

No. 1-16-2224

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CANCUN ASSOCIATES, LLC, a Delaware limited, Liability company,)	Appeal from the
)	Circuit Court
)	Cook County.
Plaintiff,)	
)	
v.)	
)	No. 11 L 9369
JOSEPH J. CASPER III and ROBIN W. ROBINSON,)	
)	
Defendants.)	

JOSEPH J. CASPER III and ROBIN W. ROBINSON,)	
)	
Third-Party Plaintiffs/Appellants,)	
)	
v.)	
)	
EVEREST REAL ESTATE FUND, LLC, EVEREST CANCUN, LLC, and FRACCIONAMENTO PENINSULA) S. DE R.K. DE C.V., a Mexican limited liability company,)	Honorable
)	Patrick J. Sherlock,
Third-Party Defendants/Appellees.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly granted summary judgment in favor of Everest on plaintiffs' claim for declaratory judgment where the claim was made after the fact

and the contract had been fully performed; and (2) the trial court did not abuse its discretion in denying plaintiff's leave to file a third amended complaint alleging a new cause of action.

¶ 2 This case involves a dispute relating to commercial real estate property in Cancun, Mexico. Third-party plaintiffs Joseph J. Casper III and Robin W. Robinson (collectively, plaintiffs) were part owners of the property and personal guarantors of a senior loan from third-party defendant Everest Real Estate Fund, LLC (Everest), as well as a junior loan from Cancun Associates, LLC (Cancun). Following a default on both loans, the borrower group, which included plaintiffs, entered into a settlement agreement with Everest. The settlement agreement provided that Everest would pay the delinquent property taxes on the property in a timely manner and granted the borrower group a right of first refusal (ROFR) on any proposed sale of the property for 24 months from the effective date, February 22, 2010.

¶ 3 The initial action was filed in the trial court by Cancun against plaintiffs for a breach of the junior loan. Cancun obtained a judgment of \$3,200,000 against plaintiffs on that claim. No issues on appeal relate to that action. The instant appeal involves only the third-party action filed within this circuit court case number.

¶ 4 In March 2013, plaintiffs filed their initial third-party complaint against Everest alleging (1) breach of contract; (2) declaratory judgment; and (3) an injunction on the sale of the property. Following cross-motions for summary judgment, the trial court granted summary judgment in Everest's favor for breach of contract and declaratory judgment, and dismissed the claim for injunctive relief as moot. Plaintiffs appeal, arguing that (1) the trial court erred in granting summary judgment on the declaratory judgment count; and (2) the trial court erred in denying leave to plead a claim of specific performance. Plaintiffs do not challenge the trial court's rulings related to the breach of contract or injunction claims.

¶ 5 In 2007, Everest filed a collection suit in the circuit court against the borrower group, including plaintiffs, seeking amounts due and owing under the Everest loan for the property in Mexico. *Everest Real Estate Fund, LLC v. US Investment Capital, LLC*, No. 07 L 6147. In February 2010, the parties settled the case and entered into the “Settlement and Restructuring Agreement” (Settlement Agreement). The Settlement Agreement stated that US Investment Capital, LLC (USIC) owned 99.9999% of the property with the remaining 0.0001% owned by Casper. The Settlement Agreement included USIC, USIC Manager, LLC, both plaintiffs, and a third individual Terry M. Rozdolsky, who is not a party to this action (collectively, USIC parties), and Everest. Pursuant to the loan agreement, all the obligations of USIC were guaranteed by plaintiffs, jointly and severally. As of the effective date of the Settlement Agreement, the outstanding balance of the Everest loan was \$21,598,063.15. The Settlement Agreement noted a pending labor suit in Mexico, which included a labor lien on the property.

¶ 6 Under the Settlement Agreement, ownership of the property was transferred to Everest. Upon confirmation of the transfer to Everest, the Settlement Agreement stated in section 3(a):

“Everest will fund up to \$300,000 (the ‘Additional Funds’) to be applied toward the predial taxes for the Property for 2007, 2008, 2009 (the ‘Delinquent Property Taxes’) and 2010. Such funds shall be disbursed as determined by Everest in sole and absolute discretion.”

