2015 IL App (1st) 141073-U

FIRST DIVISION
AUGUST 10, 2015

No. 1-14-1073

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADVANCED PHYSICIANS, S.C., Plaintiff-Appellant, v. ATI HOLDINGS, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF NAPERVILLE, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF MIDWAY, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF AVONDALE, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF BOLINGBROOK, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF BOURBONNAIS, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF JOLIET, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF MATTESON, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF NEW LENOX, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF OSWEGO, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF PLAINFIELD, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF ROLLINGRIDGE, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF SHOREWOOD, LLC; ATHLETIC & THERAPEUTIC INSTITUTE OF WILLOWBROOK, LLC; ATHLETICO, LTD.; ATHLETICO OF ADDISON, LLC; ATHLETICO OF ANDERSONVILLE, LLC; ATHLETICO OF ARLINGTON HEIGHTS, LLC; ATHLETICO AURORA, LLC; ATHLETICO OF BANNOCKBURN, LLC; ATHLETICO OF BARRINGTON, LLC; ATHLETICO OF PORTAGE PARK, LLC; ATHLETICO OF BERWYN, LLC; ATHLETICO OF BLOOMINGDALE, LLC; ATHLETICO OF BOLINGBROOK, LLC; ATHLETICO OF BOURBONNAIS, LLC; ATHLETICO OF BUCKTOWN, LLC; ATHLETICO OFCHICAGO/NILES, LLC; ATHLETICO ON CLARK, LLC; ATHLETICO ON CLYBOURN, LLC; ATHLETICO OF DEERFIELD, LLC; ATHLETICO OF DES PLAINES, LLC; ATHLETICO ON DIVERSEY, LTD.; ATHLETICO ON EAST BANK CLUB, LTD.; ATHLETICO OF ELK GROVE, LLC;	)	Appeal from the Circuit Court of Cook County. No. 11 L 6519

ATHLETICO OF EVANSTON, LLC; ATHLETICO OF FRANKFURT, LLC; ATHLETICO OF GARFIELD RIDGE, LLC; ATHLETICO OF GLENVIEW, LLC; ATHLETICO GLENVIEW, LLC; ATHLETICO OF GRAYSLAKE, LLC; ATHLETICO OF GURNEE, LLC; ATHLETICO OF HIGHLAND PARK, LLC; ATHLETICO OF HOFFMAN ESTATES, LLC; ATHLETICO OF HYDE PARK, LLC; ATHLETICO ON IRVING PARK, LLC; ATHLETICO OF LAGRANGE PARK, LLC; ATHLETICO OF LAKE IN THE HILLS, LLC; ATHLETICO OF LEMONT, LLC; ATHLETICO OF LISLE, LLC; ATHLETICO OF MATTESON, LLC; ATHLETICO OF MCCOOK, LLC; ATHLETICO OF MCHENRY, LLC; ATHLETICO ON MICHIGAN AVENUE, LTD.; ATHLETICO OF MT. GREENWOOD, LLC; ATHLETICO OF NAPERVILLE, LLC; ATHLETICO OF NEW LENOX, LLC; ATHLETICO OF OAK BROOK, LLC; ATHLETICO OF OAK PARK, LLC; ATHLETICO OF PALATINE, LLC; ATHLETICO OF PARK RIDGE, LLC; ATHLETICO OF PLAINFIELD, LLC; ATHLETICO OF PORTAGE PARK, LLC; ATHLETICO OF SCHAUMBURG, LLC; ATHLETICO OF SKOKIE, LLC; ATHLETICO OF SOUTH ELGIN, LLC; ATHLETICO OF WILLOWBROOK, LLC; ATHLETICO OF WHEELING, LLC; ATHLETICO OF TINLEY PARK, LLC; ATHLETICO OF LEMONT, LLC; ATHLETICO OF AURORA, LLC; ATHLETICO OF WEST LOOP, LLC; ATHLETICO OF URBANA, LLC; ATHLETICO AT WESTCHESTER, LLC; ATHLETICO OF WHEATON, LLC; ATHLETICO OF ST. CHARLES, LLC; ACCELERATED REHABILITATION CENTERS, LTD., and NEWSOME INVESTMENTS, LLC; NEWSOME PHYSICAL AND SPORTS THERAPY CENTERS, LTD., Defendants-Appellees.	) Honorable) Bridgid M.McGrath,) Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed plaintiff's Illinois Consumer Fraud and Deceptive Business Practices Act claim; the common law unfair competition claim; and civil conspiracy claims, where the allegations in the second and third amended complaints were insufficiently pled.

