FOURTH DIVISION
February 18, 2016

1-15-2193

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KATHY POSNER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 13224
	)	
SOHEILA T. BROUK, BAIRD & WARNER RESIDENTIAL SALES, INC., RICHARD CEBULAK, and CATHRYN BROWNE,	)	Honorable
	)	Eileen O'Neill Burke,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment granting defendants' motion to dismiss plaintiff's complaint with prejudice is affirmed in part and reversed in part; the dismissal with prejudice of the common law fraud claim in count IV is affirmed, and the dismissal of counts II, III, and V with prejudice is reversed. Plaintiff stated a claim for Consumer Fraud in Count V, and we cannot say plaintiff can prove no set of facts under which she can prevail on her complaint against defendants for negligent or intentional misrepresentation in counts II and III.

¶ 2 Plaintiff, Kathy Posner, purchased a condominium from Soheila T. Brouk. Brouk is not a party to this appeal. Defendant Baird & Warner Residential Sales, Inc. (Baird & Warner) represented Brouk and listed the condominium for sale. Defendant Cathryn Browne is a broker associate for Baird & Warner and was designated as Brouk's agent. Defendant Richard Cebulak is the managing broker of the Baird & Warner office that listed the condominium for sale. The basis of plaintiff's complaint is that the listing stated the condominium included parking for two cars in the purchase price, but plaintiff cannot park two cars in the single parking space included with the purchase of the condominium. Defendants Baird & Warner, Cebulak, and Browne filed a motion to dismiss the complaint on the grounds plaintiff failed to state a claim for relief. The circuit court of Cook County granted defendants' motion with prejudice.

¶ 3 For the following reasons, we affirm in part, reverse in part, and remand.

¶ 4 BACKGROUND

¶ 5 Plaintiff alleges she was led to believe she was purchasing a condominium with parking for two cars and she was sold a condominium with parking for only one car. Plaintiff claims she paid an inflated price based on believing there was parking for two cars. The listing for the condominium read, in pertinent part, as follows: "Tandem indoor garage parking for 2 cars included in price." The listing also stated as follows: "All information provided is deemed reliable but is not guaranteed and should be independently verified." Plaintiff completed her purchase of condominium unit 1003S located at 1221 N. Dearborn in Chicago on July 28, 2014. The condominium plaintiff purchased included parking space number 78 in the parking garage in plaintiff's building. On December 23, 2014, plaintiff filed a five-count

complaint based on the alleged fact that "parking space #78 is a space intended for the use and parking of one motor vehicle." Count I of the complaint is a claim for breach of contract against the seller Brouk, who is not a party to this appeal. Plaintiff filed Counts II through IV against all codefendants and Count V against Cebulak, Browne, and Baird & Warner.

¶ 6 Plaintiff alleges negligent misrepresentation in Count II, intentional misrepresentation in Count III, and common law fraud in Count IV. Count IV of plaintiff's complaint "incorporates the entirety of Count III." Plaintiff alleges consumer fraud in Count V. One of the exhibits attached to plaintiff's complaint was a printout of an email communication between plaintiff and the property manager of the condominium building. Plaintiff wrote as follows:

> "Thank you for speaking to me today, August 8 [(eleven days after plaintiff closed on the property)], and verifying that unit 1003S only comes with one parking space. [Could] you please e-mail me back confirming that previous owner Soheila Brouk knew that she had only one parking space because there was only one number on the space--#78."

The property manager responded as follows:

> "It is common knowledge that although there are parking spaces of different sizes and shapes at The Towers Condominium Association, that each individual parking space has it's [*sic*] own number. There are a number of owners who capitalize on the fact that their spaces are large enough to squeeze two cars in, but that doesn't alter the fact that it is a single parking space identified by its unique number.

> I cannot say what Soheila knew, but she did have difficulty parking two cars in one space and we talked about it. The parking space is also appurtenant to the title and is designated by a single number."

