2019 IL App (1st) 172336-U

No. 1-17-2336

Order filed February 14, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CHANDRA JOINER and WILLIAM BLACKMOND, Individually and on Behalf and Similarly Situated Persons,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 16 CH 16407
v.	)	
SVM MANAGEMENT, LLC,	)	Honorable Pamela McLean Meyerson,
Defendant-Appellee.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Although the circuit court properly dismissed plaintiffs' Count I on mootness grounds and Count II for failing to state a claim upon which relief could be granted, the court erred in dismissing Count III where plaintiffs sufficiently pled a violation of the Rental Property Utility Service Act (765 ILCS 735/0.01 *et seq.* (West 2016)) and their claim was not founded upon a written instrument so as to require the instrument's attachment to the complaint. The court also properly stayed discovery in this case pending resolution of defendant's motions to dismiss.

¶ 2 Plaintiffs Chandra Joiner and William Blackmond (collectively, plaintiffs) were tenants in an apartment building owned and operated by defendant SVM Management, LLC (defendant). Plaintiffs occupied in the apartment for two years, and after vacating the premises, they filed a class action lawsuit against defendant. After amending their complaint, plaintiffs brought three causes of action: Count I for violations of the Security Deposit Interest Act (Security Deposit Act) (765 ILCS 715/0.01 *et seq.* (West 2016)); Count II for violations of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2016)); and Count III, an individual cause of action, for violations of the Rental Property Utility Service Act (Rental Utility Act) (765 ILCS 735/0.01 *et seq.* (West 2016)). Defendant filed a motion to dismiss and concurrently, a motion to stay discovery pending the resolution of the motion to dismiss. The circuit court granted the stay and eventually dismissed Count I on mootness grounds, Count II for failing to state a claim upon which relief could be granted and Count III for failing to attach the written instruments upon which the claim was founded.

¶ 3 Plaintiffs now appeal, contending that the circuit court erred in dismissing their three counts and granting the stay in discovery. Although we agree the court properly dismissed Counts I and II, and did not err in granting the stay in discovery, we find that Count III, which alleged a statutory violation, was not founded upon a written instrument and thus, plaintiffs did not need to attach a written instrument to its complaint to support the cause of action. Thus, we affirm in part, but reverse the court's dismissal of Count III and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On October 1, 2014, plaintiffs entered into a one-year written lease with defendant to rent a unit in the Versailles Apartment complex in Hazel Crest, Illinois, which defendant owned and operated. Defendant also required a $1290 security deposit. Prior to the expiration of the lease,

the parties agreed to a written one-year extension. At the end of the second year, plaintiffs vacated their apartment, and within two weeks, defendant returned their security deposit.

¶ 6 In December 2016, plaintiffs filed a class action complaint. Count I alleged violations of the Security Deposit Act (765 ILCS 715/0.01 *et seq.* (West 2016)), based on defendant's alleged failure to pay interest on their and other tenants' security deposits. Count II alleged violations of the Uniform Deceptive Trade Practices Act (Deceptive Practices Act) (815 ILCS 510/1 *et seq.* (West 2016)), namely for defendant's practices and a rider to its lease agreement that allegedly violated various laws and principles of implied good faith in contract. Count III, which was an individual cause of action, alleged violations of the Rental Utility Act (765 ILCS 735/0.01 *et seq.* (West 2016)), based on defendant's alleged failure to provide plaintiffs notice that they were paying the cost to operate a parking lot light stanchion and other related disclosures.

¶ 7 In March 2017, defendant filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). It argued that, under section 2-619 of the Code (*id.* § 2-619), Count I was moot because it had made plaintiffs a tender of all relief that they could obtain under that count before they had filed a motion for class certification. Defendant attached to its motion an affidavit from its counsel, wherein he averred that, on February 1, 2017, he caused to be delivered to the office of plaintiffs' counsel a cashier's check payable to "Berton N. Ring, P.C. #12735" (plaintiffs' attorney) in the amount of $1290 along with a letter. The letter stated that defendant "unconditionally tenders the following:" (1) "Cashier's check in the amount of $1,290.00 representing your clients' maximum individual recovery under [the Security Deposit Act]" and (2) "All court costs and reasonable attorney's fees as allowed by the court that Plaintiffs incurred in pursuing Count I of the complaint." According to defendant's counsel, a week later, he received a letter from plaintiffs' counsel

along with the cashier's check that rejected the offer. Additionally, in defendant's motion to dismiss, it argued that, under section 2-615 of the Code (*id.* § 2-615), Count II failed to state a cause of action under the Deceptive Practices Act (815 ILCS 510/1 *et seq.* (West 2016)). Concurrent with the filing of its motion to dismiss, defendant filed a motion to stay discovery pending the resolution of its motion to dismiss.