¶ 2 This appeal arises from a March 13, 2014 order entered by the circuit court of Cook County, which dismissed with prejudice a third amended complaint alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2 (West 2012)),

filed by plaintiff Advanced Physicians, S.C. (AP) against defendant ATI Holdings, LLC and its multiple affiliated entities (ATI); defendant Athletico, Ltd. and its affiliated entities (Athletico); defendant Accelerated Rehabilitation Centers, Ltd. (Accelerated); and defendants Newsome Investments, LLC and Newsome Physical and Sports Therapy Center, Ltd. (Newsome) (collectively, the defendants). This appeal also arises from the circuit court's August 5, 2013 order, which dismissed common law unfair competition and civil conspiracy claims brought against the defendants in a second amended complaint. On appeal, AP contends that the circuit court erred in dismissing the second and third amended complaints, arguing that: (1) it alleged a valid claim under the Illinois Consumer Fraud and Deceptive Business Act; (2) it alleged a valid claim for common law unfair competition; and (3) it alleged valid claims for civil conspiracy. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 AP operates healthcare clinics in the greater Chicago metropolitan area "for the delivery of physical therapy and related rehabilitative outpatient services" (PT services). According to AP, it has offices in Cook, DuPage, and Will Counties, and provides PT services to patients in the "Chicagoland PT Marketplace"—which AP defines as those who live or work in Cook, DuPage, Kane, Lake, McHenry, Will, Grundy, and Kendall Counties. ATI operates physical therapy clinics in the Chicago area and is headquartered in Bolingbrook, Illinois. Athletico operates physical therapy clinics in the Chicago area and has its principal office in Oak Brook, Illinois. Accelerated operates physical therapy clinics in the Chicago area and has its principal office in Chicago, Illinois. Newsome operates physical therapy clinics in the Chicago area and has its principal office in Joliet, Illinois. AP claims to be a competitor of the defendants for providing PT services in the "Chicagoland PT Marketplace."

¶ 5 On December 23, 2009, AP filed a lawsuit against ATI in the circuit court of DuPage County, alleging that ATI had violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505 *et seq.* (West 2008)), as well as common law prohibitions on unfair competition and tortious interference (case No. 09 L 001599) (the DuPage County lawsuit). On June 21, 2010, AP filed an amended complaint in the DuPage County lawsuit, after which ATI sought to dismiss the amended complaint for failure to state a claim under Illinois law. On January 25, 2011, the circuit court in the DuPage County lawsuit granted AP's motion to voluntarily dismiss the lawsuit without prejudice.

¶ 6 On June 22, 2011, AP refiled the instant action against ATI in the circuit court of Cook County, alleging Consumer Fraud Act claims; common law unfair competition claims; and civil conspiracy claims. The refiled action also added Athletico, Accelerated, Newsome, and additional ATI entities as named defendants. On July 5, 2011, AP filed a first amended complaint, which was nearly identical to the original Cook County complaint, with the exception that it omitted certain pricing information that was the subject of a protective order entered by the circuit court in the DuPage County lawsuit. Thereafter, the defendants filed various motions attacking the first amended complaint.

