2017 IL App (1st) 160624-U
No. 1-16-0624

THIRD DIVISION
March 29, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM T. BEIRNE and STEVE BEIRNE, Plaintiffs-Appellants, v. RAND MANOR MOTEL AND MOBILE HOME PARK, JOHN PEICUCH, LIN INVESTMENT, INC., WILLIAM KUSHNER, Police Chief of the City of Des Plaines, and THE CITY OF DES PLAINES, a municipal corporation, Defendants (William Kushner, Police Chief of the City of Des Plaines, and the City of Des Plaines, a municipal corporation, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 13 L 2443 The Honorable Eileen O'Neill Burke, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's dismissal of the plaintiffs' claim against the municipal defendants for violations of 42 U.S.C. §1983 was affirmed where the exhibit to the plaintiffs' complaint refuted the plaintiffs' claim that the municipal defendants had agreed to refrain from intervening in the illegal eviction of the plaintiffs, and it was not an abuse of discretion for the trial court to deny the plaintiffs' request to amend its claim against the municipal defendants where the plaintiffs

failed to present sufficient factual allegations to allow the trial court to assess whether the requested amendment would cure the defects in the claim.

¶ 2 In Count VIII of their Corrected Second Amended Complaint ("Complaint"), the plaintiffs, William T. Beirne and Steve Beirne, sought to hold defendants William Kushner ("Kushner") and the City of Des Plaines ("City") liable, pursuant to 42 U.S.C. §1983, for the alleged violation of the plaintiffs' fourth and fourteenth amendment rights resulting from the claimed illegal eviction of the plaintiffs by defendants Rand Manor Motel and Mobile Home Park ("Rand Manor") and John Peicuch ("Peicuch"). According to the plaintiffs, Kushner entered into an agreement with Rand Manor and Peicuch in which the City and its police department would not intervene in the illegal eviction of tenants at Rand Manor's properties. The trial court dismissed Count VIII pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 2-619(a)(9) (West 2014)) on the basis that the agreement between Kushner and Rand Manor and Peicuch did not impose any obligation on the part of the City, and the City did not otherwise have a duty to intervene in the plaintiffs' eviction.

¶ 3 BACKGROUND

¶ 4 The plaintiffs' made the following relevant allegations in the Complaint. Rand Manor is a corporation owned and operated by Peicuch. On adjacent properties, Rand Manor is comprised of two separate business—a motel for short-term, transient guests, and a mobile home park. The mobile home park houses long-term tenants, some of whom rent mobile homes owned by Rand Manor and some of whom own the their mobile home but rent a lot from Rand Manor. The actual property used to operate the motel and the mobile home park—the real property, the motel, buildings, and other fixtures—is owned by defendant Lin Investment, Inc. ("Lin"), but leased to Peicuch and his former wife.

¶ 5 In 2009, the plaintiffs began renting a mobile home at Rand Manor. Over the course of the next three years, the relationship between the plaintiffs and Peicuch was difficult and strained, with Peicuch refusing to repair defects in the plaintiffs' home, suddenly raising the plaintiffs' rent, and otherwise making unreasonable demands on the plaintiffs.

¶ 6 In 2012, Peicuch wanted to evict the plaintiffs. In order to manufacture a rent delinquency, Peicuch began to charge the plaintiffs fabricated fees for "soiled linens." When the plaintiffs refused to pay the fees, Peicuch refused to accept the plaintiffs' rent payments. Desiring to evict the plaintiffs without pursuing a judicial eviction proceeding, Peicuch, through the lawyers for Rand Manor, reached out to the City's lawyers. Following negotiations, the City agreed that its police department would not interfere in Peicuch's evictions of tenants without a court order, so long as Peicuch and Rand Manor agreed to indemnify the City and Kushner against any claims arising out of said evictions. On October 5, 2012, Kushner signed a written agreement to this effect ("Agreement").

¶ 7 The Agreement, as executed, provided the following:

"This Statement of Tenancy and Indemnification is made by John Peicuch as owner of Rand Manor Motel on this 1st day of October, 2012.