¶ 7 Defendants filed a motion to dismiss Counts II through V of plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). Defendants argued plaintiff improperly asserted two claims based on fraud (Counts III and IV); Cebulak is not a proper defendant because Browne, not Cebulak, represented the seller; and plaintiff failed to allege or assert facts to support an allegation of justifiable reliance for her claims of negligent misrepresentation (Count II) and intentional misrepresentation or fraud (Count III, IV). Specifically, defendants argued Counts III and IV were redundant and therefore Count IV should be dismissed; plaintiff failed to allege sufficient facts against Cebulak as to any claims; and plaintiff failed to allege that her reliance on the alleged misstatements was justifiable, or to allege facts to demonstrate that the reliance was reasonable, in support of her intentional misrepresentation and negligent misrepresentation claims, respectively.

¶ 8 Alternatively, defendants argued that even if plaintiff did plead justifiable or reasonable reliance, exhibits to plaintiff's complaint demonstrate that her reliance on defendants' alleged misstatements was neither justifiable nor reasonable because "the contract which is attached to the Verified Complaint states there is only one space '# 78 tandem' which was being assigned as part of the transaction. " Defendants further note that plaintiff did not allege she cannot park two cars in the space. Defendants concluded plaintiff "had ample opportunity to read and review documents which could further confirm that she was purchasing one parking

space which could accommodate two vehicles," therefore Counts II through IV should be dismissed. Defendants further argued Counts II through V should be dismissed because the contract advised plaintiff she was purchasing one numbered parking space thereby curing any misrepresentation that plaintiff was purchasing two numbered parking spaces. Defendants also moved to strike plaintiff's prayer for attorney fees.

¶ 9 Following briefing by the parties, on July 14, 2015 the trial court entered a written order. The trial court found plaintiff alleged she purchased a single numbered space and the fact "the space may have been able to accommodate two or more cars *** is of no consequence" given plaintiff knowingly purchased one space and no other. The trial court also wrote that plaintiff "later discovered that it was indeed possible to fit two cars within the single space, as stated by the property manager." The court also found plaintiff's reliance on defendants' alleged statements was unreasonable because plaintiff had the opportunity to view the space in question. The court concluded "the basis of [plaintiff's] claims arise out of her alleged understanding that she [(plaintiff)] was purchasing a single parking space which could potentially accommodate two cars, which is confirmed not only in the listing itself, but by the property manager of the building in question." The court granted defendants' motion to dismiss with prejudice.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 A motion to dismiss pursuant to section 2-615 of the Code tests the legal sufficiency of the complaint and will be granted if the well-pled facts are not sufficient to state a cause of action. *CNA International v. Baer*, 2012 IL App (1st) 112174, ¶¶ 29, 30. The court should

interpret the factual allegations in the complaint in the light most favorable to the plaintiff, "but factual deficiencies may not be cured by liberal construction. [Citation.]" (Internal quotation marks and citations omitted.) *Id.* ¶ 30. "A complaint should be dismissed under section 2–615 for failure to state a cause of action only when it clearly appears that no set of facts could be proved under the pleadings which would entitle the plaintiff to relief. [Citation.]" (Internal quotation marks and citations omitted.) *Id.* However, "a complaint should be dismissed with prejudice only if it is apparent that the plaintiff can prove *no set of facts* that will entitle him or her to recover. [Citation.]" (Emphasis added.) *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008). The decision to grant a section 2-615 motion to dismiss is reviewed *de novo*. *Id.* at 404. "Where a claim can be stated, the trial court abuses its discretion if it dismisses the complaint with prejudice and refuses the plaintiff further opportunities to plead. [Citation.] We thus review the trial court's decision to dismiss a complaint with prejudice for an abuse of discretion. [Citation.]" *Id.*

¶ 13 Plaintiff argues she pled sufficient facts to state a cause of action for her claims against defendants Browne and Baird & Warner in Counts II through V and, alternatively, the trial court erred in dismissing the complaint with prejudice thereby denying plaintiff an opportunity to replead. Plaintiff has conceded that her complaint did not contain sufficient facts to state a claim against defendant Cebulak. Plaintiff did not make clear whether she also conceded that she can prove no set of facts that would entitle her to recover against Cebulak, but that is of no moment. For the reasons that follow, we hold the trial court properly dismissed plaintiff's complaint for failure to state a cause of action, but the court abused its

discretion when it dismissed the complaint with prejudice and did not afford plaintiff an opportunity to replead.