¶ 7 On December 20, 2012, the circuit court granted AP leave to file a second amended complaint. On January 8, 2013, AP filed a second amended complaint against the defendants, alleging claims of Consumer Fraud Act violations (count I); common law unfair competition (count II); and civil conspiracy (counts III, IV, and V).[1] Specifically, AP alleged that the defendants unfairly competed against AP by engaging in the following conduct: (1) offering

[1] The civil conspiracy claims were only directed at ATI, Athletico, and Newsome, but not Accelerated.

kickbacks to physicians as an inducement for referrals for PT services, in violation of state and federal laws; (2) providing free transportation to actual or prospective patients regardless of medical need; and (3) providing free or below-market-value athletic training services to schools and sports organizations in order to direct athletes to certain physicians with whom they had referral relationships. AP further alleged that it opened its first clinic in 1997; that business grew throughout the next 10 years; that its market share continued to grow until 2007, when the defendants' unfair and illegal conduct became so "widespread that [AP] began to see a decrease in the number of patient referrals from physicians and a decrease in revenue." AP alleged that it suffered a loss of patients and profits as a direct and proximate result of the defendants' unfair and illegal conduct.

¶ 8 On January 31, 2013, Newsome filed a combined section 2-619.1 motion to dismiss the second amended complaint. On that same day, ATI filed a separate combined section 2-619.1 motion to dismiss the second amended complaint. On February 4, 2013, Athletico filed a combined section 2-619.1 motion to dismiss the second amended complaint. On February 7, 2013, Accelerated filed a section 2-619.1 motion to dismiss the second amended complaint, which was later amended on February 13, 2013.

¶ 9 On August 5, 2013, the circuit court, pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2012)), dismissed without prejudice the Consumer Fraud Act claim (count I) of the second amended complaint with leave to replead the claim. The circuit court dismissed with prejudice the common law unfair competition claim (count II) of the second amended complaint, finding that it was the "exact same tort being alleged" as the Consumer Fraud Act claim. Pursuant to section 2-615 of the Code, the circuit court dismissed without prejudice the civil conspiracy counts (counts III, IV, and V), but granted

AP leave to file discovery requests concerning the civil conspiracy issues on or before September 3, 2013.

¶ 10 On September 17, 2013, AP filed a third amended complaint against the defendants, alleging again a claim of Consumer Fraud Act violations (count I). Although the circuit court had previously dismissed with prejudice AP's common law unfair competition claim in the second amended complaint, AP adopted the allegations contained therein as count II of the third amended complaint in order to preserve them for appellate review. Although the circuit court had previously dismissed without prejudice AP's civil conspiracy counts, AP did not replead those counts with new allegations but simply adopted the allegations contained in the second amended complaint on those counts in order to preserve them for appellate review (counts III, IV, and V).[2] AP again alleged that the defendants "unfairly competed and continue to unfairly compete" against AP by engaging in the following conduct: (1) offering kickbacks to physicians as an inducement for referrals for PT services, in violation of state and federal laws; (2) providing free transportation to actual or prospective patients regardless of medical need; and (3) providing free or below-market-value athletic training services to schools and sports organizations in order to direct athletes to certain physicians with whom they had referral relationships. AP again alleged that it opened its first clinic in 1997; that business grew throughout the next 10 years; that its market share continued to grow until approximately 2007, when the defendants' unfair and illegal conduct became so "widespread that it caused [AP] to see a decrease in the number of patient referrals from physicians and a decrease in revenue, which is continuing today." AP alleged that, as a direct and proximate result of the defendants' unfair and

[2] As noted, the civil conspiracy claims were only directed at ATI, Athletico, and Newsome, but not Accelerated.

illegal conduct, it "suffered and continues to suffer a decrease in its market share, the loss of patients and profits, and a diminution in the value of its business."

¶ 11 On November 5, 2013, the defendants filed separate motions to dismiss AP's third amended complaint, which were argued before the circuit court at a hearing on February 25, 2014. On March 13, 2014, the circuit court dismissed the entirety of the third amended complaint with prejudice. The circuit court noted that AP had had numerous opportunities to plead the appropriate causes of action, but that it had failed to plead the necessary facts to correct the deficiencies underlying the court's August 5, 2013 dismissals. Specifically, the circuit court found, *inter alia*, that the allegations for the Consumer Fraud Act claim were "general and nonspecific," that AP failed to plead the elements of the alleged violation of the Consumer Fraud Act, and that AP only relied on "boilerplate" and "very general" allegations. The circuit court also found that the Consumer Fraud Act claim must be pled with particularity and specificity, which AP failed to do, and that AP also failed to allege the necessary facts to adequately plead proximate cause.