I. The Owner warrants and represents the following as true and accurate:

a. JOHN Peicuch is the owner and operator of the Rand Manor Motel ("Motel"), located at 1322 Rand Road, in Des Plaines, Illinois ("Motel Property").

b. The property on which the Motel is located includes guest units within a structure as well as a mobile home lot.

c. Contained on the mobile home lot are both mobile homes that are owned by the Motel, as well as others that are privately owned.

d. The privately owned mobile homes are located on the Motel Property subject to individual ground leases ("Private Mobile Homes").

e. The mobile home units owned by the Motel are operated by the Motel and are provided to guests as an alternative to the motel units within the structure ("RMM Guest Mobile Homes"). Guests that stay in the RMM Guest Mobile Homes do not have leases, and are subject to the same occupancy requirements and restrictions as other guests in the Motel.

f. A site map of the mobile home lot reflecting which mobile homes are owned and operated by the Motel, and which are privately owned is attached to this Statement of Tenancy and Indemnification as Exhibit A ("Site Map"). The Private Mobile Homes are designated on the Site Map by the letters "PO" and the RMM Guest Mobile Homes are designated on the Site Map by the letters "RMM," along with a unite number designation. The Site Map reflects a true and accurate depiction of which mobile homes on the Motel Property are Private Mobile Homes and which are RMM Guest Mobile Homes. A copy of the Site Map is posted on the premises of the Motel Property and each of the RMM Guest Mobile Homes are marked as such on the outside of the Mobile home with a sign indentifying it as property of Rand Manor Motel.

2. If the ownership status of the mobile homes on the Motel Property changes, the Owner must promptly (a) provide the Des Plaines Police Department with an updated Site Map reflecting such changes, (b) post the updated Site Map on the Motel Property, and (c) ensure that all necessary exterior markings of the mobile homes have been updated.

> 3. The Owner shall, and does hereby, waive, release, indemnify, hold harmless, and agreed [*sic*] to defend the City of Des Plaines ("Des Plaines"), its police department, its elected and appointed officials, officers, employees, agents, representatives, and attorneys harmless [*sic*] from any and all liabilities, claims, injuries or damages of whatever nature, arising from, or on account of, directly or indirectly, any claims that a guest of the Motel may have as a result of removal from an RMM Guest Mobile Home by the City of Des Plaines Police Department based on the representations by the Owner in this Statement of Tenancy and Indemnification."

¶ 8 The Complaint further alleged that on October 11, 2012, while at work, William received a call informing him that he and Steve's belongings were being removed from the home. When William returned home, he found that Peicuch had removed his and Steve's belongings from the home, padlocked the doors of the home, and had turned off the gas to the home. Pieicuch refused to allow William to enter the home, even to retrieve his insulin, so William called the police. When the police arrived, they refused to intervene to stop the eviction, although they did enter the home to retrieve William's insulin.

¶ 9 In Count VIII, the plaintiffs alleged that their illegal eviction from the mobile home constituted a violation of their fourth and fourteenth amendment rights and that said constitutional violations were direct results of the Agreement, in which the City and Kushner agreed to not interfere in Peicuch's evictions of mobile home tenants without a court order. Without the Agreement, Peicuch would not have evicted the plaintiffs from their home, and the City and Kushner knew or should have known that their entry into the Agreement would set in motion a violation of the plaintiffs' constitutional rights. In addition, pursuant to the express

policy of non-intervention found in the Agreement, officers responding to William's call refused to intervene in the eviction and did nothing to prevent the eviction from occurring.

¶ 10 Shortly after the filing of the Complaint, the City and Kushner moved to dismiss Count VIII on the basis that Kushner was not a final policymaker for the City and, thus, they could not be held liable under §1983. The parties began to pursue discovery on the motion, and in January 2015, the trial court entered an order that stated in part, "The depositions of the City Manager and Chief Kushner shall be limited to the subject matter of the 2-619 motion and shall be completed by February 16, 2015." As there is no written motion by either party to limit the scope of discovery in the record or any transcript of the hearing at which the matter was discussed, it is unclear which party requested the limitation, for what purpose the limitation was requested, and whether the limitation was intended to apply to anything beyond the depositions of the city manager and Kushner.

