FIRST DIVISION
August 29, 2016

No. 1-15-2470
2016 IL App (1st) 152470-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMIE CHAIM MASADA and MIKA HAMADA-ANO,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	
DAN CICCONE and	)	No. 14 L 10698
Defendant-Appellee,	)	Honorable Sheryl A. Pethers, Judge Presiding.
KATHRYN CICCONE,	)	
Defendant.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Where the proposed amendment would cure the defective pleading, the other parties would not sustain prejudice, the proposed amendment was timely, there was only one previous opportunity to amend, and the trial court did not compare the allegations of the amended complaint to the second amended complaint before making its ruling, the trial court abused its discretion when it denied plaintiffs leave to refile count I of their second amended complaint, which was a claim for intentional infliction of emotional distress.

¶ 2 This case arises out of a dispute between neighbors in a condominium building located in the Lakeview neighborhood of Chicago. Plaintiffs, Jamie Chaim Masada (Masada) and Mika

Hamada-Ano (Hamada-Ano), brought suit against defendants, Dan Ciccone (Ciccone) and Kathryn Ciccone[1] (Corthinos), claiming, *inter alia*, intentional infliction of emotional distress as a result of defendants' alleged harassing and intimidating conduct, which included defacing a symbol of Masada's religion that was affixed to his front door, and calling Hamada-Ano race and gender-based slurs. Defendants brought a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (720 ILCS 5/2-619.1) (West 2012). The trial court granted the motion and dismissed with prejudice count I, which was a claim for intentional infliction of emotional distress against Ciccone. Thereafter, the court also denied plaintiffs' motion to reconsider, and plaintiffs filed this appeal. We find that the trial court abused its discretion when it did not allow plaintiffs leave to replead. We therefore reverse and remand for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 In December 2011, Masada bought unit number two in the condominium building located at 549 West Belmont Avenue in Chicago (condo). Masada is the owner of the Laugh Factory, a comedy club located adjacent to the condominium building at issue. Defendants are plaintiffs' neighbors and live in unit three of the same building. Beginning in March 2012, Masada lived in the condo and used it as his residence when staying in Chicago. Defendants have lived in the condo building at issue for the entire time that Masada has lived there. Hamada-Ano, Masada's fiancé, also lived in the condo from sometime in 2012 until December 2013, when she was allegedly forced to move out due to the harassing conduct of defendants.

¶ 5 On October 15, 2014, Masada filed his original verified complaint, which contained two counts directed against both defendants: one count for intentional infliction of emotional distress

[1] In Ciccone's brief, he states that Corthinos is incorrectly named as "Kathryn Ciccone," instead of "Kathryn Corthinos," which is her legal name, as she did not change her name after marrying Ciccone. For purposes of this appeal, we refer to her as "Kathryn Ciccone" in the caption, because that is the name listed on the notice of appeal.

(IIED) and one count for tortious interference with existing business relationships. The count for IIED alleged that defendants "engaged in a pattern of harassment, intimidation and nuisance designed to burden and prevent Masada's enjoyment of his residence." Masada alleged that defendants had, *inter alia*, removed, destroyed, or defaced the Mezuzah, which is a Jewish parchment, that was attached to Masada's front door. Masada further alleged that defendants harassed Masada's friends by using "extreme and outrageous slurs and defamatory comments," assaulted Masada on at least two occasions, made unfounded allegations about inactions and condo violations by Masada, removed Masada's clothes from the laundry and dumped them on the floor, and "engage[ed] in other extreme and outrageous conduct and harassment." The count for IIED also alleged that such conduct by defendants was intended to cause Masada bodily harm, and had, in fact, caused Masada great emotional distress and harm that resulted in medical treatment and temporary housing expenses. The count for tortious interference with existing business relationships alleged that on various occasions in the previous two years, defendants harassed Masada, his associates, and his employees at Masada's place of business, the Laugh Factory, by verbally attacking and humiliating Masada, his associates, and his employees. Masada's complaint further alleged that defendants' actions caused Masada financial harm and harm to his business relationship with his employees and patrons.

¶ 6 On November 18, 2014, defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (720 ILCS 5/2-619(a)(9) (West 2012)), arguing that the complaint should be dismissed because it was brought in retaliation against defendants for threatening to bring a lawsuit against the condominium board if certain defects were not corrected, which was violative of the Citizens Participation Act (735 ILCS 110/1 *et seq.* (West 2012)). Also on November 18, 2014, defendants filed a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-

615(a) (West 2012)), asserting that both counts of Masada's complaint should be dismissed because he failed to plead the proper elements of both IIED and a tortious interference claim.