¶ 12 On April 8, 2014, AP filed a timely notice of appeal from the circuit court's August 5, 2013 and March 13, 2014 orders.

¶ 13 ANALYSIS

¶ 14 We have jurisdiction over this case pursuant to Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303(a)(1) (eff. June 4, 2008). We review the following issues on appeal: (1) whether the circuit court erred in dismissing the third amended complaint in its entirety; (2) whether the circuit court erred in dismissing the common law unfair competition claim in the second amended complaint; and (3) whether the circuit court erred in dismissing the civil conspiracy claims in the second amended complaint.

¶ 15 As a preliminary matter, Accelerated argues that AP's statement of facts in its opening brief should be stricken for violating Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013), which prohibits the inclusion of arguments or comments. We agree that AP's statement of facts contains improper argumentative statements in violation of Rule 341(h)(6). In the interest of simplicity, we will simply disregard the argumentative statements. We note that this course of action does not in any way hinder our resolution of the issues before us.

¶ 16 Turning to the merits of the appeal, we note that Newsome argues that AP had no standing to assert a claim under the Consumer Fraud Act, by pointing out that AP failed to allege that the defendants' conduct involved "trade practices addressed to the market generally or otherwise implicates consumer protection concerns" because it only sought recovery for its own injuries rather than any injuries inflicted upon patients by that conduct. We disagree. Businesses who are not consumers have standing to sue under the Consumer Fraud Act where "the alleged conduct involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 534 (1989); see *Empire Home Services, Inc. v. Carpet America, Inc.*, 274 Ill. App. 3d 666, 669 (1995) (quoting *Sullivan's Wholesale Drug Company, Inc. v. Faryl's Pharmacy, Inc.*, 214 Ill. App. 3d 1073, 1082 (1991) ("the protections of the statute are not limited to consumers. That this is so is made clear by the full title of the Act itself, which indicates that it is 'An Act to protect consumers and borrowers and *businessmen* against fraud, *unfair methods of competition* and *unfair or deceptive acts* or practices in the conduct of any trade or commerce' " (Emphasis added.))). AP alleged in the third amended complaint that the defendants' alleged conduct caused patients to be referred to their facilities based on bribes and kickbacks rather than the patients' best interests. It also alleged that charges for remuneration

were passed on to patients and insurers who were unaware that their bills included "considerations of illegal remuneration," which AP alleged "harms the market." Further, to accept Newsome's argument that a competitor has no standing to bring a claim under the Consumer Fraud Act where it seeks recovery for its own injuries, would essentially mean that no competitor could ever sue under the Consumer Fraud Act because a party is not entitled to recover for an injury suffered by someone else. See *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988) (standing in Illinois requires some injury in fact to a legally cognizable interest). Thus, we find that AP had standing to sue under the Consumer Fraud Act.

¶ 17 We first determine whether the circuit court erred in dismissing the third amended complaint in its entirety, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14.

¶ 18 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. *Id.*; see 735 ILCS 5/2-615 (West 2012). "In reviewing a section 2-615 dismissal motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Duffy*, 2012 IL App (1st) 113577, ¶ 14. A section 2-615 motion to dismiss is granted where "no set of facts can be proved entitling the plaintiff to recovery." *Id.* However, a plaintiff "may not rely on factual or legal conclusions that are not supported by factual allegations." *Id.* Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). We may

affirm the circuit court's decision on any basis supported by the record. *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 19 In the third amended complaint, AP pled a new Consumer Fraud Act claim (count I), but simply adopted the allegations contained in the second amended complaint as to the common law unfair competition claim (count II) and civil conspiracy claims (counts III, IV and V) in order to preserve them for appellate review.