¶ 8 In response to defendant's motion to dismiss, plaintiffs argued that Count I was not moot because defendant's argument was based on out-of-date law, but nevertheless, it merely made them a settlement offer, not a tender. Regarding Count II, plaintiffs stated that they would be seeking leave to amend it. In response to defendant's motion to stay discovery, plaintiffs argued that the motion was fatally defective because defendant's counsel failed to consult with their counsel in violation of Supreme Court Rule 201(k) (eff. July 1, 2014). Regardless of this noncompliance, plaintiffs argued that the motion was insufficient because defendant failed to explain why proceeding with discovery would be burdensome.

¶ 9 In April 2017, the circuit court stayed discovery until the hearing on defendant's motion to dismiss and granted plaintiffs three weeks to replead Count II of their complaint.

¶ 10 Later that month, plaintiffs filed an amended class action complaint, though Counts I and III remained the same. Count II now alleged violations of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2016)), based on defendant allegedly informing plaintiffs that, pursuant to the terms of the rider to their lease agreement, they were required to pay for replacement blinds, extermination services and a furnace repair. Plaintiffs asserted that defendant had used the rider "to transfer repair obligations to the tenants, increase their income by employing illegal penalties and forfeiture clauses and consuming tenants' security deposits and interest." And further,

plaintiffs alleged that defendant "willfully inserted" certain identified clauses into the rider of the lease in order to "impose monetary penalties unlawfully upon" them and the class members.

¶ 11 The circuit court held a hearing on defendant's motion to stay discovery. During argument, defendant's counsel indicated that defendant would be filing a motion to dismiss the amended Count II. Following argument, the court highlighted defendant's anticipation of another motion to dismiss and stated it:

> "would like to see that the pleadings are complete and no longer at issue before we move forward with discovery. Putting aside the issues of class certification, which are separate, it, I think, behooves everyone to wait and see what the outlines of the case are, what the issues of the case are, to have the pleadings in order before we move forward with discovery otherwise you may have to re-do things and maybe do things that would eventually end up being unnecessary."

The court accordingly extended the stay in discovery for a week until the parties' next court date.

¶ 12 At the next court date, the circuit court granted defendant's motion to dismiss Count I, finding the count moot because defendant made a valid tender before plaintiffs had filed a motion for class certification. The court also continued the stay in discovery so plaintiffs could file a motion to certify a question of law under Supreme Court Rule 308 (eff. July 1, 2017). Two days later, plaintiffs filed that motion, after which the court extended the stay in discovery until July 20, 2017.

¶ 13 While plaintiffs' motion was pending, defendant filed a motion to strike the amended complaint and dismiss Count II. Initially, defendant argued that plaintiffs' amended complaint was deficient because they had failed to attach the initial lease agreement and the extension agreement, which were exhibits referenced in the amended complaint. Defendant further argued

that, regardless of the exhibits not being attached to the amended complaint, Count II had to be dismissed because plaintiffs failed to plead any facts to show that it had committed a deceptive or unfair act or practice.

¶ 14 The circuit court eventually denied plaintiffs' motion to certify a question of law under Rule 308 and continued the matter for a ruling on the second motion to dismiss. The court did not address the stay in discovery.

¶ 15 The following month, plaintiffs filed a motion to reconsider the circuit court's dismissal of Count I and its denial of the motion to certify a question of law under Rule 308. The following day, the court dismissed plaintiffs' first amended complaint without prejudice. The court found that the amended complaint was deficient because plaintiffs failed to attach the written instruments upon which the claims were founded and separately, Count II failed to adequately plead a violation of the Consumer Fraud Act because they failed to allege a deceptive or unfair act with the requisite specificity. The court, however, granted plaintiffs leave to replead within 28 days but warned that, if they did not, the dismissal would be with prejudice.