¶ 7 On January 16, 2015, the judge who was initially assigned to this case transferred it from the Law Division to the First Municipal Department due to the value of the case being lower than the jurisdictional limit required by the Law Division. See Cook Co. Cir. Ct. G.O. 1.2, 2.1(a)(1)(i) (June 12, 1998). On January 29, 2015, defendants refiled their motions to dismiss before their new judge in the First Municipal Department and a hearing was set for March 10, 2015. Masada filed his response to defendants' motions on February 24, 2015, and defendants filed their replies on March 3, 2015. On March 10, 2015, the court entered an order denying defendants' section 2-619 motion to dismiss and granting defendants' section 2-615 motion without prejudice. The court also granted Masada leave to refile an amended complaint "with additional details" within 28 days, with no attorney fees or punitive damages to be alleged. Additionally, Masada was given leave to add Hamada-Ano as a plaintiff.

¶ 8 Masada and Hamada-Ano filed their amended complaint on April 17, 2015. The amended complaint consisted of the following four counts: count I for IIED against both defendants, count II for invasion of privacy against Corthinos, count III for trespass against Corthinos, and count IV for tortious interference with existing business relationships against both defendants. Count I for IIED included the dates of the alleged pattern of harassment as being "October 2012 to the present." Also, the amended complaint listed the allegations of IIED against Ciccone and Corthinos separately. In relevant part, the amended complaint alleged that Ciccone engaged in the following pattern of continued harassment:

> "a. Removing, destroying and/or defacing the Mezuzah, a Jewish parchment, from Masada's front door on two (2) separate occasions;

b. Alleging unfounded violations of the [d]eclaration and bylaws related to Masada's parking space and harassing Masada and his drivers when Masada or his drivers park his vehicle;

c. Preventing Masada from participating or being a member of the board for the [c]ondo claiming '(Masada) cannot be on the board';

d. Making continued and unfounded allegations about inactions and alleged [c]ondominium violations by Masada;

e. Coming to Masada's place of business and harassing Masada and his associates with unfounded allegations;

f. Removing Masada's clothes from the laundry and dumping the clothes on the floor;

g. Making continued and unfounded accusations about actions taken by Masada at his residence;

h. Alleging unfounded violations of the bylaws and declaration for 'late fees' and living violations when no such violations existed; and

i. Engaging in other extreme and outrageous conduct and harassment."

¶ 9 The allegations of IIED in Count I against Corthinos included, *inter alia*, preventing Masada from closing his front door by placing her foot in front of the door and trying to enter plaintiffs' condo without permission, following Hamada-Ano into the plaintiffs' condo and taking photos, calling Hamada-Ano a "whore" and other derogatory names, and calling Hamada-Ano, who is Asian-American, a "chink" and telling her to "go back to [her] country." Counts II, III, and IV are not at issue in this appeal.

¶ 10 The amended complaint was supported by a notarized affidavit signed by Hamada-Ano, which stated in part:

"My unpleasant experience with [Corthinos] probably numbers between 10 and 15 instances, but a couple stand out. Once, she came to the Laugh Factory where my sister and I work and she berated my sister in front of the customers. It was mortifying to watch.

Another incident involved the most racially fueled encounter I have ever experienced. On this particular day, I was parking my fiancé, Jamie Masada's car - in mid day in his assigned space. While in the process of parking, I saw [Corthinos] bolt out of the building and come towards me yelling that 'I did not park correctly.' When I attempted to ask why she was yelling at me, she replied[:] 'You chinks don't know how to drive.' [A]s a woman of Asian descent I am familiar with, but not accustomed to hearing this word. I said 'I beg your pardon' and was answered, under her breath, that 'you chinks need to learn how to drive in America' and that I 'should go back to your country.' "

¶ 11 On May 21, 2015, defendants filed a combined motion to dismiss the amended complaint, brought pursuant to section 2-619.1 of the Code. Pursuant to section 2-615 of the Code, defendants' motion argued, in relevant part, that count I did not plead a legally sufficient claim for IIED because it failed to allege extreme and outrageous conduct by defendants, failed to allege facts suggesting that defendants knew there was a high probability that their conduct would cause severe emotional distress to either plaintiff, and failed to allege facts showing that plaintiffs actually suffered severe emotional distress. Plaintiffs filed their response on June 26, 2015, arguing that they had, in fact, properly pled a claim for IIED because they included more specific and detailed allegations in their amended complaint than were contained in the original complaint. Additionally, the amended complaint contained an affidavit from Hamada-Ano that detailed her alleged racially-fueled encounter with Corthinos. Plaintiffs further argued that when

viewed as a whole, rather than individually, the allegations of the amended complaint satisfied plaintiffs' burden under Illinois law. Finally, plaintiffs asserted that they sufficiently alleged that defendants knew there was a high probability their conduct would cause severe emotional distress because the amended complaint contained an allegation that Masada complained about defendants' conduct on various occasions in order to make the harassment stop, and that Masada contacted the police to assist with Corthinos's allegedly abusive behavior on two occasions.

