance on the statement; and (5) plaintiff's damages

resulting from reliance on the statement. *Connick v. Suzuki Motor Co.* 174 Ill. 2d 482, 496 (1996). The elements of fraud must be pled with sufficient particularity, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made. *Board of Education of the City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 457 (1989).

¶ 21 Plaintiff alleges that she provided ample factual support in her complaint to establish common law fraud. Here, she argues that in her complaint she alleged that all of defendants made false statements of material fact including soliciting elderly consumers with false advertising, leading the Bridges into thinking they could live in the house for the rest of their lives for only the cost of taxes, insurance, utilities and a small down payment, recording a secret deed and phony liens to make it appear that substantial improvements were made and to inflate the value of the property to lenders, misrepresenting, withholding and omitting documents, and misleading plaintiff as to the nature of the services offered by Start Rehab.

¶ 22 In count I of her complaint, plaintiff "incorporates by reference paragraphs 1-70 above by reference herein" and states that "defendants made numerous material false presentations and deceptive omissions, as set forth above, to Mrs. Bridges." Plaintiff further alleged that defendants "knew their presentations and omission" were false and misleading and made them "intentionally in order to deceive [plaintiff] and induce her to enter into the subject transaction."

¶ 23 Our review of plaintiff's allegations as contained in count I shows that plaintiff has failed to allege specific instances of material false representations and deceptive omissions. As stated, the elements of fraud must be pled with sufficient particularity, including what misrepresentations were made, when they were made, who made the misrepresentations and to

whom they were made. *Board of Education of the City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 457 (1989).

¶ 24 Notwithstanding the lack of factual specificity, the facts alleged do not support a claim for common law fraud. The crux of plaintiff's argument is that she was told that she would be able to obtain a reverse mortgage upon her husband's passing. After her husband's death she was unable to refinance the balance due on the mortgage and faces foreclosure.

¶ 25 The facts, as alleged in the complaint, establish that Mr. Bridges entered into a contract to purchase the property. The property was conveyed to Mr. Bridges by a trustee's deed, on which plaintiff was not named. Mr. Bridges obtained an initial mortgage with Hammond Avenue. The Bridges made mortgage, tax and insurance payments to Hammond Avenue. Defendants then recorded a mortgage and a mechanic's lien on the property to secure compensation for the rehabilitation of the property. Subsequently, Mr. Bridges obtained a reverse mortgage on the property and used those funds to pay defendants for their work and for the purchase of the property. Plaintiff specifically alleged that it was Mr. Bridges who "would be able to get a reverse mortgage," not plaintiff and Mr. Bridges. Plaintiff's name appeared on none of the documents; she was not named on the contract, the trustee's deed, the initial mortgage to Hammond Avenue or the reverse mortgage. As far as we can ascertain, prior to his death Mr. Bridges did not convey to plaintiff any ownership interest in the property.

¶ 26 The alleged false statements made by defendants regarding plaintiff's ability to obtain a reverse mortgage on the property at a later date were not false statements of material fact because plaintiff's ability to obtain a reverse mortgage on the property would be contingent on her obtaining a property interest, which never occurred, and qualifying for a reverse mortgage.

Despite plaintiff's argument to the contrary, after the execution of the trustee's deed to Mr. Bridges, defendants were in no position to ensure that plaintiff would be able to secure a reverse mortgage and it was not reasonable for plaintiff to rely on that representation. Even if these statements could be viewed as false misrepresentations, under Illinois law, common law fraud claims may not be based on "statements regarding future events." *People ex rel. Peters v. Murphy-Knight*, 248 Ill. App. 3d 382, 387 (1993). Furthermore, plaintiff was never "induced to enter into the transaction to her severe detriment." In fact, she was never a party to the real estate transaction that is the subject here. We therefore find the trial court properly dismissed count I against defendants Start Rehab, Hammond Avenue, Inc., Greg Bingham and Ann Kann.