¶ 7 The Settlement Agreement further provided in section 3(c):

“Notwithstanding anything to the contrary in this Agreement, Everest confirms that Everest intends (but does not covenant) to exercise reasonable efforts to pay or resolve the

Specified Liabilities to the extent that Everest in good faith determines appropriate and in the best interests of the Property, but this Agreement imposes no legal obligations or liability of any kind upon Everest or Transferee.”

¶ 8 The Settlement Agreement also provided the USIC parties the option to purchase the property from Everest for a period of one calendar year for the amount of \$12,025,000, which was the reset senior loan amount under the Settlement Agreement, plus all accrued interest and Everest’s out of pocket costs. During that first year, the USIC parties were permitted to direct the sale of the property. Section 5 of the Settlement Agreement stated:

“(d) After the First Year, if there is no transaction resulting in a cash payment to Everest of at least the Everest Minimum Payment Amount, then thereafter Everest shall have sole and absolute authority to sell, refinance or otherwise dispose the Property without the consent or approval of any of the USIC Parties.

(e) From the Effective Date through the 24th month following the Effective Date, the USIC parties collectively, through the Designated Principal, shall have the right of first refusal with respect to any proposed sale of the Property or sale of all of Everest’s interest in Transferee to be exercised within 30 days following delivery to such notice party of a term sheet disclosing the following terms that have been agreed to by a potential purchaser: price, closing date, and other customary terms

of sale (the 'ROFR'). *** If the USIC Parties fail to exercise such ROFR in writing, Everest shall be free to sell the Property, sell Transferee (or any interests therein) or sell the respective Transferred Interests pursuant to the terms of the ROFR to the potential purchaser or to any subsequent purchaser for a price equal to or greater than those set forth in the term sheet referenced above. If the USIC Parties exercise the ROFR but fail to close on the ROFR within 15 days of exercise of the ROFR, the ROFR shall terminate and USIC Parties' right to Direct the Sale of the Property during the First Year shall terminate. The ROFR shall expire without further notice on the first day of the 25th calendar month following the Effective Date."

¶ 9 The Settlement Agreement directed that proceeds from the disposition of the property were to be distributed first to Everest, then to Cancun to satisfy the junior loan, and then to plaintiffs and Rozdolsky. The agreement also included a "time is of the essence" clause.

¶ 10 The Settlement Agreement stated that the USIC parties were to present a business plan for Everest's approval on or before the effective date of the agreement. The approved business plan stated that its goal was "to obtain the highest possible sale bid for the Cancun Property in the marketplace" to pay Everest and Cancun. The approved business plan would not "override or contravene" the Settlement Agreement, and the terms of the Settlement Agreement would govern over any inconsistencies. The property was subsequently transferred to Everest's transferee, Everest Cancun LLC, a named third-party defendant in the instant action.

¶ 11 In April 2010, Everest paid approximately \$165,000 toward the outstanding property taxes based on the April balance statement indicating this was the amount due for 2007 through 2010. Everest was advised that the April balance statement was inaccurate. A subsequent balance statement from October 2010 showed approximately \$412, 508.35 remained owing. In February 2011, after a negotiation with the municipality, the balance was agreed to be paid in monthly installments, guaranteed by a lien over the property. The payment agreement was later amended in February 2012 to account for the accruing property taxes for 2011 and 2012. All property taxes were paid and no foreclosure action was filed against the property for failure to pay the property taxes.

¶ 12 Under the operation of the Settlement Agreement, the ROFR was in effect until March 1, 2012. In November 2012, Everest entered into a contract to sell the property to BECSA, a Mexican entity. In March 2013, the initial third-party complaint was filed by Casper against Everest alleging (1) a claim of damages from a breach of contract, (2) a declaratory judgment that the ROFR was valid and exercisable, and (3) an injunction barring parties from consummating a sale without first permitting plaintiffs to exercise ROFR. Plaintiffs' claims were based on their allegation that Everest failed to timely pay the delinquent property taxes, which were paid in full after the ROFR had expired. A first amended complaint was filed in September 2013. The property was sold to BECSA in November 2013, for \$12,000,000.