¶ 12 Defendants filed their reply in support of their combined motion on July 10, 2015. The reply pointed out that plaintiffs' amended complaint still contained nonspecific allegations and terms that amounted to legal conclusions, such as "harassed," "extreme and outrageous," and "defamatory." Additionally, defendants asserted that the conduct described in the amended complaint did not rise to the requisite level of extreme and outrageous conduct, noting: "Allegations such as removing clothes from the laundry do not rise to the level of an IIED [claim]. If they did, then almost every resident in the City of Chicago would have an IIED claim."

¶ 13 The court conducted a hearing on the combined motions to dismiss on July 15, 2015. No transcript or report of the proceedings was included in the record on appeal. The order that was entered following the hearing read as follows:

> "This motion coming to be heard on [d]efendants' combined motion to dismiss, all parties having notice and the court being fully advised, it is hereby ordered:
>
> (1) Count I as to Dan Ciccone is dismissed with prejudice.
>
> (2) Count I as to Kathryn Corthinos is dismissed without prejudice.
>
> (3) Counts II & III are dismissed without prejudice as to Corthinos.
>
> (4) Count IV is dismissed with prejudice. Ciccone is dismissed from case.

(5) Plaintiffs are given until July 30, 2015 to file [a]mended complaint with details as mentioned by the court." (Emphasis in original.)

¶ 14 On July 28, 2015, plaintiffs filed a motion titled "motion to reconsider and for leave to file plaintiffs' second amended complaint." The motion sought leave to file the second amended complaint with a repled version of all counts, including those the court had previously dismissed with prejudice. The court had given plaintiffs leave to file another amended complaint in its July 15, 2015, order, specifically directing plaintiffs to file the complaint "with details as mentioned by the court." However, prior to the court ruling on the motion to reconsider and for leave to file plaintiffs' second amended complaint, plaintiffs filed their second amended complaint on July 30, 2015, and included a repled version of count I alleging IIED against Ciccone, which was one of the two counts that the court had previously dismissed with prejudice. Plaintiffs included a footnote that read: "Count I is subject to Plaintiffs' Motion to Reconsider this Honorable Court's Dismissal with Prejudice of Count I as it pertains to Dan Ciccone." In their motion to reconsider and for leave to file plaintiffs' second amended complaint, plaintiffs argued that the court erred in not allowing plaintiffs to file a second amended complaint as to Counts I and IV. Plaintiffs asserted that a cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiffs to recovery. Specifically, plaintiffs pointed out that when the court originally granted defendants' first section 2-615 motion to dismiss, it required plaintiff to include more facts in their amended complaint, which implied that the court believed there were indeed facts that existed that would make out a claim for IIED. Further, plaintiffs contended that defendants' alleged conduct went well beyond the level of "mere insults" and constituted extreme and outrageous conduct. Even if it had not, plaintiffs argued that whether it was extreme and outrageous was a question of fact for a jury.

¶ 15 The court conducted a hearing on plaintiffs' motion to reconsider and for leave to file a second amended complaint on August 11, 2015. At the hearing, plaintiffs' counsel stated that the basis of the motion to reconsider was the court's misapplication of existing law. Plaintiffs argued that they had added facts to their amended complaint as requested by the court, and that their complaint set forth enough facts to make out an IIED claim. Plainitffs' counsel also explained that although the court dismissed count I with prejudice, they had refiled that count with additional facts in the second amended complaint, to which the court replied, "How about next time when the judge says the count is dismissed with prejudice, you don't put it back in and you wait until after the ruling on the motion to reconsider." Plaintiffs' counsel then showed the court the footnote that was included in the second amended complaint that stated: "Count I is subject to Plaintiffs' Motion to Reconsider this Honorable Court's Dismissal with Prejudice of Count I as it pertains to Dan Ciccone." Moving on, the court noted that it had previously found that plaintiffs' facts in the amended complaint "don't amount to outrageous conduct." Plainitffs' counsel asserted that the second amended complaint remedied this, as it contained more facts, and the reason the amended complaint did not include those same facts was as a result of the ongoing discovery needed in order to obtain "time, place, and manner" facts.

¶ 16 The transcript reflects that neither of the attorneys for either side nor the court had a copy of plaintiffs' amended complaint to compare to their more-recently filed second amended complaint. Plaintiffs' counsel stated that someone from his office was bringing over a copy of the amended complaint for the court to review. The court then replied, "You know what, I'm not waiting any longer on that. The motion to reconsider is denied because I think it's insufficient. What is said in the motion isn't anything new. And I can't tell -- I can't reevaluate the argument

because I can't see the [f]irst [a]mended [c]omplaint and compare it." Plaintiffs' counsel insisted that he had provided courtesy copies to the court, but the court denied having them.