¶ 27 Plaintiff also claims that Hogan and Barclay Financial are liable for common law fraud. She argues that Hogan and Barclay Financial had a fiduciary duty to her as the borrower and, by misrepresenting plaintiff's status on the title and her ability to remain in her home after her husband's death, they are liable for common law fraud. Defendants Hogan and Barclay Financial argued in their motion to dismiss that no fiduciary relationship existed and plaintiff failed to state a cause of action for common law fraud.

¶ 28 A mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law. *Northern Trust Co. v. Halas*, 257 Ill. App. 3d 565, 572 (1993). Where the alleged fiduciary relationship does not exist as a matter of law, the party claiming that a fiduciary relationship exists must plead facts from which a fiduciary relationship arises. *Santa Claus Industries, Inc. v. First National Bank*, 216 Ill. App. 3d 231, 238 (1991).

¶ 29 Plaintiff's allegations do not support the existence of a fiduciary relationship here. There simply is no fiduciary relationship between plaintiff and Hogan and Barclay Financial and there

never was. There are no facts alleged that plaintiff applied for the reverse mortgage jointly with her husband, and as plaintiff has clearly plead, she was not named on the reverse mortgage.

Therefore, plaintiff has failed to allege sufficient facts to demonstrate a fiduciary relationship and her claim against Hogan and Barclay Financial must fail.

¶ 30 Even absent a fiduciary relationship, plaintiff's argument holds no weight. Again, the elements of fraud must be pled with sufficient particularity. *Board of Education of the City of Chicago*, 131 Ill. 2d at 457. The facts alleged by plaintiff with respect to defendants Hogan and Barclay Financial were meager at best and lack the necessary particularity. Plaintiff alleged that when she inquired about her name not being on the mortgage documents, Hogan told her that everything had to be in her husband's name alone "for everything to work." Hogan also told her that her name would be put on the deed so that should be able to get her own reverse mortgage in the future. Plaintiff suggests, without factual support, that Hogan knew this information to be false and knew that plaintiff would never be able to obtain a reverse mortgage. Unfortunately for plaintiff, these alleged statements relate to future events that cannot be the basis of a common law fraud claim. *People ex rel. Peters*, 248 Ill. App. 3d 382 at 387.

¶ 31 In addition, plaintiff alleged that Hogan and Barclay would somehow have received a higher commission on the loan by including only Mr. Bridges' name on the mortgage. Plaintiff has failed to plead sufficient facts related to this claim to establish an action for common law fraud and the trial court properly dismissed this claim.

¶ 32 The Illinois Consumer Fraud Act provides broader consumer protection than the common law action of fraud by prohibiting any deception or false promises. *Smith v. Prime Cable*, 276 Ill. App. 3d 843, 856 (1995). Therefore, to state a cause of action for statutory fraud, a party need

not prove all the elements of common law fraud. *Salkeld v. V. R. Business Brokers*, 192 Ill. App. 3d 663, 677 (1989). The elements necessary to sustain a cause of action under the Illinois Consumer Fraud Act are: (1) a statement by the seller; (2) of an existing or future material fact; (3) that was untrue, without regard to defendant's knowledge or lack thereof of such untruth; (4) made for the purpose of inducing reliance; (5) on which the victim relies; and (6) which resulted in damages to the victim. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996).

¶ 33 The statute of limitations for an action under the Act is three years and begins to run when the cause of action accrues. 815 ILCS 505/10a(e) (West 2012). A cause of action not filed within the statute of limitations is time barred. 815 ILCS 505/10a(e) (West 2012).

¶ 34 Taking the allegations in her complaint as true, plaintiff has alleged several instances in her complaint, the earliest in September 2009 and the latest in June 2010, which would have shifted the burden to plaintiff to inquire further as to the existence of a cause of action for a violation of the Act. First, plaintiff was aware that she was not a party to the real estate contract on September 9, 2009, when Mr. Bridges alone signed the contract. Also, according to the complaint, plaintiff was aware "at the time of the initial transaction [September 9, 2009] and when the Bridges moved into the property [October 26, 2009]" that she would not be named on the eventual reverse mortgage but "her name would be included on the deed [at closing] so she would be able to get her own reverse mortgage in the future, after her husband passed away." Although plaintiff claims that she and her husband were completely unaware of the "purported mortgage" recorded on October 26, 2009, this court notes the fact that the mortgage granted to Hammond Avenue on September 9, 2009, bears only the signature of what appears to be William Bridges and is notarized. At the very least, plaintiff should have been aware of the existence of