¶ 14 1. Counts II, III, and IV

¶ 15 Initially we note that Count III and Count IV of plaintiff's complaint are identical not only because they contain the exact same allegations but also because intentional misrepresentation is simply another name for fraud. *Abazari v. Roaslind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 14 (citing *Soules v. General Motors Corp.*, 79 Ill. 2d 282, 286 (1980)). The trial court properly dismissed one of them. *Calhoun v. Rane*, 234 Ill. App. 3d 90, 95 (1992) ("duplicative count may be properly dismissed").

¶ 16 To prevail on a claim of intentional misrepresentation (Count III of plaintiff's complaint), a plaintiff must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance." *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008). Fraudulent misrepresentation and negligent misrepresentation have essentially the same elements. Only the defendant's mental state is different, and for negligent misrepresentation, the plaintiff must also allege the defendant owes the plaintiff a duty to communicate accurate information. *Id.* at 360. Thus, to state a cause of action for negligent misrepresentation (Count II of plaintiff's complaint), a plaintiff is required to plead facts that, if proven, would establish that the defendant made a false statement of material fact, the defendant was careless or negligent in ascertaining the truth of the statement, the defendant owed the plaintiff a duty to communicate accurate information, the defendant intended to

induce the plaintiff to act, and the plaintiff reasonably relied on the truth of the statement. *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 87. The plaintiff must also plead damages resulting from this reliance. *Id.*

¶ 17 In Count II plaintiff alleges, in part, that "Cebulak, Browne, and Baird & Warner made false statements of material fact when they made public the property listing for Unit 1003S and 'tandem' parking space #78." Specifically, defendants "advertised that the sale price for Unit 1003S included 'tandem' indoor parking for 2 cars." Plaintiff alleges defendants were "negligent in ascertaining whether parking space #78 was indeed a space intended for the use and parking of two cars" and that their "only intentions for advertising parking space #78 as being a two car parking space was to induce prospective buyers to purchase Unit 1003S and parking space #78 for a price appropriate for a condominium unit with two sparking spaces, not one." Plaintiff claims she relied on the property listing and was induced to purchase the unit and parking space believing she was purchasing, among other things, two parking spaces. Plaintiff alleges damages in that "she paid nearly $50,000 more for her condominium and one parking space than other purchasers who bought comparable condominium units and only one parking space, in addition to increased transfer and property taxes as a result of the wrongfully inflated purchase price."

¶ 18 In Count III plaintiff realleges that defendants made false statements of material fact regarding the parking to induce buyers to purchase the unit at a higher price and she was damaged. Plaintiff also realleges that she relied on the property listing and was induced to purchase the unit and parking space believing she was purchasing, among other things, two parking spaces. Plaintiff alleges defendants' property listing was not accurate as to the parking

and they knew their advertisement and listing "of parking space #78 as a 'tandem' parking space for two cars was untrue." We also find it informative that Count IV also alleges that the seller "knew that parking space #78 was a one car parking space because when she [(the seller)] parked two cars in that space, the 1221 North Dearborn Management Company continuously cited Brouk for the inappropriate and unauthorized use of the parking space."

¶ 19 Count II and Count III of plaintiff's complaint do not allege facts that, if true, would prove that plaintiff's reliance on defendants' alleged misstatements was reasonable. (We find no authority for giving "justifiable reliance" and "reasonable reliance" different meanings. This court has used the terms interchangeably. See *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill. App. 3d 567, 575 (1998) ("no recovery for fraudulent misrepresentation, fraudulent concealment or negligent misrepresentation is possible unless plaintiffs can prove justifiable reliance, *i.e.*, that any reliance was reasonable").) "A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another. [Citation.]" *Newton v. Aitken*, 260 Ill. App. 3d 717, 721-22 (1994). "The issue of reasonable reliance is not a *per se* question of fact. [Citation.] *** In assessing whether reliance was justifiable, all facts known to the plaintiff and those facts plaintiff could have learned through the exercise of ordinary prudence must be taken into account." *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶¶ 37. "Generally, it is only where parties do not have equal knowledge or means of obtaining knowledge of the facts which are allegedly misrepresented that a person may justifiably rely on them. [Citation.]" *Newton*, 260 Ill. App. 3d at 721-22.