¶ 17 Plaintiffs' counsel then asked the court to clarify, for appellate purposes, whether the dismissal of count I with prejudice was pursuant to section 2-615 or 2-619, because the July 15, 2015, order dismissing count I with prejudice did not state which section the court relied on in its dismissal. After engaging in some discussion, the court stated,

> "How about you ask me that when I did it, do you know what I mean, because I can't remember sitting right here whether it was one or both. I'm sure it was -- I don't know. I don't know. Why not ask me at that hearing? And, in fact, I'm sure I said which it was at that hearing. Why don't you put it in the order? Instead of 30 days later, Judge, was that 2[-]619 or 2[-]615 you dismissed that under? I don't remember."

¶ 18 Plaintiffs' attorney then stated he was not requesting that the court redo the previous hearing, rather he was asking the court if it could provide a response as to whether the motion was ruled on pursuant to both sections 2-615 and 2-619, or just one. The following exchange then occurred:

> "THE COURT: I'm not going back and doing that now and figuring it out. I would have to go back, read the motion, read the response, read the reply, and redo my reasonings [*sic*]. I don't even have the motion or the order that was written up that day.
>
> MR. FARAHVAR [plaintiffs' attorney]: It's part of the exhibit, Judge.
>
> THE COURT: Okay.
>
> MR. FARAHVAR: It says A and B are the two motions -- or the two orders. I apologize.
>
> THE COURT: Okay. And this is from March?

MR. FARAHVAR: Exhibit A is the one -- yes, your Honor. Exhibit A is the March one and Exhibit B is the July one.

THE COURT: And you wrote this up? Why not ask me then, was it 2[-]619 or 2[-]615? Actually, I'm positive that I said, because I always do. And if you didn't write it in the order, that's not my problem. Okay? Argue to the [a]ppellate [c]ourt that it couldn't have been either one. Okay? I'm not going to go back and read all of those pleadings--"

At the end of the hearing, the court granted plaintiffs' request for Rule 304(a) language. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The August 11, 2015, order read, in relevant part:

"Plaintiffs' motion to reconsider is denied. Count I as to [d]efendant Dan Ciccone is stricken from the second amended complaint. There is no just reason for the delay in this order's enforcement of this final judgment under Rule 304(a) as to [d]efendant Dan Ciccone."

¶ 19 Plaintiffs filed their notice of appeal on August 28, 2015.

¶ 20 ANALYSIS

¶ 21 On appeal, plaintiffs argue that they pled sufficient facts to state an IIED claim against Ciccone, and that the court below abused its discretion when it refused to allow plaintiffs leave to plead additional facts in count I of their second amended complaint. In response, Ciccone argues that plaintiffs' allegations in both their amended complaint and second amended complaint rely on legal conclusions, not facts, and do not meet the specific pleading standard, thus the court did not err in denying plaintiffs leave to replead. Although we agree with the trial court's determination that the amended complaint did not sufficiently state a cause of action for IIED against Ciccone, we find the trial court abused its discretion in denying plaintiffs leave to

replead. We reverse the decision of the trial court and remand for further proceedings consistent with this order.

¶ 22 Based on the procedural background of this case, it is apparent there was some initial confusion among plaintiffs and the trial court regarding under which section of the Code the motion to dismiss with prejudice was granted. However, on appeal, plaintiffs and Ciccone agree that the dismissal with prejudice was based on section 2-615 of the Code, as the arguments made by both sides revolve around the pleading requirements and the factual sufficiency of plaintiffs' amended complaints. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (recognizing that a section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face). Here, the trial court granted Ciccone's motion to dismiss count I with prejudice based on pleading defects. An order granting or denying a motion to dismiss a complaint based on defects apparent on its face is reviewed *de novo*. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 920 (2007).

¶ 23 Prior to reaching the merits of this appeal, we must first address Ciccone's argument that plaintiffs failed to provide a complete record on appeal. Specifically, Ciccone asserts that because a court reporter was not present at the March 10, 2015, and July 15, 2015, hearings, and plaintiffs did not attempt to provide a bystanders report or agreed statement of facts, as allowed under Rule 323 (c) and (d), respectively, (Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005)) we should find that the court below properly issued the orders dismissing the complaint on March 10, 2015, and July 15, 2015. We need not address Ciccone's arguments regarding the March 10, 2015, hearing and order, because that order is not the subject of this appeal. It was not mentioned in plaintiffs' notice of appeal or substantive arguments of their brief. Further, we do not find a lack of the July 15, 2015, hearing transcript, bystanders report, or agreed statement of facts to be fatal

to our review regarding the sufficiency of the allegations of plaintiff's complaint, as our review is *de novo*. See *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003) (stating that "[b]ecause we are not required to defer to the trial court's reasoning on *de novo* review, the transcripts of the hearings on the motion to dismiss are unnecessary"). Further, plaintiffs included a transcript of the hearing on the motion to reconsider, which allows us the necessary insight into the trial court's decision to determine whether it abused its discretion in denying plaintiffs leave to replead.