the mortgage when, after they moved into the home in October 26, 2009, they began receiving "mortgage billing statements" from Hammond Avenue, Inc. Plaintiff even went so far as to investigate where she was mailing her monthly payments and discovered that she was mailing them to Hammond Avenue at a vacant, boarded-up single family home. After being given a different address to mail her payments to, she continued to mail mortgage payments to Hammond Avenue at a different address. After that, a mechanic's lien was recorded against the property on June 2, 2010. By waiting to file suit until December 12, 2013, plaintiff's claims were brought well outside of the three year statute of limitations. 735 ILCS 5/2-619(a)(5) (West 2012). Therefore, the trial court properly dismissed count II of plaintiff's complaint against all defendants for failing to bring the complaint within the three year statute of limitations. 619(a)(5) (West 2012)). Therefore, the trial court properly dismissed count II of plaintiff's complaint against all defendants for failing to bring the complaint within the three year statute of limitations.

¶ 35 Finally, plaintiff argues that the trial court abused its discretion in dismissing the complaint with prejudice and in refusing to permit plaintiff to file an amended complaint.

¶ 36 A circuit court should consider the particular facts and unique circumstances of the case when deciding whether to dismiss a complaint with or without prejudice. *Ingold v. Irwin*, 302 Ill. App. 3d 378, 384 (1998). The trial court's determination of whether to dismiss an action with or without prejudice rests within the sound discretion of the court, and we will disturb such a determination on appeal only if it constitutes an abuse of discretion. *Ingold*, 302 Ill. App. 3d at 383. An abuse of discretion occurs when no reasonable person would take the circuit court's view. *Fennel v. Illinois Central Railroad Co.*, 2012 IL 113812, ¶ 59.

¶ 37 A trial court should exercise its discretion liberally in favor of allowing amendments to pleadings if doing so would further the ends of justice. *Alpha School Bus Co. v. Wagner*, 391 Ill. App.3d 722, 748 (2009). However, the privilege to amend is not absolute. *Id.* To determine whether to allow an amendment, a trial court should consider (1) whether the proposed amendment would cure defective pleadings, (2) whether other parties would sustain prejudice or surprise because of the proposed amendment, (3) the timeliness of the proposed amendment, and (4) whether there were earlier opportunities to amend. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). We will not reverse a trial court's decision to deny a motion to amend a pleading unless the trial court abused its discretion. *Id.* at 273-74.

¶ 38 Here, the trial court did not abuse its discretion in dismissing plaintiff's complaint with prejudice and refusing to permit plaintiff to file an amended complaint. The trial court considered each of plaintiff's arguments and determined that dismissal was required. No amendment to plaintiff's complaint could have cured its basic errors. First, plaintiff was not a party to the relevant real estate transactions at issue here. Second, any representations made by Start Rehab or its representative or Farrah Hogan and Barclay Financial regarding plaintiff's ability to obtain a reverse mortgage in the future was not actionable under common law fraud as they involve future occurrences. *People ex rel. Peters*, 248 Ill. App. 3d at 387. Furthermore, plaintiff's ability to obtain a reverse mortgage in the future was dependent on numerous contingencies, including having an ownership interest in the property, a qualifying financial background and the value of the mortgaged property. In addition, nothing plaintiff could have plead in an amended complaint would have cured the fact that her count II for a violation of the Act was time barred. Accordingly, we find that the trial court did not abuse its discretion by

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dismissing the complaint with prejudice and denying plaintiff's motion to file an amended complaint.

¶ 39

CONCLUSION

¶ 40 Based on the foregoing, we affirm the order of the trial court dismissing plaintiff's complaint.

¶ 41 Affirmed.