¶ 11 In their response to the motion to dismiss, the plaintiffs argued that Kushner was, in fact, a final policymaker, such that liability could be imposed on the City for his action of signing the Agreement. Further, the plaintiffs argued that the Agreement constituted an express policy of the City's, such that liability could be imposed on the City regardless of whether Kushner was a final policymaker. According to the plaintiffs, because the City and Kushner did not refute this independent ground for liability in their motion to dismiss, the motion to dismiss could be denied on that basis alone.

¶ 12 In addition to reiterating their contention that Kushner did not qualify as a final policymaker, the City and Kushner argued in reply that the Agreement did not constitute an express policy that deprived the plaintiffs of their constitutional rights because the Agreement did not require the City to act or refrain from acting in any unconstitutional manner, the

Agreement did not contain any language depriving the plaintiffs of their constitutional rights, the Agreement was not ratified by a final policymaker prior to the plaintiffs' eviction, and the City's officers did not perform any unconstitutional act pursuant to the Agreement. The City and Kushner also argued that even if Kushner were a final policymaker, his actions did not deprive the plaintiffs of their constitutional rights.

¶ 13 Prior to the hearing on the motion to dismiss, the plaintiffs filed a motion to strike all portions of the City's and Kushner's reply that did not specifically address the issue of whether Kushner qualified as a final policymaker. According to the plaintiffs, all other arguments exceeded the scope of the original motion to dismiss and, therefore, could not be raised for the first time in the reply. In addition, the plaintiffs argued that such contentions should not be permitted to stand because the plaintiffs were limited to conducting discovery only on the issue of whether Kushner was a final policymaker. The trial court denied the plaintiffs' motion to strike, although the reasons for the denial are unknown, as there was no transcript of the hearing on the motion included in the record on appeal.

¶ 14 After hearing arguments from the parties, the trial court granted the City's and Kushner's motion to dismiss Count VIII. In its written decision, the trial court concluded that even if the Agreement constituted a policy properly ratified by the City, it does not impose any duty or obligation on the City. Accordingly, there could be no act or omission performed under the Agreement that would have violated the plaintiffs' constitutional rights. In addition, the trial court concluded that because there was no evidence of criminal conduct in the eviction of the plaintiffs, the police were not otherwise obligated to act. Furthermore, even if the police were somehow obligated to prevent the eviction, there is nothing they could have done to prevent the eviction, because the plaintiffs had already been removed from the mobile home by the time that

the police were summoned. Concluding that the plaintiffs had failed to allege an intentional deprivation of their constitutional rights, the trial court granted the motion to dismiss Count VIII.

¶ 15 The plaintiffs then filed their "Motion for Reconsideration or, Alternatively, for Leave to Amend Their Complaint, or for an Order Certifying the Court's Decision as Immediately Appealable under Rule 304(a)" ("motion to reconsider"). In that motion, the plaintiffs argued that in deciding the motion to dismiss, the trial court failed to take all factual allegations in the Complaint as true and in failing to presume the legal sufficiency of the Complaint. Namely, the plaintiffs argued, the trial court's determinations that the City did not assume an obligation under the Agreement and that the City and Kushner did not deprive the plaintiffs of constitutional rights refuted factual allegations in the Complaint. In addition, the plaintiffs argued that the trial court decided the motion under the standards of a section 2-615 (735 ILCS 5/2-615 (West 2014)) motion to dismiss, as evidenced by its determination that the plaintiffs had failed to sufficiently allege that the City and Kushner deprived them of their constitutional rights. According to the plaintiffs, even if considering the motion to dismiss under section 2-615 standards was not error (which they allege it was), they sufficiently alleged that the City's and Kushner's agreement to not intervene in the evictions of Rand Manor tenants caused Peicuch to evict the plaintiffs. In their reply in support of their motion to reconsider, the plaintiffs also argued that it was improper for the trial court to consider the City's and Kushner's arguments relating to causation, because they were raised for the first time in the reply on the motion to dismiss and the plaintiffs did not have the opportunity to conduct discovery on or brief the issue.