¶ 16 A month later, after plaintiffs failed to replead, the circuit court denied their motion to reconsider and dismissed the entire case with prejudice.

¶ 17 Plaintiffs now appeal.

¶ 18 II. ANALYSIS

¶ 19 A. Count I

¶ 20 Plaintiffs first contend that the circuit court improperly dismissed Count I pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2016)), where the court relied on out-of-date case law and erroneously found that defendant had made a valid tender.

¶ 21 A motion to dismiss brought under section 2-619 of the Code (*id.*) admits the legal sufficiency of the complaint, but asserts that certain external defects or defenses defeat the claims. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. Such defects and defenses include a lack of subject-matter jurisdiction, statute of limitations violations and where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(1), (5), (9) (West 2016). We review a motion to dismiss *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

¶ 22 Generally, and as the circuit court in this case found, if a defendant tenders the requested relief to the named plaintiff in a class action lawsuit before the plaintiff files a motion for class certification, the underlying cause of action must be dismissed as moot because an actual controversy is no longer pending. *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 376-77 (2005). Before discussing plaintiffs' arguments over the validity of this principle of law, we must address their threshold argument concerning whether defendant actually submitted a valid tender because absent a valid tender, the mootness of plaintiffs' claim would not be at issue. See *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶¶ 26-30. A tender is an "unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation" and a "tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his rights." *Brown & Kerr, Inc. v. American Stores Properties, Inc.*, 306 Ill. App. 3d 1023, 1032 (1999).

¶ 23 Here, defendant submitted a cashier's check in an amount equal to plaintiffs' security deposit and a letter providing for the payment of all court costs and reasonable attorney fees. In plaintiffs' complaint, their requested relief under Count I was for an amount equal to their security deposit ($1290) along with costs and attorney fees. This relief also matched the

statutorily provided remedy set forth in the Security Deposit Act (765 ILCS 715/2 (West 2016)) of "an amount equal to the amount of the security deposit, together with court costs and reasonable attorneys fees." Because defendant's offer mirrored plaintiffs' requested relief as stated in their complaint as well as provided for by statute, defendant offered the payment of an actual production of a sum not less than the amount due on its obligation. See *Gatreaux*, 2011 IL App (1st) 103482, ¶ 30 (finding that the defendants made a valid tender in part where their offer "mirrored" the "the request for relief made by the plaintiffs' amended complaint"). Furthermore, contrary to plaintiffs' argument, merely because the court costs and attorney fees were not precisely known at the time of defendant's offer does not mean that defendant did not make a valid tender. See *id.* (finding that the defendants made a valid tender despite their offer including "the payment of all costs and reasonable attorney fees incurred by the plaintiffs in litigating the lawsuit"). Additionally, defendant's offer was unconditional, as its letter presented no conditions to plaintiffs' acceptance, *i.e.*, some sort of time limitation. See *G.M. Sign, Inc. v. Swiderski Electronics, Inc.*, 2014 IL App (2d) 130711, ¶ 33.

¶ 24 Despite defendant's offer providing their entire requested relief and being unconditional, plaintiffs still posit that the offer was not a valid tender. According to plaintiffs, because the cashier's check was payable to the name of their attorney, not themselves or even the client fund account of their attorney, the offer was not actually made to the named plaintiffs. Although plaintiffs are correct that the cashier's check was payable to their attorney, we cannot find this technical defeat renders the offer not being considered a valid tender. Importantly, when dealing with tenders, "the action of the judgment debtor in making the tender controls, not the judgment creditor's acceptance or rejection" (*Niemeyer v. Wendy's International, Inc.*, 336 Ill. App. 3d 112, 115 (2002)), meaning the intent and actions of defendant is what was important. And its

intent was undoubtedly to provide plaintiffs the entirety of their desired relief. Consequently, defendant made a valid tender to plaintiffs.