¶ 13 In January 2015, the second amended complaint was filed, which added Robinson as a third-party plaintiff. All three complaints alleged the same three counts and also named BECSA, the purchaser of the property, as a defendant. Everest filed a two-count third-party counterclaim, alleging breach and contractual indemnification under the Settlement Agreement. In November 2015, plaintiffs and Everest filed cross-motions for summary judgment.

¶ 14 In January 2016, following briefing, the trial court granted Everest's motion for summary judgment on plaintiffs' claim for damages for a breach of contract and dismissed the claim for an injunction as moot. In its written order, the trial court observed that "[t]he gist of plaintiffs' claim is that Everest wrongfully delayed paying the delinquent real estate taxes for 21 months, almost the entire 24 month period until plaintiffs' ROFR expired, and only sold the property after the ROFR had expired."

¶ 15 As to the damages for breach of contract count, the court found that the parties provided a "staggering amount of evidentiary material" related to the payment of the delinquent real estate taxes and the negotiations with Mexican authorities. The court pointed out that "neither side states that there are no contested issues of fact regarding Everest's negotiation and payment." The court concluded that "[e]ven if all of the material facts concerning Everest's conduct *** was uncontested (which the Court does not find)," it would still need live testimony to determine credibility and the reasonableness of Everest's conduct. The court declined to find summary judgment on the issue of Everest's liability for breach of contract. However, that finding did not end the trial court's consideration. The court turned to plaintiffs' requested damages, and found that the Settlement Agreement excluded any claim for "indirect, consequential, or punitive damages." The court concluded that plaintiffs' claim did not involve a claim for direct damages by the alleged breach by Everest, but merely consequential damages, which were waived under the Settlement Agreement. For this reason, the trial court granted summary judgment in favor of Everest on the claim. As pointed out earlier, plaintiffs have not appealed this ruling.

¶ 16 The trial court observed that plaintiffs failed to mention their third count for an injunction in their summary judgment filings. The court pointed out that the contract to sell the property was entered into in November 2012. Plaintiffs' first amended complaint was filed in September

2013, and attached the sale contract as an exhibit. No action was taken to enjoin the sale, which occurred in November 2013. The court found the claim for an injunction moot by the sale of the property and struck it.

¶ 17 Regarding plaintiffs' claim for declaratory judgment, the trial court noted that it had already found "contested issues of material fact on whether Everest breached its contractual obligation to pay the delinquent property taxes" and whether the delay was an attempt to prevent plaintiffs from exercising their ROFR. The court stated that:

"The issue remains, however, whether Everest's purported misconduct would permit the Court to revive the ROFR or order title to the property pass to plaintiffs upon payment of the somewhat mysterious mortgage." (Emphasis in original.)

The court then ordered supplemental briefing addressing the grounds for remedies under the declaratory judgment count and authorities supporting their claim.

¶ 18 In February 2016, following the supplemental briefing, the trial court granted summary judgment in favor of Everest on the declaratory judgment claim. The court concluded that declaratory judgment was not appropriate because the Settlement Agreement had been fully performed. "There is no act required by the contract that the Court could, at this late date, order Everest to perform. It could hardly recognize plaintiffs' ROFR since the sale to BECSA has long since been consummated." In responding to plaintiffs' argument in favor of an equitable remedy, the court stated:

"The fact of the matter is, plaintiffs sat on their claim for an unconscionable period of time. Having lost their 2011 emergency motion in the Everest collection case, they essentially gave up.

They did nothing while the time remaining on the ROFR expired. Even then, and even after having filed a (third party) complaint in this case that sought, *inter alia*, to enjoin the pending sale to BECSA, plaintiffs did not actually seek an injunction. The sale closed unchallenged in 2013.

Now, more than two years after BECSA bought the property, plaintiffs want this Court to find that their long-expired ROFR, which would have permitted plaintiffs to buy the property at the same price BECSA paid, is still valid.”

¶ 19 Plaintiffs filed a motion to reconsider the grant of summary judgment in favor of Everest on the declaratory judgment claim, which the trial court denied. Plaintiffs also sought leave to file a third amended third-party complaint to add a claim for specific performance. In July 2016, the trial court denied plaintiffs’ motion.