¶ 16 Should the trial court deny the plaintiffs' motion to reconsider, the plaintiffs requested leave to amend the Complaint to include allegations that emails, communications, actions, and non-actions by the City, both before and after the execution of the Agreement, evidenced a

promise by the City—outside of the express terms of the Agreement—to not intervene in Peicuch's evictions of Rand Manor tenants. In the case that the trial court also denied that request, the plaintiffs asked that the trial court enter a finding pursuant to Supreme Court Rule 304(a), so that they could immediately appeal the dismissal of Count VIII.

¶ 17 The trial court denied the plaintiffs' motion to reconsider, stating that it had considered the motion to dismiss pursuant to section 2-619. The trial court explained that the Complaint explicitly relied on the terms of the Agreement, not on any emails or negotiations between the parties, and the Agreement—as an affirmative matter—defeated the plaintiffs' claim that the City and Kushner agreed to permit the evictions, thus causing Peicuch to evict the plaintiffs. In addition, the trial court explained that the police report related to the plaintiffs' evictions was an affirmative matter that defeated the plaintiffs' claim that the police failed to prevent their eviction pursuant to the Agreement, because it evidenced that the police were not summoned to the plaintiffs' home until after the eviction had occurred. The trial court considered the plaintiffs' complaints regarding the consideration of the causation argument to be waived for failing to seek leave to file a surreply and for failing to move to strike the City's and Kushner's reply brief.

¶ 18 The trial court also denied the plaintiffs' requests to amend the Complaint, concluding that a claim that communications before or after the Agreement established a promise by the City to not intervene in the evictions by Peicuch was defeated by the language of the Agreement, which does impose any duty or obligation on the City or its police department. As for the plaintiffs' request for a Rule 304(a) finding, the trial court denied it on the basis that Count VIII was too interwoven with the remaining claims to allow for its separate consideration on appeal.

¶ 19 The plaintiffs continued to pursue their claims against Rand Manor, Peicuch, and Lin following the dismissal of Count VIII against the City and Kushner. Eventually, however, the plaintiffs settled their claims against Rand Manor, Peicuch, and Lin, and pursuant to those settlements, the trial court dismissed those claims with prejudice. The plaintiffs then filed this timely appeal.

¶ 20 ANALYSIS

¶ 21 On appeal, the plaintiffs argue that the dismissal of Count VIII against the City and Kushner should be reversed for a number of reasons: (1) the trial court erred in considering the City's and Kushner's argument regarding causation because it was raised for the first time in their reply; (2) even if the causation argument was properly considered, the plaintiffs adequately alleged causation in their Complaint; and (3) Kushner was a final policymaker. The plaintiffs also argue that they should have been allowed the opportunity to amend Count VIII. We conclude that none of these arguments warrant reversal.

¶ 22 Dismissal

¶ 23 A motion to dismiss brought pursuant to section 2-619 of the Code of Civil Procedure is designed to allow for the disposition of issues of law easily proved issues of fact. *O'Hare Truck Service, Inc. v. Illinois State Police*, 284 Ill. App. 3d 941, 945 (1996). Under such motions, the legal sufficiency of the complaint is admitted, as are all well-pleaded facts. *Brock v. Anderson Road Association*, 287 Ill. App. 3d 16, 21 (1997). Where, however, facts alleged in the complaint are contradicted by facts found in exhibits attached to the complaint, the exhibit controls and the facts as alleged in the complaint are not deemed admitted. *Id.*

¶ 24 The City's and Kushner's motion to dismiss was specifically based on section 2-619(a)(9), which allows for the involuntary dismissal of a complaint on the basis that the claim

"is barred by other affirmative matter avoiding the legal effect of or defeating the claim." Generally speaking, an affirmative matter is something that completely negates the alleged cause of action. *O'Hare Truck*, 284 Ill. App. 3d at 945-46. "[A]lthough affirmative matter does not include evidence offered to refute a well-pleaded fact stated in the complaint, it does include something that refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Id.* at 946 (internal quotations omitted).

¶ 25 Our review of the trial court's grant of the motion to dismiss is *de novo*, and we must assess whether there existed a genuine issue of material fact that precluded the dismissal of Count VIII or, in the absence of such an issue of fact, whether the dismissal of Count VIII was proper as a matter of law. *Brock*, 287 Ill. App. 3d at 21.