¶ 25 Because defendant submitted a valid tender to plaintiffs, we now must address whether the circuit court relied on current law in finding Count I moot. In *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 483-85 (1984), our supreme court found that, where a class of teachers had sued a school board after their employment was terminated, the lawsuit was mooted when the named plaintiffs accepted the board's offer of re-employment. Thus, the rule following *Wheatley* was that, where the named plaintiff in a class action receives and accepts his or her desired relief before moving for class certification, the claim is moot. Building upon accepted offers, in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011), our supreme court found that even rejected offers can moot a claim. There, the court held that an airline's offer to refund a checked baggage fee, which was the named plaintiff in a class action's only alleged damages, mooted her claim, even though she had rejected the offer. *Id.* at 453, 457. In the decision, our supreme court held that what determined whether a named plaintiff's claim was mooted was not whether an offer was accepted but rather "whether that representative filed a motion for class certification prior to the time when the defendant made its tender." *Id.* at 456. As such, when a tender is made before a motion for class certification is filed, "the interests of the other class members are not before the court [citation], and the case may properly be dismissed." *Id.* at 457. In *Ballard RN Center, Inc. v. Kohll's Pharmacy & Homecare, Inc.*, 2015 IL 118644, ¶ 36, our supreme court re-affirmed *Barber*'s holding.

¶ 26 In this case, the circuit court relied on *Barber* and *Ballard* in dismissing plaintiffs' Count I. And based on those cases, the court's dismissal on mootness grounds was proper because defendant made a valid tender to plaintiffs before they moved for class certification.

Nevertheless, plaintiffs argue that *Barber* and *Ballard* are no longer valid law in light of the United States Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 577 U.S. ___, 136 S.Ct. 663 (2016). There, the Court held that "an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant's continuing denial of liability, adversity between the parties persists." *Id.* at ___, 666. Or, in other words, "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Id.* at ___, 672.

¶ 27 Before addressing *Campbell-Ewald*, we note that our supreme court in *Barber* relied on the Seventh Circuit Court of Appeals decision in *Susman v. Lincoln American Corp.*, 587 F.2d 866 (7th Cir. 1978) that made no distinction between accepted and rejected settlement offers. See *Barber*, 241 Ill. 2d at 456-57 (citing *Susman*, 587 F.2d at 869-70). However, the Seventh Circuit has since distinguished between accepted and rejected settlement offers. In *Chapman v. First Index, Inc.*, 796 F.3d 783, 786-87 (7th Cir. 2015), the court adopted the dissent of Justice Kagan from *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting), wherein she asserted that an unaccepted settlement offer cannot moot a case because it "is a legal nullity, with no operative effect." As such, in *Chapman*, 796 F.3d at 787, the Seventh Circuit rejected the premise that "a defendant's offer of full compensation moots the litigation."

¶ 28 Returning to *Campbell-Ewald*, when the United States Supreme Court reached its holding, it did so by expressly "adopt[ing] Justice Kagan's analysis" from *Genesis Healthcare*, "as has every Court of Appeals ruling on the issue post *Genesis Healthcare*." *Campbell-Ewald*, 577 U.S. at ___, 136 S.Ct. at 670. Despite what has occurred federally since *Barber* and *Ballard*, our supreme court "has not yet considered whether, in light of *Campbell-Ewald*, Illinois courts should continue to draw no distinction between accepted and rejected settlement offers when

determining whether a case is moot." *Alderson v. Weinstein*, 2018 IL App (2d) 170498, ¶ 14. Because of this, and until our supreme court says otherwise, *Barber* and *Ballard* remain the controlling authority in Illinois. See *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 836 (2004) ("After our supreme court has declared the law with respect to an issue, this court must follow that law, as only the supreme court has authority to overrule or modify its own decisions."). The circuit court therefore relied on the proper law in dismissing Count I as moot.

¶ 29 Lastly, plaintiffs posit that, even if *Barber* remains good law, the circuit court incorrectly applied the case. They argue that, in *Barber*, the defendant's tender would have disposed of the entire case, not just one count of the litigation. Although plaintiffs present several arguments why *Barber* should not be applied to this case where defendant's tender would have resolved only one count of the three-count complaint, our supreme court never suggested that *Barber* could not apply to the circumstances of this case and plaintiffs cite no decision supporting such an assertion. Therefore, we disagree that the court incorrectly applied *Barber*.