¶ 20 Count II of plaintiff's complaint alleges only that plaintiff "relied on the property listing." Count III merely incorporates the allegation in Count II. Plaintiff did not plead facts that would prove that she could not have learned whether she could physically park two cars in space # 78 or whether she would be permitted to do so, or that the information was not available to her. Plaintiff did not plead facts that would establish that in this transaction, ordinary prudence would not have required her to learn that fact or obtain that information, or that she did not have means of doing so. Nor are the allegations against defendants sufficient to reasonably infer that plaintiff was lulled into a false sense of security, that defendants prevented her from obtaining the correct information about the parking, or that the information was difficult to obtain. See *Abazari*, 2015 IL App (2d) 140952, ¶ 37, 38; *Los Amigos Supermarket, Inc. v. Metropolitan Bank & Trust Co.*, 306 Ill. App. 3d 115, 128 (1999) ("The plaintiff, may, however, justifiably rely where the defendant has created a false sense of security or blocked further inquiry, provided that the facts were not such as to put a reasonable person on inquiry."). This is not a roadmap to how plaintiff must or should plead her complaint, but merely a demonstration that the allegations in the complaint do not state a cause of action for intentional or negligent misrepresentation.

¶ 21 But we are not prepared to say that plaintiff will not be able to prove any set of facts that would demonstrate her reasonable reliance on defendants' alleged misstatements. A plaintiff should be given leave to replead unless doing so would be futile. *Abazari*, 2015 IL App (2d) 140952, ¶ 35. Defendants concede plaintiff "could amend a complaint to include the required element of justifiable reliance" but argue doing so would be futile because plaintiff's "own pleading bars her claim in Count II for negligent misrepresentation and her claims in

Counts III and IV for fraudulent misrepresentation." Defendants rely on the fact the contract attached to the complaint states that plaintiff was purchasing only one numbered space (that was merely labeled "tandem") and their assertion that plaintiff had ample opportunity to review the documents listing one numbered space, talk to the property manager, and to look at the space before closing the sale. Defendants argue, without citation to authority, that "[n]o professional survey for measurement was necessary when viewing a designated parking space to determine if a certain number of vehicles would fit in the space." Defendants also complain about what plaintiff did not allege to support their argument she could allege no more to cure her pleading. For example, defendants argue plaintiff "is not denying she looked at the space." However, defendants do not argue that the pleadings and exhibits demonstrate plaintiff cannot allege those things.

¶ 22 Nothing in or attached to plaintiff's complaint establishes that giving plaintiff leave to replead would be futile. Defendants assert plaintiff had ample time to inspect the space and talk to the property manager but fail to point to anything in the complaint or the exhibits that would prove that fact. Although plaintiff did not plead she could not have done those things, the complaint does not establish she could or did. The contract attached to the complaint states that plaintiff "may conduct" home inspections and give notice of defects to the seller, but nothing attached to the complaint indicates plaintiff ever inspected the property, and we will not assume that fact. *Baer*, 2012 IL App (1st) 112174, ¶ 30 (court should interpret the factual allegations in the complaint in the light most favorable to the plaintiff).

¶ 23 Defendants' reliance on the fact the contract lists only one numbered space is misplaced. Nothing in the complaint suggests plaintiff's claims are based on the fact she

received only one numbered space. A reasonable inference from the allegations in the complaint and the exhibits attached thereto is that plaintiff was led to believe she was purchasing one numbered parking space in which she would be able to park two cars and that is not what she received. Clearly, for example, if defendants sold plaintiff a ten-foot parking space as tandem parking for two cars, and plaintiff reasonably relied on their assertion, plaintiff could state a claim for fraud. However, nothing in the current complaint or the record even establishes the physical size of the parking space. Defendants have not demonstrated that plaintiff cannot plead any facts to prove her reasonable reliance on defendants' assertions. Further, defendants have not demonstrated that plaintiff can prove no set of facts under which she can prevail against Cebulak. Defendants cite *Allen v. Peoria Park District*, 2012 IL App (3d) 110197, ¶ 14 to argue that plaintiff "filed an admittedly faulty complaint against Cebulak and then desired to use that as a basis to later conduct discovery as to him," and that this is improper. We disagree. *Allen* is distinguishable and not controlling. See *Id.* ¶ 12 (plaintiffs in *Allen* sought discovery "to determine whether a wrong occurred, not who committed a known wrong"). On this record we cannot say that plaintiff cannot obtain facts as to Cebulak's role in the transaction or duty to plaintiff to communicate accurate information, if any exist, and amend her pleading as permitted by law. The trial court abused its discretion when it dismissed plaintiff's complaint with prejudice. On this record we cannot say plaintiff can plead no set of facts sufficient to state a cause of action for intentional or negligent misrepresentation.