¶ 26 In Count VIII of the Complaint, the plaintiffs sought to impose liability on the City and Kushner, pursuant to §1983, for the constitutional violations they claim to have suffered as a result of Peicuch's eviction of them without a court order. Under §1983, a municipality may be held liable for the violation of an individual's constitutional rights "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). A policy or custom may be demonstrated in one of three ways: "proof of an express policy causing the loss, a widespread practice constituting custom or usage that caused the loss, or causation of the loss by a person with final policymaking authority." *Kujawski v. Board of Commissioners of Bartholomew County*, 183 F.3d 734, 737 (1999).

¶ 27 The plaintiffs spend much time arguing that the trial court erred in considering the causation argument advanced by the City and Kushner and that, in any case, they sufficiently pleaded causation in the Complaint. The shortcoming in the plaintiffs' argument, however, is that the trial court's ruling, although referencing causation, is actually based on the conclusion that the governmental "policy" the plaintiffs claimed caused their eviction—the City's agreement not to intervene—did not exist. Specifically, the trial court made the following statement in its decision granting the motion to dismiss:

> "[T]he agreement itself places no duty upon Des Plaines, Kushner, the police department, or its officers. Consequently, as there is no duty or obligation on part of Des Plaines to act under the agreement, there can be no act or omission thereunder which may have violated Plaintiffs' constitutional rights. Further, as there exists no duty placed upon Des Plaines or Kushner, there is nothing for Des Plaines to ratify."

In its order denying the plaintiffs' motion to reconsider, the trial court further stated:

> "Count VIII of Plaintiffs' [Complaint] is premised upon the [] Agreement, and for the purpose of establishing liability upon Des Plaines's agreeing to permit Rand Manor to engage in unlawful evictions. [Citation.] Within the Court's prior Order, the Court determined as a matter of law that Des Plaines made no such promise."

From this, it is apparent that the thrust of the trial court's decision was the determination that the Agreement did not, as the plaintiffs alleged, contain any promise by the City or Kushner to act or refrain from acting when Peicuch evicted Rand Manor tenants. The trial court's statement that without a duty imposed on the City or Kushner by the Agreement, there could be no act or omission by the City or Kushner under the Agreement that caused the claimed violations of the

plaintiffs' constitutional rights is nothing more than a statement of the obvious corollary to the trial court's holding: a policy that does not exist cannot cause a constitutional violation.

¶ 28 Because the trial court did not dismiss the Complaint on the basis that the plaintiffs failed to sufficiently allege causation, we need not address whether the trial court erred in considering the issue or whether the plaintiffs sufficiently alleged it. The question remains, however, whether the trial court properly concluded that the plaintiffs' claim in Count VIII was defeated by the language of the Agreement. We conclude that it did.

¶ 29 In the Complaint, the plaintiffs allege that in the written Agreement, the City and Kushner agreed to refrain from intervening in Peicuch's evictions of Rand Manor tenants, and that this promise of non-intervention constituted a governmental policy that caused Peicuch to evict the plaintiffs. The Agreement, however, does not contain any promise by the City or Kushner to act or refrain from acting with respect to Peicuch's evictions of Rand Manor tenants. In fact, the Agreement does not contain a promise by the City or Kushner to do or refrain from doing *anything*. Thus, the Agreement itself defeats the plaintiffs' claim that the City and Kushner agreed not to intervene in Peicuch's eviction of Rand Manor tenants. Given that it was this supposed agreement of non-intervention that the plaintiffs alleged was the City's policy that caused their constitutional violations, its absence is fatal to the plaintiffs' §1983 claim. See *Monell*, 436 U.S. at 694 ("it is when execution of *a government's policy or custom*, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983" (emphasis added)).