¶ 24 We now turn to the merits. First, plaintiffs argue that they pled sufficient facts to state a claim against Ciccone for IIED. In ruling on a section 2-615 motion to dismiss, the court must accept as true all well-pleaded facts in the complaint and all reasonable inferences that can be drawn therefrom. *Kolegas v. Heftel Broadcasting Corp*, 154 Ill. 2d 1, 8-9 (1992). "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Van Horne v. Muller*, 185 Ill. 2d 299, 305 (1998). In making this determination, the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. *McGrath v. Fahey*, 126 Ill. 2d 78, 90 (1988).

¶ 25 To establish a claim for IIED, a "plaintiff must plead facts which indicate: (1) that the defendant's conduct was extreme and outrageous; (2) that the defendant knew that there was a high probability that his conduct would cause severe emotional distress; and (3) that the conduct in fact caused severe emotional distress." *Kolegas*, 154 Ill. 2d at 20. A complaint for IIED must be " 'specific, and detailed beyond what is normally considered permissible in pleading a tort action.' " *Duffy v. Orlan Brook Condominium Owners' Association*, 2012 IL App (1st) 113577, ¶ 43 (quoting *McCaskill v. Baker*, 92 Ill. App. 3d 157, 158 (1980)).

¶ 26 We first consider whether the plaintiffs' amended complaint satisfies the extreme and outrageous requirement. Whether conduct is extreme and outrageous is evaluated on an objective standard based on all the facts and circumstances. *McGrath*, 126 Ill. 2d at 90. "Liability for IIED only results in circumstances where the defendant's conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." (Internal quotation marks omitted.) *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976). It does not extend to "mere insults, indignities, threats, annoyances, petty oppressions[,] or trivialities." *Id.* However, "[a] pattern, course, and accumulation of acts can make an individual's conduct sufficiently extreme to be actionable, whereas one instance of such behavior might not be." (Internal quotation marks omitted.) *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 274 (2003).

¶ 27 Looking at the allegations of plaintiffs' amended complaint, we agree with the trial court that plaintiffs' amended complaint does not adequately plead extreme and outrageous conduct by Ciccone. We point to *Duffy v. Orlan Brook Condominium Owners' Association*, 2012 IL App (1st) 113577, for support. In *Duffy*, the trial court dismissed the plaintiff's fourth amended complaint with prejudice for failing to sufficiently plead an IIED claim. *Id.* ¶ 35. The plaintiff's fourth amended complaint alleged that the defendants failed to make timely repairs to her condo unit, and ultimately refused to make the repairs, which caused her displacement from her home. *Id.* ¶ 37. The plaintiff also alleged that the defendants were in a position as fiduciaries and managers, and abused their authority when they placed her in circumstances where she was particularly susceptible to emotional distress. *Id.* The court found that, "[a]lthough inconvenient, aggravating, and annoying, we do not believe they rise to the level of extreme and outrageous conduct because the actions were not so extreme as to go beyond all possible bounds of decency and to be regarded as intolerable." *Id.* ¶ 39.

¶ 28 Similarly, the Second District did not find the plaintiffs' allegations rose to the requisite level of extreme and outrageous in *Schiller v. Mitchell*, 357 Ill. App. 3d 435 (2005). In *Schiller*, the plaintiffs filed a claim for IIED against their neighbors, alleging, *inter alia*, that their neighbors recorded 24-hour video surveillance of their home and made hundreds of phone calls to the police regarding the plaintiffs, which resulted in the police "investigating, questioning and suspecting" the plaintiffs. *Id.* at 437. The court found that when viewing the cumulative effect of the defendants' conduct, the plaintiffs could not make out a claim for IIED because it did not rise to the requisite level of extreme and outrageous conduct. *Id.* at 452. The *Schiller* court contrasted the facts before it with those of *Pavilon v. Kaferly*, 204 Ill. App. 3d 235 (1990), which exemplified the type of conduct that qualifies as extreme and outrageous. *Id.* In *Pavilon*, the counterplaintiff and counterdefendant had dated for a period of time, and after their relationship ended, the counterplaintiff began working for the counterdefendant, who pressured her to attend events with him and promised that her work would be easier if she complied. *Id.* (citing *Pavilon*, 204 Ill. App. 3d at 239-41). The counterdefendant also offered counterplaintiff money for sex on 8 to 10 occasions, which she refused, and was then fired. *Id.* Additionally, the counterdefendant in *Pavilon* informed the counterplaintiff that he wanted to rape her on the day he fired her and on a subsequent occasion. *Id.* The counterdefendant also committed numerous acts of harassment toward the counterplaintiff's new employer, her family, and her psychotherapist, and spread false information about counterplaintiff and her new employer. *Id.* Further still, the counterdefendant threatened to kill the counterplainitff, rape her, and file a lawsuit to take custody of her son away from her. *Id.* After its review of *Pavilon*, the *Schiller* court concluded that, "[d]efendants' conduct in the instant case looks innocent when measured against the *Pavilon* standard." *Id.* at 452.