¶ 30 In sum, because defendant made a valid tender to plaintiffs before they filed a motion for class certification and *Barber* controls, not *Campbell-Ewald*, the circuit court properly dismissed Count I as moot.

¶ 31 B. Stay of Discovery

¶ 32 Plaintiffs next contend that the circuit court erred in staying the discovery and argue that, because a grant of class certification is heavily dependent on the factual circumstances, they needed the benefit of discovery to ascertain the necessary facts to support their prospective motion for class certification.

¶ 33 When ruling on discovery matters, the circuit court has broad discretion. *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 380 (2004). As such, its decision to stay discovery

will not be reversed absent an abuse of that discretion (*id.* at 381), which occurs only when its decision is unreasonable or arbitrary, or where no reasonable person would adopt the same view. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009).

¶ 34 In this case, the circuit court initially stayed discovery on April 5, 2017. The record on appeal contains only a written order from this date, so we do not know why exactly the court initially stayed discovery. However, we do know the court's reasons for extending the stay on June 12, 2017, which was to resolve matters related to the pleadings, in particular its rulings on defendant's motions to dismiss. The court wanted the issues of the case to come more into focus before allowing discovery to proceed so that the parties did not waste resources on superfluous matters. In *Adkins Energy*, 347 Ill. App. 3d at 381, this court found the circuit court did not abuse its discretion in staying discovery "until it ruled on the motion to dismiss, because if a cause of action had not been stated, discovery would have been unnecessary." As the court in this case essentially relied on the same reasoning, it was a proper use of discretion to stay discovery here.

¶ 35 Although plaintiffs argue that they were entitled to conduct discovery in order to develop the facts necessary to meet the requirements of section 2-801 of the Code (735 ILCS 5/2-801 (West 2016)) and establish their class, "there is no need to determine whether these prerequisites are met if, as a threshold matter, the record establishes that the plaintiff has not stated an actionable claim." *Uesco Industries, Inc. v. Poolman of Wisconsin, Inc.*, 2013 IL App (1st) 112566, ¶ 47. The threshold of any class action is whether at the individual level, the named plaintiff can state a viable cause of action. See *De Bouse v. Bayer AG*, 235 Ill. 2d 544, 560 (2009) ("A representative cannot adequately represent a class when the representative does not state a valid cause of action."). Had plaintiffs been unable to maintain individual causes of

action, they could not serve as class representatives on Counts I and II. Consequently, the circuit court did not abuse its discretion in staying discovery at the various times in this case.

¶ 36 C. Count II

¶ 37 Plaintiffs next contend that the circuit court erred in dismissing Count II, which the court did pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2016)) for their failure to attach the written instruments upon which the claim was founded and independently section 2-615 of the Code (*id.* § 2-615) for their failure to adequately plead a violation of the Consumer Fraud Act. We first address the section 2-615 dismissal.

¶ 38 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects that are apparent on its face. *Bueker v. Madison County*, 2016 IL 120024, ¶ 7. We must accept all well-pled facts and reasonable inferences from those facts as true and construe all allegations in the light most favorable to the plaintiff. *Id.* In doing so, the critical inquiry is whether the complaint's allegations are sufficient to state a cause of action upon which relief may be granted. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶ 21. Our review of a section 2-615 dismissal proceeds *de novo*. *Id.*

¶ 39 Initially, defendant argues that our review of the circuit court's dismissal is precluded by plaintiffs' failure to provide a transcript or bystander's report of the hearing on the motion to dismiss. Often, when the appellant fails to provide a transcript or bystander's report of the hearing on which its claim of error is based, we are precluded from reviewing the claim of error and must presume the circuit court's ruling was proper. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393-94 (1984). This rule's application often occurs when our standard of review of the claim of error is for an abuse of discretion. See *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 56 (finding that, absent a transcript or bystander's report of a hearing, the

appellate court could not "divine the trial court's reasoning" in denying a motion and thus could not determine whether the court abused its discretion). However, as discussed, our review of a motion to dismiss is *de novo* (*Clark*, 2011 IL 108656, ¶ 21), meaning we afford the circuit court no deference. *Hassebrock v. Deep Rock Energy Corp.*, 2015 IL App (5th) 140105, ¶ 56. As such, we do not need to have a transcript or bystander's report of the motion to dismiss hearing to review the propriety of the dismissal. See *Watkins v. Office of State Appellate Defender,* 2012 IL App (1st) 111756, ¶ 20 (finding where review is *de novo*, "we do not need the transcripts of the hearing below to review the propriety of the circuit court's dismissal").