¶ 30 The plaintiffs make a number of arguments that, although framed as arguments that the trial court erred in finding that they did not sufficiently allege causation, are nevertheless

relevant here. First, the plaintiffs argue that the trial court erred in focusing on the language of the Agreement and not the effect of the Agreement, *i.e.*, that it caused Peicuch to illegally evict the plaintiffs. The problem with this contention, of course, is that in the Complaint, the plaintiffs place the focus on the language of the Agreement by alleging that it was the City's promise in the written Agreement not to intervene in Peicuch's evictions that caused Peicuch to evict the plaintiffs. Thus, by the plaintiffs' own contentions, it was the language of the Agreement that gave rise to the effect on which, they argue, the trial court should have focused. The trial court cannot be faulted for failing to address the effect of a promise that does not exist in the Agreement as alleged by the plaintiffs.

¶ 31 Nevertheless, the plaintiffs contend that the trial court should have considered the negotiations and discussions that took place before and after the signing of the Agreement as further evidence that the City promised not to intervene in the evictions. This contention fails for two reasons. First, the plaintiffs did not allege in the Complaint that the entirety of the agreement between the City and Peicuch was contained in not only the written Agreement but also in the emails and discussions that took place before and after the execution of the Agreement. Rather, the Complaint very clearly focuses solely on the Agreement, and no mention is made of any emails or discussions being part of a larger agreement. Representative of this focus is the following language from the Complaint:

> "The [] Agreement established an express municipal policy, and was a deliberate act of a decision maker with pertinent policy making authority, that the Des Plaines Police Department would not interfere in any attempted eviction by Rand Manor or Peicuch without a judicial eviction order, and violated Bill and Steve's rights under the Fourth Amendment to the United States Constitution against unreasonable seizures of property

> and the Fourteenth Amendment to the United States Constitution against violations of procedural due process because, among other violations, Bill and Steve were deprived of a hearing before they were dispossessed of their tenancy of the Mobile Home."

This is just one of many allegations that evidence the plaintiffs' claim that the *Agreement* represented the relevant promises by the City and Kushner.

¶ 32 Second, although the plaintiffs appear to contend that wherever a written agreement does not contain an integration clause, the parties and interpreting courts can consider parole evidence as they please, the plaintiffs do not cite any authority that supports this position. The one case that they do cite—*W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752 (2004)—recognized the general principal that where a contract contains an integration clause, the parole evidence rule precludes consideration of evidence demonstrating understandings not found in the contract that would vary or modify the terms of the agreement. It did not, however, say that where a contract does not contain an integration clause, parties can introduce whatever outside evidence they wish to influence the court's interpretation of the contract's terms. Nor did *W.W. Vincent* attempt to alter the well-established canons of contract interpretation that the intent of the parties is to be ascertained from the language of the agreement itself and only if the terms of the agreement are ambiguous are courts to take parole evidence into consideration. See *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288 (1990).

¶ 33 Next, the plaintiffs argue that the trial court was required to accept as true their allegation that the City agreed not to intervene in the evictions and to draw in their favor the inference that the City must have received something in return for indemnification from Peicuch. Plaintiffs ignore, however, the basic principle that where facts alleged in the complaint are contradicted by facts found in exhibits attached to the complaint, the exhibit controls and the facts as alleged in

the complaint cannot be deemed admitted. *Brock*, 287 Ill. App. 3d at 21. Moreover, the Agreement acts as an affirmative matter that refutes the plaintiffs' conclusion of material fact that the City and Kushner promised in the Agreement to refrain from intervening in the evictions, especially since the plaintiffs have not cited—in the Complaint or otherwise—any specific provisions of the Agreement that they claim demonstrates this alleged promise. See *O'Hare Truck*, 284 Ill. App. 3d at 946 (stating that "although affirmative matter does not include evidence offered to refute a well-pleaded fact stated in the complaint, it does include something that refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint" (internal quotations omitted) and concluding that a document submitted by the defendant was an affirmative matter that refuted the plaintiff's conclusory allegations regarding what procedures were required by the towing policy at issue).