¶ 20 This appeal followed.

¶ 21 Initially, we address Everest’s renewed motion to dismiss this appeal for lack of jurisdiction. This court previously denied the motion in September 2016, and we reach the same conclusion now. Plaintiffs filed their notice of appeal within 30 days of the trial court’s final order denying their motion to reconsider the summary judgment ruling, and accordingly, this court has jurisdiction over this appeal under Supreme Court Rules 301 and 303. See Ill. S. Ct. Rs. 301 (eff. Feb 1, 1994) and 303 (eff. Jan. 1, 2015).

¶ 22 Plaintiffs first argue that the trial court erred in granting summary judgment in favor of Everest on their claim of declaratory judgment because the court had found questions of material

fact related to Everest's conduct and a claim for a declaratory judgment is not barred by the presence of alternative remedies.

¶ 23 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). We review cases involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998). "As in this case, where the parties file cross-motions for summary judgment, they invite the court to decide the issues presented as a matter of law." *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 335, 339 (2005).

¶ 24 The Illinois declaratory judgment statute provides in relevant part:

"No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, *** of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not

terminate the controversy or some part thereof, giving rise to the proceeding.” 735 ILCS 5/2-701(a) (West 2012).

¶ 25 “The essential requirements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests.” *Behringer v. Page*, 204 Ill. 2d 363, 372 (2003). “The declaratory judgment procedure allows ‘ ‘the court to take hold of a controversy one step sooner than normally—that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting.’ ” ” *Id.* at 372-73 (quoting *Kaske v. City of Rockford*, 96 Ill. 2d 298, 306 (1983), quoting *Buege v. Lee*, 56 Ill. App. 3d 793, 798 (1978), quoting Ill. Ann. Stat., ch. 110, par. 57.1, Historical & Practice Notes, at 132 (Smith-Hurd 1968)). “ ‘The declaratory judgment procedure was designed to settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right. [Citation.] The remedy is used to afford security and relief against uncertainty so as to avoid potential litigation.’ ” *Id.* at 373 (quoting *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 174 (1995)).

¶ 26 “A declaratory judgment action is purely statutory and is to be liberally construed. However, the provisions of the statute must be strictly complied with.” *Id.* Moreover, “[a] declaratory judgment action is strictly remedial. The statute does not create substantive rights or duties, but merely affords a new, additional, and cumulative procedural method for the judicial determination of the parties’ rights.” *Id.*

“ ‘ “Actual” in this context does not mean that a wrong must have been committed and injury inflicted. Rather, it requires a showing

that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events.’ ” (Emphasis omitted.) *Id.* at 374-75 (quoting *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 375 (1977)).

¶ 27 Here, plaintiffs seek a declaratory judgment that their ROFR is still valid more than five years after it expired due to Everest’s delay in satisfying the delinquent property taxes. It is undisputed that plaintiffs’ ROFR expired on its terms on March 1, 2012, and that in November 2012, BECSA entered into a contract to buy the property. It is also undisputed that plaintiffs were aware of the pending sale as the contract was attached to the first amended complaint.

¶ 28 Plaintiffs first argue that the trial court’s finding that questions of material fact existed regarding Everest’s payment of the delinquent taxes precluded the grant of summary judgment. However, plaintiffs fail to understand the reason why summary judgment was granted despite these questions, which is that declaratory relief is not appropriate in this case. As the trial court stated, the issue was “whether Everest’s purported misconduct would permit the Court to revive the ROFR.” The trial court concluded that no viable relief could be awarded in this case as the Settlement Agreement had been fully performed and the subject property was sold years earlier to another entity with no action by plaintiffs to enjoin the sale.