¶ 40 In Count II, plaintiffs claimed violations of the Consumer Fraud Act (815 ILCS 505/1 *et seq*. (West 2016)). Specifically, they alleged that an agent of defendant informed them that, pursuant to the rider of their lease agreement, they were required to pay for replacement blinds, extermination services and a furnace repair. And according to plaintiffs, defendant unfairly used the rider of the lease agreement to "to transfer repair obligations to the tenants, increase their income by employing illegal penalties and forfeiture clauses and consuming tenants' security deposits and interest."

¶ 41 To sufficiently plead a cause of action under the Consumer Fraud Act, the plaintiff must allege that: (1) the defendant committed a deceptive or unfair act or practice; (2) the defendant intended for the plaintiff to rely on the deception or unfair practice; (3) the deceptive or unfair act or practice occurred within the course of trade or commerce; (4) there was actual damage to the plaintiff; and (5) the deception or unfair practice caused the damage. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002); *Fogt v. 1-800-Pack-Rat, LLC*, 2017 IL App (1st) 150383, ¶ 56. "A complaint stating a claim under the Consumer Fraud Act must state with particularity and specificity the deceptive [unfair] manner of defendant's acts or practices, and the failure to make

such averments requires the dismissal of the complaint." (Internal quotation marks omitted.) *Demitro v. General Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 20 (2009). In determining whether a practice is unfair, Illinois courts utilize three factors: (1) whether the practice offends public policy; (2) whether the practice is oppressive or unethical; and (3) whether the practice causes substantial injury to consumers. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (2002). Whether a practice is unfair is determined on a case-by-case basis and all three factors need not be met in order to find a practice unfair. *Fogt*, 2017 IL App (1st) 150383, ¶ 58.

¶ 42 In this case, plaintiffs' Count II failed to meet the pleading requirements. In essence, their allegation was that defendant passed certain maintenance expenses onto them, as the tenants, using language in the rider of the lease agreement. Although plaintiffs further alleged that this conduct illegally increased defendant's income, plaintiffs failed to allege with the required particularity and specificity how a purported clause in a lease rider that both parties agreed to was illegal, offended public policy, was oppressive or caused substantial injury to consumers. To constitute an unfair practice, the defendant's conduct must be so outrageous "that it leaves the consumer with little alternative except to submit to it." *Crichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1146 (2005). Plaintiffs alleged nothing of the sort beyond their bare assertion that the practice was illegal. See *Robinson*, 201 Ill. 2d at 421 (finding that the "plaintiffs' bare assertion of unfairness without describing in what manner the [practices or acts] either violate public policy or are oppressive is insufficient to state a cause of action"). Notably, in the section of plaintiffs' brief in which they argue that the circuit court erroneously dismissed Count II, their only argument concerning the adequacy of their pleading is that "the pleadings were specific." Plaintiffs do not even attempt to explain this conclusion. Consequently, the circuit court properly dismissed Count II under section 2-615, and we need not determine if the

dismissal was also proper for plaintiffs' failure to attach the written instruments upon which the claim was founded.

¶ 43 Furthermore, to the extent that plaintiffs argue that the dismissal with prejudice itself constituted an error, we also disagree. We review the circuit court's decision to dismiss with prejudice for an abuse of discretion. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28. Here, the court gave plaintiffs time to replead this count and warned them that, if they failed to, the count would be dismissed with prejudice. Having failed to replead, we cannot say the court abused its discretion in dismissing the count with prejudice. Consequently, the circuit court properly dismissed Count II with prejudice.

¶ 44 D. Count III

¶ 45 Plaintiffs lastly contend that the circuit court erred in dismissing Count III, which the court did pursuant to section 2-606 of the Code (735 ILCS 5/2-606 (West 2016)) for their failure to attach the written instruments upon which the claim was founded, *i.e.*, the lease agreement and renewal agreement.