¶ 34 Ironically, despite complaining that the City and Kushner raised the causation argument for the first time in their reply on the motion to dismiss, the plaintiffs' final argument regarding the Agreement is one that they raise for the first time in their reply brief. In that argument, the plaintiffs contend that by signing the Agreement, Kushner and the City signaled their acceptance of Peicuch's "Renter/Owner Theory," *i.e.*, Peicuch's belief that renters of Rand Manor's mobile homes were no different than motel guests and could be evicted without resort to judicial proceedings. According to the plaintiffs, this then gave Peicuch the reassurance he needed to proceed with the eviction of the plaintiffs. Again, the plaintiffs make this contention in support of their position that they sufficiently alleged causation, but to the extent that it was at all intended to refute the conclusion that the Agreement did not contain any promise by the City or Kushner, our response is the same: the argument is waived. Not only was this argument first

raised on appeal in the reply brief, resulting in its waiver under Supreme Court Rule 341(j) (eff. Jan. 1, 2016), but it appears that this is the first time it has ever been raised. Thus, it is also waived for the reason that the plaintiffs did not make this argument in the trial court. See *In re Marriage of Culp*, 399 Ill. App. 3d 542, 550 (2010).

¶ 35 Because we determine that the language of the Agreement affirmatively defeats the plaintiffs' allegations that the City and Kushner agreed to refrain from intervening in the evictions of the Rand Manor tenants, the plaintiffs' §1983 claim against the City and Kushner must fail, as the governmental "policy" alleged to have caused the plaintiffs' injury does not exist. Given this conclusion, we need not address Kushner's status as a final policymaker; absent a governmental policy or custom—whether implemented by the municipality or by one of its final policymakers—there can be no liability under §1983. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (discussing how liability under §1983 must flow from a municipality's "official policy"); *Monell*, 436 U.S. at 691 ("Congress did not intend municipalities to be held liable unless *action pursuant to official municipal policy* of some nature caused a constitutional tort." (Emphasis added.)); *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993) ("Similarly, there must be proof of such a custom or policy in order to permit recovery on claims against individual municipal employees in their official capacities, since such claims are tantamount to claims against the municipality.").

¶ 36 Amendment

¶ 37 We turn now to the plaintiffs' contention that the trial court erred in denying their request to amend Count VIII against the City and Kushner. As a part of their motion to reconsider filed in the trial court, the plaintiffs requested leave to amend Count VIII of the Complaint to include allegations that two emails between counsel for the City and counsel for Peicuch and Rand

Manor demonstrate that the bargain between the City and Peicuch/Rand Manor continued to evolve after the execution of the Agreement and was the moving force that caused Peicuch to evict the plaintiffs. In their reply in support of their motion to reconsider, the plaintiffs argue that their amendment to Count VIII would "make clear that, regardless of how just [*sic*] the written Indemnification Agreement may be interpreted, the communications and action (or non-actions) of the City before and after the signing of that document are part of what caused the Constitutional violation."[1]

¶ 38 Section 2-616(a) of the Code of Civil Procedure (735 ILCS 5/2-616(a) (West 2014)) provides that amendments to pleadings may be allowed on "just and reasonable terms" at any time before final judgment. Despite this liberal standard, the right to amend is neither absolute nor unlimited. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010). In determining whether leave to amend should be granted, four factors are to be considered: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). A plaintiff seeking to amend its complaint must meet all four of these factors. *I.C.S. Illinois*, 403 Ill. App. 3d at 220.

¶ 39 Whether to grant leave to amend is within the discretion of the trial court, and we will not disturb the trial court's decision absent an abuse of that discretion. *Id.* at 219. "[B]efore a trial judge can be found to have abused his or her discretion in denying leave to amend, it must be

[1] In their reply brief on appeal, the plaintiffs also argue that their proposed amended Count VIII would have alleged that "the City made clear that it would accept and rely on Rand Manor's Renter/Owner Theory." As before, this contention is waived because the plaintiffs raise it for the first time in their reply brief in violation of Rule 341(j) and failed to raise it at all in the trial court (*Culp*, 399 Ill. App. 3d at 550).

clear from the record that reasons or facts were presented as a basis for requesting the favorable exercise of the court's discretion." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004). "There is no presumption that a proposed amendment will be a proper one and it is not error to refuse to allow an amendment that has not been presented when there are no means of determining whether or not it will be proper and sufficient." *Intini v. Schwartz*, 78 Ill. App. 3d 575, 579 (1979); see also *In re Estate of Nicholson*, 268 Ill. App. 3d 689, 695 (1994).