¶ 20 Section 2 of the Consumer Fraud Act provides the following:

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the 'Uniformed Deceptive Trade Practices Act,' approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." 815 ILCS 505/2 (West 2012).

¶ 21 Illinois courts have recognized two types of claims under the Consumer Fraud Act: (1) unfair practices claims; and (2) deceptive practices claims. *Robinson v. Toyota Motor Credit*

Corp., 201 Ill. 2d 103, 417 (2002). To state a claim for "unfair practices" under the Consumer Fraud Act, the plaintiff must establish that the defendant's conduct: (1) offends public policy; (2) is oppressive; and (3) causes substantial injury to consumers. *Id.* at 417-18. All three criteria need not be satisfied in order to support a finding of unfairness. *Id.* at 418. To state a claim for "deceptive practices" under the Consumer Fraud Act, the plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; and (3) the occurrence of the deception during a course of conduct involving trade or commerce. *Id.* at 417; *Demitro v. General Motors Acceptance Corp.*, 388 Ill. App. 3d 15, 19 (2009). Further, to state a claim under the Consumer Fraud Act, the plaintiff must also establish that the defendant's conduct was the proximate cause of the plaintiff's alleged injury. *Stehl v. Brown's Sporting Goods, Inc.*, 236 Ill. App. 3d 976, 981 (1992) ("a [p]laintiff can recover damages under the Consumer Fraud Act *only* when his injury is a direct and proximate result of an alleged violation of the Act"); *Weis v. State Farm Mutual Automobile Insurance Co.*, 333 Ill. App. 3d 402, 409 (2002) (affirming dismissal of Consumer Fraud Act claim where plaintiff failed to sufficiently allege with specific allegations of fact that the deceptive act or practice was the proximate cause of her injury).

¶ 22 Our supreme court has held that in order to state a claim under the Consumer Fraud Act, a plaintiff "must state with particularity and specificity the deceptive manner of defendant's acts or practices, and the failure to make such averments requires the dismissal of the complaint." *Robinson*, 201 Ill. 2d at 419. Both the "unfair practices" and "deceptive practices" claims under the Consumer Fraud Act are subject to this heightened pleading standard requiring particularity and specificity. *Pantoja-Cahue v. Ford Motor Credit Co.*, 375 Ill. App. 3d 49, 61 (2007); *Demitro*, 388 Ill. App. 3d at 20. AP concedes that its deceptive practices claims are subject to

the heightened pleading burden, but argues, citing federal case law, that a lower pleading standard should apply to its unfair practices claims under the Consumer Fraud Act. However, the federal cases upon which AP relies are inapposite to the case at bar, because they pertained to the application of Rule 9(b) of the Federal Rules of Civil Procedure (FRCP) and did not purport to construe or apply Illinois pleading requirements. See *O'Brien v. Landers*, 2011 WL 221865; *Windy City Metal Fabricators & Supply, Inc. v. CIT Technology Financing Services, Inc.*, 536 F. 3d 663 (7th Cir. 2008); *Strohmaier v. Yemm Chevrolet*, 211 F. Supp. 2d 1036 (N.D. Ill. 2001). We see no reason to deviate from this court's precedent in *Pantoja-Cahue* and *Demitro*. Thus, we find that the heightened pleading standard applies to both unfair practices claims and deceptive practices claims under the Consumer Fraud Act.

¶ 23 Turning to the allegations in count I of the third amended complaint, AP argues that it alleged a valid claim under the Consumer Fraud Act. The defendants, who filed separate briefs before this court, counter that AP failed to adequately plead the elements to support its Consumer Fraud Act claim.