¶ 29 In this case, we believe Ciccone's alleged conduct of defacing Masada's Mezuzah is deplorable. However, looking at the allegations contained in plaintiffs' amended complaint as a whole, we do not believe that the defacing, in addition to the other allegations of allegedly "harassing" conduct, rose to the level of extreme and outrageous conduct that is required in order to sustain a claim for IIED. Some of plaintiffs' allegations against Ciccone are conclusory and vague in nature and must be pled with more specificity. For example, the amended complaint states that Ciccone alleged "unfounded violations of the [d]eclaration and bylaws related to Masada's parking space and harassing Masada and his drivers when Masada or his drivers park his vehicle." This allegation is not sufficiently clear as to what allegedly extreme and outrageous acts Ciccone specifically performed. The amended complaint further alleges that Ciccone "made continued and unfounded allegations about inactions and alleged [condominium] violations by Masada." Again, it is unclear what Ciccone did that was extreme and outrageous. Another example of ambiguity in plaintiffs' amended complaint is the allegation of Ciccone "coming to Masada's place of business and harassing Masada and his associates with unfounded allegations." This statement needs more detail and more explanation in order to determine whether Ciccone's alleged conduct rises to the level of extreme and outrageous. Like *Duffy* and *Schiller,* we believe Ciccone's alleged actions are aggravating and annoying, but as they are currently pled in the amended complaint, we cannot find that they satisfy the high threshold required to make out an actionable IIED claim. There are significant differences between the current allegations in this case versus those in the *Pavilon* case that resulted in the court there finding an actionable pattern of extreme and outrageous conduct. As plaintiffs have not adequately pled the first element of IIED, we need not address the sufficiency of the remaining elements. See *Schiller,* 357 Ill. App.

at 447 (finding that plaintiffs had not pleaded sufficient facts to establish the first element of an IIED claim, and as a result, the court did not examine the remaining two elements).

¶ 30 Moving on to plaintiffs' second argument, plaintiffs contend that the trial court abused its discretion when it refused to allow them leave to refile count I in their second amended complaint. Ciccone responds that the court "should not allow the plaintiffs to keep throwing spaghetti at the wall to see what sticks," and argues that the allegations in the second amended complaint still do not rise to the requisite level of extreme and outrageous. We disagree with Ciccone's characterization of plaintiffs' attempt to satisfy the heightened pleading requirements of IIED, and believe that the trial court erred when it only allowed plaintiffs one amendment to their complaint prior to dismissing it with prejudice.

¶ 31 Section 2-616 of the Code, in relevant part, reads: "At any time before final judgment amendments may be allowed on just and reasonable terms, *** in any matter, either of form or substance, ***, which may enable the plaintiff to sustain the claim for which it was intended to be brought." 735 ILCS 5/2-616 (West 2012). "Illinois law supports a liberal policy of allowing amendments to the pleadings so as to enable parties to fully present their alleged cause or causes of action." (Internal quotation marks omitted.) *Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 417 (2006). However, this does not mean a party has an absolute right to amend a complaint. *Id.* Whether to allow an amendment of a complaint is a matter within the sound discretion of the trial court, and absent an abuse of that discretion, the court's determination will not be overturned. *Compton v. Country Mutual Insurance, Co.*, 382 Ill. App. 3d 323, 331 (2008). An abuse of discretion will be found only where no reasonable person would take the view adopted by the trial court. *Id*. at 331-32.

¶ 32 "In considering whether a trial court abused its discretion in ruling on a motion for leave to file an amended complaint, we consider the following factors: (1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified." (Internal quotation marks omitted.) *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62, 75 (2010).