¶ 40 To that end, if a plaintiff does not submit a proposed amended complaint or otherwise provide specific facts supporting his or her claimed amendment, there is no way to determine whether justice would be served by allowing amendment, and the trial court cannot be said to have erred by denying leave to amend. See *id.* at 695 (the trial court did not err in denying the plaintiff's oral motion to amend where the plaintiff "presented only further general allegations that did not serve to cure the factual insufficiencies which resulted in dismissal"); *Misselhorn v. Doyle*, 257 Ill. App. 3d 983, 987 (1994) (the appellate court could not determine whether the trial court abused its discretion in denying leave to amend where the plaintiff failed to include a proposed amended complaint in the record); *Intini*, 78 Ill. App. 3d at 579-80 (where the plaintiff failed to submit a proposed amended complaint and did not otherwise indicate how he intended to cure the defects, the record was not sufficient for the appellate court to determine whether amendment would have been appropriate); *Hassiepen v. Marcin*, 22 Ill. App. 3d 433, 436 (1974) ("[A] party desiring to file an amended pleading should make it part of the record on appeal. If this is not done, a court of review is not in a position to say that justice would be served by granting leave to amend. In such instances it can be presumed that a plaintiff's second attempt to state a cause of action would be no more successful than his first.").

¶ 41 In the present case, the plaintiffs did not submit a proposed amended complaint in support of their request for leave to amend or otherwise make one a part of the record. Moreover, the plaintiffs did not provide more than general claims that they wanted to amend Count VIII to allege that emails, communications, actions, and non-actions both before and after the execution of the Agreement were "part of" what caused their claimed constitutional violations. Rather, the plaintiffs simply attached two emails that counsel for Peicuch/Rand Manor and counsel for the City exchanged after the signing of the Agreement. Nowhere in their motion to reconsider or their reply in support of the motion to reconsider did the plaintiffs explain the relevance of these emails to their proposed amended claims, nor do the plaintiffs identify what other emails, communications, actions, or non-actions they claim support their amendment or how those items would support their §1983 claim. In fact, at no point in the trial court did the plaintiffs explain what specific factual allegations they would make in their amended Count VIII that would cure its deficiencies. Because the plaintiffs failed to present the trial court with sufficient information on which it could assess whether the defects of Count VIII could be cured by the plaintiff's proposed amendments (*i.e.*, whether amendment would be futile), we cannot say that the trial court erred.

¶ 42 The plaintiffs contend that the trial court's denial of their request for leave to amend must be reversed because the trial court did not explain its reasoning for denying the request. In support, the plaintiffs cite an unpublished decision of the Illinois Appellate Court. Supreme Court Rule 23(e) (eff. July 1, 2011) specifically provides that such orders are not precedential and "may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppels or law of the case." The plaintiffs ignore the unpublished status of the case and make no effort whatsoever to justify their use of the unpublished decision under this

rule; accordingly, we make no effort to consider the holding of the case. Given that the plaintiffs have not cited any other authority for the proposition that a trial court must provide the parties with an explanation of its denial of leave to amend or face reversal, this contention is waived for failure to cite appropriate authority. See *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010) ("Supreme Court Rule 341(h)(7) requires a clear statement of contentions with supporting citation of authorities and pages of the record relied on. [Citation.] Ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived.").

¶ 43 Moreover, we note that the trial court stated in its written order on the motion to reconsider that "any communication prior to, or after the execution of the [Agreement], purporting to establish some promise on [the] part of Des Plaines to refrain from intervening in Rand Manor's alleged illegal eviction appears as roundly defeated by the language of the [Agreement] itself, which provokes no duty or obligation upon Des Plaines or its police department." Although not part of a specific discussion on the plaintiffs' request for leave to amend Count VIII, this statement is a clear refutation of the plaintiffs' claim that it could cure the defect in Count VIII by including additional allegations based on communications between the City and counsel for Peicuch Rand Manor before and after the execution of the Agreement. Thus, even if the plaintiffs' contention that the trial court failed to provide a reason for denying them leave to amend was not waived, it would be without merit.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 46 Affirmed.