¶ 29 “Although a declaratory judgment action is proper to determine the parties’ existing rights, a court may dismiss such an action if ‘a party, seeks to enforce his rights after the fact.’ ” *Karimi v. 401 N. Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 10 (quoting *Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302, 314 (1991)). In *Karimi*, the plaintiffs entered into a

contract to purchase a condominium, but failed to obtain financing and close by the set deadline. The defendants terminated the contract and notified the plaintiffs. The condominium was subsequently sold to a third party. The plaintiffs filed a complaint seeking, in part, for a declaration that the purchase contract remained in effect. *Id.* ¶¶5-7. The trial court dismissed that claim, and the reviewing court affirmed, finding that the defendants had already terminated the contract and the plaintiff was seeking to enforce their rights after the fact and which rights were properly allegations of a breach of contract. *Id.* ¶ 10. We agree with this reasoning and find it applicable to the instant case.

¶ 30 As previously stated, under the declaratory judgment statute, “The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding.” 735 ILCS 5/2-701(a) (West 2012). The relief requested would not terminate any controversy because plaintiffs are seeking relief after the fact that the Settlement Agreement has been performed. Plaintiffs could have taken action to enjoin the sale of the property, but despite a claim for an injunction in the complaint, declined to act. Plaintiffs assert that reviving their expired ROFR after Everest’s alleged misconduct lies in equity, but it is also inequitable to reward plaintiffs who failed to doggedly pursue their claims before the property was sold to another entity. See *Schroeder v. Schlueter*, 85 Ill. App. 3d 574, 577 (1980) (“In regard to the right at equity to have specific performance of a contract of sale, unreasonable delay coupled with a material advance in value is fatal for equity will not allow a purchaser to remain in the wings gambling on the future rise in price.”) Accordingly, we find that summary judgment was proper on plaintiffs’ claim for a declaratory judgment where the contract at issue had been performed and plaintiffs were seeking to enforce their rights after the fact.

¶ 31 Next, plaintiffs contend that the trial court erred in denying them leave to file a third amended complaint adding a new claim of specific performance. According to plaintiffs, the claim of specific performance was added in response to grant of summary judgment in favor of Everest and would cure the defects of the complaint.

¶ 32 Section 2-1005(g) states that “[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms.” 735 ILCS 5/2-1005(g) (West 2012). “Although this section indicates that amendments may be allowed after the entry of summary judgment, there is strong argument to be made for the proposition that the right to amend following a final summary judgment should be more restricted than the right to amend prior to summary judgment or where the summary judgment is interlocutory.” *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 521 (2007). “The rationale for such differentiation may well be that a party ought not be allowed to withhold his theory of a case while putting his opponent and the court to the burdens of summary judgment on an earlier pleading only to then sidestep the court's ruling by seeking to amend and start over.” *Id.* at 522 (citing *In re Schwartz's Estate*, 286 Ill. App. 310, 316 (1936) (“a party may not submit a cause to the court upon one theory, and, having failed to prevail therein, seek to inject an entirely new issue into the proceeding by amendment and have the cause tried over”); *Tires ‘N Tracks, Inc. v. Dominic Fiordiroso Construction Co.*, 331 Ill. App. 3d 87, 95 (2002) (“It is improper practice to engage in piecemeal litigation, seeing one theory of the case to conclusion before proposing another”).

¶ 33 “The circuit court retains broad discretion in allowing or denying amendment to pleadings prior to the entry of final judgment, and a reviewing court will not reverse the trial court's decision absent a manifest abuse of such discretion.” *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 35. In determining whether a trial court abused its discretion by denying leave

to amend, Illinois courts must determine whether “(1) the proposed amendment would cure the defective pleading; (2) the proposed amendment would surprise or prejudice the opposing party; (3) the proposed amendment was timely filed; and (4) the moving party had previous opportunities to amend.” *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69; see also *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). “The plaintiff must meet all four factors, and ‘if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis.’ ” *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010) (quoting *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill.App.3d 1, 7 (2004)). “ ‘[W]hen ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading’ and it is not necessary for the plaintiff to file an amended complaint and the defendant to test the sufficiency of that complaint through a motion to dismiss.” *Id.* (quoting *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 7).

¶ 34 “To state a cause of action for specific performance, the plaintiff must allege and prove the following elements: (1) the existence of a valid, binding, and enforceable contract; (2) compliance by the plaintiff with the terms of the contract, or proof that the plaintiff is ready, willing, and able to perform the contract; and (3) the failure or refusal of the defendant to perform his part of the contract.” *Hoxha v. LaSalle National Bank*, 365 Ill. App. 3d 80, 85 (2006).