¶ 33 After consideration of all the factors, we believe the court abused its discretion in denying plaintiffs leave to refile count I of their second amended complaint. We believe the first factor, whether the proposed amendment would cure the defective pleading, weighs in favor of plaintiffs, as count I of their second amended complaint is alleged with much more specificity and facts regarding Ciccone's alleged conduct. The allegations of extreme and outrageous conduct against Ciccone in count I of the second amended complaint are stated as follows:

> "9. From December, 2012 to June 2013, Defendant Dan Ciccone engaged in a pattern of continued harassment, intimidation and nuisance designed to burden and prevent Masada from the quiet and peaceful enjoyment of his residence including:
>
> a. Forcibly removing, destroying and/or defacing the Mezuzah, a Jewish parchment, from Masada's front door in the Shared Hallway of 549 Belmont between December 2012 and January 2013;
>
> b. Forcibly removing, destroying and/or defacing the second Mezuzah, which replaced the previously removed Mezuzah from Masada's front door in the Shared Hallway of 549 Belmont, sometime between May and June, 2013;

c. Removing Masada's clothes from the laundry washer from the 549 Belmont laundry room and throwing his clothes on the floor of the basement[;]

d. Denying Masada, an owner, from being a member of the board for the Condo stating "(Masada) cannot be on the board" when Masada asked to be a member of the board and continuing to deny him access to the Board;

e. Stalking Masada and taking photos and videos of him in the privacy of his own home;

f. Contacting city inspectors to make unfounded and unwarranted allegations of code and legal violations by Masada and Masada's Business, including but not limited to claims of improper use, impermissive use, doing work without a permit, and garbage violations for Masada's Business;

g. Contacting city government officials including the alderman and the Chamber of Commerce to make unfounded and unwarranted allegations of city violations against Masada and Masada's Business including but not limited [to] improper licensing, impermissive use of by [*sic*] his Business, improper construction, unpermitted work, business license violations and improper use of his residence and Business;

h. Screaming and following Masada on various occasions at his residence, in the Shared Hallway, and in the alley and on the general premisses [*sic*] of 549 Belmont regarding Masada's invited guests, 'improper' parking use by Masada;

i. Making false accusations about various legal violations related to improper licenses, impermissive use as a residence by having "guests" sleep at his

apartment, and making profane comments about Masada and the use of his residence for purposes related to his Business;

j. Going through Masada's locked garbage dumpster to obtain and photograph documents and personal items of Masada;

k. Coming to Masada's Business and harassing Masada to sign documents and then yelling at Masada in front of his associates when Masada refused to sign documents; and

l. Engaging in other extreme and outrageous conduct and harassment.

10. In addition, Defendants Ciccone, individually or collectively, engaged in the following pattern of continued harassment, intimidation and nuisance designed to burden and prevent Masada from the quiet and peaceful enjoyment of his residence including:

a. Contacting Peoples Gas in February, 2012 to turn off Masada's heat during sub zero weather, without any communication or permission from Masada, leaving Masada['s] residence without heat for days.

b. Modifying or jamming the front door of 549 Belmont in September, 2012 to prevent Masada from accessing his residence late at night.

c. In May 2012, Defendant Ciccone alleged that Masadas [*sic*] broke a door knob on the property and refus[ed] to repair the property without payment from Masada."

¶ 34 These allegations are far more specific than the allegations contained in the amended complaint. See *supra* ¶ 8. Ciccone's conduct is more clearly set forth and explained in greater detail. Specifically, the second amended complaint contains more detailed facts regarding the complaints Ciccone allegedly made to city officials and Ciccone's conduct when he allegedly

harassed Masada at his place of business. Additionally, the second amended complaint contains more information regarding the dates upon which these events allegedly occurred. Overall, we believe the second amended complaint would cure the defects found in the amended complaint. That being said, we want to be clear that we are not making a determination on the sufficiency of the allegations of second amended complaint; rather, we are examining whether the second amended complaint would cure the defectiveness of the amended complaint, as is required under the first factor of our analysis. See *Moore*, 402 Ill. App. 3d at 75.

¶ 35 Looking at the second factor, we do not find that the other parties involved, namely Ciccone and Corthinos, would sustain prejudice or be surprised by the second amended complaint. Ciccone argues that he and Corthinos have been prejudiced by this case as "[t]his action has hindered their ability to work with the fellow condo board members to make repairs to the building." This court fails to see how allowing plaintiffs leave to file a second amended complaint would affect Ciccone's or Corthinos's ability to work with their condo board. The trial court granted defendants' motion to dismiss the counts of plaintiffs' amended complaint directed at Corthinos without prejudice, thus the litigation at bar could continue against Corthinos whether the claims against Ciccone continued or not. Further, Ciccone has been aware of the incidents alleged in plaintiffs' complaint since he was first served with the original verified complaint. Thus, it seems unlikely that the more factually-specific allegations contained in the second amended complaint would come as a surprise. Indeed, Ciccone is alleged to be the person responsible for the extreme and outrageous conduct alleged in count I of all versions of the complaint thus far, and therefore it is reasonable to presume that he is well-aware of the incidents alleged therein. None of the allegations have changed dramatically from one version of the complaint to the next. Instead, the amended and second amended complaints merely contain

more details and more facts than the original verified complaint. Thus, we do not find it to be likely that prejudice or surprise would result.