¶ 24 We find that AP's Consumer Fraud Act claim was properly dismissed where it failed to sufficiently plead with specificity and particularity facts to show that the defendants engaged in unfair or deceptive practices that proximately caused AP's alleged damages. Under "common allegations against all defendants" in the third amended complaint, AP alleged that the defendants "unfairly competed and continue to unfairly compete" against AP by offering kickbacks to physicians as an inducement for referrals for PT services; by providing free transportation to actual or prospective patients regardless of medical need; and by providing free or below-market-value athletic training services to schools and sports organizations in order to direct athletes to certain physicians with whom the defendants had referral relationships. AP

further alleged in paragraph 18 that Illinois public policy prohibits providers from self-referring patients or offering remuneration directly or indirectly to induce referrals for PT services, and that such prohibition was reflected in several state and federal laws. AP alleged that it opened its first clinic in 1997; that business grew throughout the next 10 years; that its market share continued to grow until approximately 2007, when the defendants' unfair and illegal conduct became so "widespread that it caused [AP] to see a decrease in the number of patient referrals from physicians and a decrease in revenue, which is continuing today." AP alleged that, as a direct and proximate result of the defendants' unfair and illegal conduct, it "suffered and continues to suffer a decrease in its market share, the loss of patients and profits, and a diminution in the value of its business."

¶ 25 With respect to allegations against ATI, AP asserted that ATI gave kickbacks to referring physicians by entering into written management service agreements (MSAs) that allowed the referring physicians to bill patients and third-party payors at a higher price for PT services provided by ATI and then pocket the difference as remuneration; by paying money to physicians for referring patients to ATI; and by giving gifts to physicians to induce future referrals. AP further alleged that ATI induced patients to obtain PT services from ATI and induced physicians to enter into referral relationships with ATI by offering free transportation to patients without regard to their medical needs. It also alleged that ATI provided free or discounted athletic training services to schools and sports organizations in order to direct athletes to certain physicians with whom ATI had referral relationships. With respect to allegations against

Athletico, Accelerated, and Newsome, AP largely repeated as general boilerplate language the same allegations directed against ATI.[3]

¶ 26 Even assuming, *arguendo*, that AP adequately pled facts with specificity and particularity that the defendants engaged in unfair or deceptive practices, count I of the third amended complaint could be dismissed on the basis that AP failed to adequately allege facts to show that AP's alleged injury was proximately caused by the defendants' conduct. See *Stehl*, 236 Ill. App. 3d at 981 ("a [p]laintiff can recover damages under the Consumer Fraud Act *only* when his injury is a direct and proximate result of an alleged violation of the Act"); *Weis*, 333 Ill. App. 3d at 409 (affirming dismissal of Consumer Fraud Act claim where plaintiff failed to sufficiently allege with specific allegations of fact that the deceptive act or practice was the proximate cause of her injury).

¶ 27 AP argues that the element of proximate cause was sufficiently pled in the third amended complaint, by pointing primarily to paragraphs 21 to 23 and 145. AP specifically contends that it did not need to allege either the locations of the defendants' facilities or the specific dates of the defendants' alleged conduct.

¶ 28 Each of the four defendants counters that AP failed to adequately plead that the defendants' conduct proximately caused AP's alleged injuries, where AP did not allege specific facts linking AP's alleged injury to their conduct.

¶ 29 Paragraphs 21 to 23 alleged in relevant part that AP opened its first clinic in 1997; that business grew over the next several years until approximately 2007, when the defendants' unfair and illegal conduct became "so widespread that it caused [AP] to see a decrease in the number of

[3] The allegations against Newsome only related to the giving of free transportation to patients and the giving of free or discounted athletic training services to sports organizations.

patient referrals from physicians and a decrease in revenue, which is continuing today"; that AP's total patient visits dropped by almost 30% between 2007 and 2010; that the "defendants' unfair and illegal conduct forced [AP] to close two clinics in the last half of 2011"; that AP's market shares declined around 2007; that "[a]s a direct and proximate result of the defendants' unfair and illegal conduct, [AP] suffered and continues to suffer a decrease in its market share, the loss of patients and profits, and a diminution in the value of its business"; and that the defendants' conduct began "sometime before 2007 and has continued until the present." Paragraphs 142 and 145 further alleged that the defendants' "acts of wrongdoing occurred inside and outside of Cook County and caused damage to [AP] inside and outside of Cook County"; and that "[a]s a direct and proximate result of the defendants' violation of the [Consumer Fraud Act], [AP] suffered and is continuing to suffer actual damages in the form of a single, indivisible injury consisting of, but not limited to, a decrease in market share[s], a decrease in patient referrals from physicians, lost profits, and diminution in the value of the plaintiff's business."