¶ 35 In its written decision, the trial court found that all of the four factors weighed against granting leave. First, the trial court rejected plaintiffs’ contention that the prior defect was that they asked for a declaratory judgment when specific performance was the correct claim. The court pointed out that this was not the type of defect referred to under Illinois case law, as their

claim for declaratory judgment was not defectively plead. As the trial court stated, “[a] change in a litigant’s strategy from one cause of action is not a cure of defect in a pleading.” See generally *Lacey v. Perrin*, 2015 IL App (2d) 141114, ¶ 77 (“plaintiff proposed not to cure any defect in any previously pleaded cause of action, but rather to add a *new* cause of action” (Emphasis in original.)); *Jones v. O’Brien Tire & Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 937 (2007) (distinguishing between adding a cause of action and curing a defective pleading); *Mason v. American National Fire Insurance Co.*, 295 Ill. App. 3d 199, 203 (1998) (noting that the proposed amended complaint did not cure the defect in the previous complaints where those complaints were based on a breach of contract, and plaintiff now raised a new theory relating to consumer fraud).

¶ 36 Even if a claim of specific performance could cure the defect of plaintiffs’ declaratory judgment claim, which we do not specifically hold, the trial court did not abuse its discretion in denying plaintiffs’ leave to file a third amended complaint. In considering the remaining three factors together, we find that plaintiffs’ proposed amended complaint prejudiced Everest by alleging a new cause of action after the prior claim failed, was untimely after more than three years of litigation had passed, and no new evidence was discovered that prevented an earlier amendment. Plaintiffs assert that Everest would not be prejudiced by the addition of a specific performance cause of action because the supporting evidence would be the same at issue in the case. Plaintiffs further argue that the amendment was timely because they did not have a prior opportunity to raise the claim for specific performance until the trial court rejected their previously pled claims for relief.

¶ 37 “ ‘Prejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial.’ ” *Hartzog*, 372 Ill. App. 3d at 525 (quoting *Miller*

v. Pinnacle Door Co., 301 Ill. App. 3d 257, 261 (1998)). “The stage of litigation at which a proposed amendment is brought is certainly a relevant consideration.” *Id.* at 525-26. This court has found prejudice in filing an amended complaint when the amendment “would allow plaintiff a ‘second bite at the apple.’ ” *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 102.

¶ 38 The *Geisler* court observed:

“Plaintiff failed to raise the issue of judicial estoppel or specifically allege damages for nearly two years since filing the instant case. In that time, plaintiff did not attempt to amend his pleadings until after he moved for summary judgment and lost. Allowing plaintiff to ‘start over’ based on facts and legal claims that were previously available to him would burden defendants with additional litigation.” *Id.*

¶ 39 The same is true in this case. Only after losing at the summary judgment stage did plaintiffs raise a new theory of relief under specific performance, more than three years after the initial complaint was filed. They assert that they did not have the opportunity to raise the claim until after the trial court’s rulings “revealed” that their other forms of relief “would not be entertained.” Plaintiffs offered this same argument to the trial court. The court rejected this statement as “not correct” because the court did not “refuse to ‘entertain’ the declaratory judgment claim.” Rather, the court considered their claims and found relief impossible. As the trial court observed, “plaintiffs always had the opportunity to seek leave to amend to add a count for specific performance. They just did not see the strategic need to do so.” We agree, the claim of specific performance was available to plaintiffs from the filing of the initial third-party

complaint in March 2013. No new information has been discovered by plaintiffs. Rather, they elected to proceed on their three claims, which did not change after two amended complaints were filed. Based on these circumstances, we cannot say that the trial court abused its discretion in denying plaintiffs' request for leave to file a third amended complaint. Plaintiffs' proposed third amended complaint did not cure defects in the pleadings, granting the motion would cause prejudice to defendants, plaintiff's attempt to amend the pleadings was not timely, and plaintiff did not attempt to file a claim of specific performance at an earlier date.

¶ 40 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 41 Affirmed.