¶ 24 The trial court's judgment dismissing Count IV of plaintiff's complaint is affirmed. The trial court's judgment dismissing Count II and Count III is affirmed, and the trial court's judgment dismissing Count II and Count III with prejudice is reversed.

¶ 25 2. Count V

¶ 26 "Unlike common law fraud, the Consumer Fraud Act does not require actual reliance, an untrue statement regarding a material fact, or knowledge or belief by the party making the statement that the statement was untrue. [Citation.]" (Internal quotation marks omitted.) *Anderson v. Klasek*, 393 Ill. App. 3d 219, 223 (2009). "To state a claim under the [Consumer Fraud] Act, a complaint must set forth specific facts showing: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the deception occurred in the course of trade or commerce; and (4) the consumer fraud proximately caused the plaintiff's injury." *Phillips*, 2014 IL App (1st) 122817, ¶ 30. "An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. [Citations.] A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase. [Citation.]" *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 504-05 (1996). Our supreme court has held the plaintiff must establish she was actually deceived by the defendant's representations or omissions in order to prove a claim under the Consumer Fraud Act. *Pappas v. Pella Corp.*, 363 Ill. App. 3d 795, 805 (2006).

¶ 27 In support of her consumer fraud claim against Cebulak, Browne, and Baird & Warner, plaintiff alleges defendants "engaged in deceptive business practices when they falsely

advertised and listed for sale 1221 North Dearborn, Unit 1003S and parking space #78, specifically listing parking space #78 as a 'tandem' parking space for two cars." Plaintiff alleges defendants intended to induce prospective purchasers to purchase the unit for a higher price than comparable units with one parking space and that their deception took place in the ordinary course of their real estate business. Plaintiff alleges she relied on the real estate property listing for Unit 1003S and parking space #78 and was induced to purchase the unit "believing that parking space #78 was intended for and was authorized for the parking of two cars." Defendants argue any alleged misrepresentation was cured by plaintiff's viewing of the parking space and the contract. Defendants argue "[t]here can hardly be a misrepresentation if the contract itself *** stated that one numbered parking space was part of the transaction, and Plaintiff viewed the property she was purchasing." The fact plaintiff purchased one numbered parking space is irrelevant. The core factual allegation is that plaintiff believed she was purchasing parking for two vehicles in one numbered parking space and that is not what she received. Defendants cite to no factual support for their claim plaintiff viewed the parking space.

¶ 28 Interpreting the allegations in Count V in the light most favorable to the plaintiff, Count V of plaintiff's complaint alleges a concealment of a material fact in that defendants allegedly listed the unit as having parking for two cars when it does not, which induced plaintiff to purchase the unit at the purchase price, which she would not have done otherwise. Plaintiff alleged she was actually deceived by defendants in that she "relied on the real estate property listing" and "believ[ed] that parking space #78 was intended for and was authorized for the parking of two cars." Plaintiff also alleged the deception was the proximate cause of

her injury in that she would not have paid the purchase price "but for her understanding and belief that she would have two parking spaces for her use." The allegations in Count V are sufficient to state a claim under the Consumer Fraud Act. See *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 503-04 (1996) (finding allegations defendant provided misinformation, intended purchasers to rely on the statement which was made in trade or commerce, and of proximate cause adequately stated a cause of action for consumer fraud). The trial court's judgment dismissing Count V of plaintiff's complaint is reversed.

CONCLUSION

¶ 29 For the foregoing reasons, the circuit court of Cook County is affirmed in part, reversed in part, and the cause is remanded.

¶ 30 Affirmed in part, reversed in part, and remanded.