¶ 36 We also find the third factor, whether the amendment is timely, weighs in plaintiffs' favor. Again, we reiterate that the second amended complaint did not contain any claims that were totally new or previously unreferenced. The second amended complaint merely added facts and details, which is what the trial court had previously expressed to be the deficiency in the complaint. Plaintiffs' sought leave to amend their complaint within 30 days of the dismissal with prejudice of the amended complaint, rendering timely their motion for leave to file the second amended complaint.

¶ 37 Lastly, we believe the fourth factor weighs heavily in plaintiffs' favor, as they were only given one opportunity to amend count I of their complaint before the trial court dismissed it with prejudice. We say this factor weighs *heavily* in plaintiffs' favor because the trial court did not compare their second amended complaint with their amended complaint before ruling that their motion to reconsider was denied. Prior to explaining our decision on this issue, we want to make clear that plaintiffs' counsel should have presented the trial court with a copy of the amended complaint as soon as the hearing began. Neither counsel for plaintiffs nor counsel for defendants had a copy of the amended complaint, but both recognized the importance of the court having a copy in order to render its decision, as evidenced by the fact that during the hearing, counsel for *defendants* stated to the court that he could call his clerk to get a copy, to which the court replied: "Why would you want to do that?" Counsel for plaintiffs sent someone from his office to retrieve a copy of the amended complaint but the court did not wait to be presented with a copy before ruling. During the hearing, the court also seemed to acknowledge the importance of

comparing the amended complaint to the second amended complaint when it stated the following:

> "I don't have time for this. I've got a motion -- I have a motion to reconsider that doesn't say a whole lot, just makes the same arguments that were made before. And I understand that you -- you're re-arguing all of them because you say I was just wrong. But, you know, I would like to look at this [f]irst [a]mended [c]omplaint and see, well, what exactly was alleged in it?"

Plaintiffs' counsel proposed the court address the other motions regarding discovery deadlines and disputes that were also up for hearing on August 11, 2015, while they waited for the copy of the amended complaint to arrive. After the court addressed the discovery-based motions, plaintiffs' counsel reminded the court that he had someone bringing over the amended complaint. The court replied in the following manner,

> "You know what, I'm not waiting any longer on that.
>
> The motion to reconsider is denied because I think it's insufficient. What is said in the motion isn't anything new. And I can't tell -- I can't reevaluate the argument because I can't see the [f]irst [a]mended [c]omplaint and compare it."

¶ 38 Thus, the trial court denied plaintiffs' motion to reconsider and for leave to file plaintiffs' second amended complaint without ever comparing the second amended complaint to the amended complaint. The court also stated, "[w]hat is said in the motion isn't anything new," even though plaintiffs' counsel expressly stated that the beginning of the hearing that the motion to reconsider was being brought on the basis that the court misapplied the law, not newly discovered evidence. We believe this was an abuse of discretion. The court, on at least, two occasions, stated that it would like to compare the allegations of the two complaints to determine

whether plaintiffs had pled sufficient facts to sustain a claim for IIED. Thus, it is clear the court knew how important such a comparison was. We understand that plaintiffs' counsel was ill-prepared for the hearing, and such conduct is not commendable. However, the court was faced with a determination that could, and did, result in the dismissal with prejudice of one of plaintiffs' claims, which is an undoubtedly severe outcome. We find the court's decision to deny plaintiffs leave to replead, effectively confirming the dismissal of count I with prejudice, without conducting a review of the complaints at issue after the court itself acknowledged the importance of comparing the complaints, results in a view that would not be adopted by any reasonable person. As such, we believe the court abused its discretion.

¶ 39 Based on our finding that all four factors weigh in favor of plaintiffs' argument and due to the inherent unreasonableness of the trial court's refusal to wait to examine the second amended complaint as compared to the amended complaint, we determine that the trial court abused its discretion when it denied plaintiffs leave to file their second amended complaint.

¶ 40 CONCLUSION

¶ 41 Based on the foregoing, we find that the trial court abused its discretion when it denied plaintiffs' motion for leave to file plaintiffs' second amended complaint. Therefore, we reverse the decision of the trial court dismissing count I with prejudice, and grant plaintiffs leave to replead.

¶ 42 Reversed and remanded.