¶ 46 Section 2-606 provides that "[i]f a claim or defense is founded upon a written instrument, a copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." A claim is founded upon a written instrument "only if the claim is 'based on' the instrument or only if the plaintiff is 'suing upon' the instrument." *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 580 (2011), *aff'd sub nom. Khan v. Deutsche Bank AG*, 2012 IL 112219 (quoting *Garrison v. Choh*, 308 Ill. App. 3d 48, 53 (1999)). But a cause of action is not "founded on a written instrument *** merely because it is indirectly connected with the writing or because the writing may be a link in the chain of

evidence establishing liability." *Garrett's Estate v. Garrett*, 24 Ill. App. 3d 895, 899 (1975). We review whether plaintiffs' alleged failure to comply with this section warranted dismissal *de novo*. *Gore v. Indiana Insurance Co.*, 376 Ill. App. 3d 282, 285, 288 (2007).

¶ 47 In Count III, plaintiffs brought a cause of action under the Rental Utility Act (765 ILCS 735/0.01 *et seq.* (West 2016)). Section 1.2(a) of the Rental Utility Act (*id.* § 735/1.2(a)) prohibits landlords from requiring renters to pay utilities for common areas of the building or other areas used by people other than the tenant without written notice and certain disclosures. And "[u]pon proof by the tenant that the tenant was billed an amount for service not attributable to the unit or premises occupied by the tenant," the tenant is entitled to various damages. *Id.* § 735/1.3(a).

¶ 48 Plaintiffs' cause of action for a violation of the Rental Utility Act was not founded upon their lease agreement, renewal agreement or any other written instrument. Although their relationship with defendant commenced because of the lease agreement, plaintiffs were not suing based upon the actual contract between the parties. Rather, plaintiffs' claim was founded upon a statutory violation of the Rental Utility Act, specifically defendant's failure to comply with its statutory notice and disclosure requirements. See *Moroni v. Intrusion-Prepakt, Inc.*, 24 Ill. App. 2d 534, 540 (1960) (finding a defendant's counterclaim against another defendant sufficient despite the contract between the two not being attached to the pleading where the first defendant did not base its counterclaim "upon the actual terms of the contract ***, but under a term that must be implied merely from its existence; namely, that when work is contracted to be performed, it must be performed with reasonable care"). The lease agreement and renewal agreement were merely ancillary to plaintiffs' claimed violation of the Rental Utility Act. See *Garrett's Estate*, 24 Ill. App. 3d at 899. Thus, contrary to the circuit court's finding, plaintiffs' claim was not founded upon the lease agreement, renewal agreement or any other written

instrument. When pleading a breach of a statutory duty, Supreme Court Rule 133(a) only requires that the statute "be cited in connection with the allegation," which plaintiffs have done.

¶ 49 Although the circuit court found this cause of action deficient for plaintiffs' failure to attach the written instruments upon which the claim was founded, we could affirm the court on any basis supported by the record (*Miller v. Lawrence*, 2016 IL App (1st) 142051, ¶ 22), meaning we could also affirm its dismissal of Count III if plaintiffs failed to sufficiently state a claim upon which relief could be granted. However, we find that plaintiffs sufficiently stated a claim. As alleged in Count III, at least one parking lot light stanchion was connected to plaintiffs' electrical meter and each stanchion used a bulb of at least 65 watts resulting in electrical costs of at least $20 per month. As further alleged, defendant never provided plaintiffs the required written notice that they were bearing the cost of operating at least one of the stanchions and related disclosures. See 765 ILCS 735/1.2(a) (West 2016). "[A] pleader is not required to set out her evidence in her complaint; she need only allege the ultimate facts to be proved." *McGoey v. Brace*, 395 Ill. App. 3d 847, 859 (2009). And here, plaintiff has alleged those ultimate facts to be proved. When the allegations in Count III are accepted as true and viewed in the light most favorable to plaintiffs, they are sufficient to state a cause of action under the Rental Utility Act. Notably, during a June 12, 2017, hearing on various motions, defendant's attorney admitted that "with respect to Count III, it states [a] cause of action." Consequently, the circuit court erred by dismissing Count III.

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part and reversed in part. The cause is remanded for further proceedings.

¶ 52 Affirmed in part; reversed in part; cause remanded.