¶ 30 Taking these allegations as true, as we must, we find that the above-quoted allegations were insufficient to allege proximate cause. Although the third amended complaint is 56 pages in length, AP failed to allege any specific facts linking each of the defendant's conduct to AP's alleged injuries. Instead, AP made general and conclusory statements claiming that the defendants' conduct, in the collective, proximately caused its decline in business. In dismissing the Consumer Fraud Act claim (count I) on March 13, 2014, the circuit court noted that AP had had numerous opportunities to plead the cause of action, but that it had failed to plead the necessary facts to correct the deficiencies underlying the court's previous August 5, 2013 dismissal of the count. The circuit court specifically found that AP did not allege *when* the alleged unfair and illegal acts began, and that "missing dates" were needed in order to "connect

up proximate cause" by noting that "[w]hat if these practices were already widespread at the time that the plaintiff was successful." Further, the circuit court found that AP failed to plead how the defendants' conduct in disparate geographic areas combined to cause its injuries:

> "Furthermore, in an attempt to allege proximate cause, the plaintiff alleges that it's [*sic*] single indivisible injury occurred in the geographical [area] it crafted, and it's an amorphous geographic area, called the Chicagoland [PT] marketplace. This includes a number of counties. As Newsome points out, the geographic area covers 4,000 plus miles.
>
> So, for example, defendant Newsome operates in and around Joliet in *** Will and Kane Counties. And it does not appear that plaintiff has any facilities in those counties. But plaintiff alleges that Newsome is in the same Chicagoland [PT] marketplace.
>
> But it defies logic that providing a ride to a patient living in Joliet would cause economic damage to a plaintiff living in Oak Park or would have an effect on a competitor that doesn't do business in Will or Kane Counties.
>
> So, again, the allegations in the [third amended] complaint, although at first glance it seems very detailed, when you go over it for a second or third time, there's some gaping holes regarding the facts that need to be alleged for [a claim] under the Consumer Fraud Act."

We agree with the circuit court's assessment. As the third amended complaint alleged, the four defendants and the facilities they operated were scattered throughout the Chicagoland area. Although the AP generally alleged that each defendant's "acts of wrongdoing occurred inside and outside of Cook County," AP made no effort to allege how these defendants, who were based in different locations, contributed to AP's business losses. Nor did AP allege any specific facts as to when the defendants' complained-of conduct began, but only pled generally that the conduct began "sometime before 2007." Thus, even taking AP's allegations as true, we find that AP failed to plead specific factual allegations to support its claim that the unfair acts or deceptive practices proximately caused AP's injuries. Therefore, we hold that the circuit court did not err in dismissing AP's Consumer Fraud Act claim (count I) in the third amended complaint—thereby, dismissing the third amended complaint in its entirety.

¶ 31 We next determine whether the circuit court erred in dismissing with prejudice the common law unfair competition claim in the second amended complaint.

¶ 32 As noted, on January 8, 2013, AP filed a second amended complaint against the defendants, alleging claims of Consumer Fraud Act violations (count I); common law unfair competition (count II); and civil conspiracy (counts III, IV, and V). On August 5, 2013, the circuit court, pursuant to section 2-615 of the Code, dismissed without prejudice the Consumer Fraud Act claim (count I) and civil conspiracy claims (counts III, IV, and V), but dismissed with prejudice the common law unfair competition claim (count II). Thereafter, in the third amended complaint, AP pled a new Consumer Fraud Act claim (count I), but simply adopted the allegations in the second amended complaint as to the common law unfair competition claim (count II) and civil conspiracy claims (counts III, IV, and V) in order to preserve them for appellate review. See *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d

713, 719 (2010) (in order to avoid forfeiture on appeal, "a party wishing to preserve a challenge to an order dismissing with prejudice fewer than all of the counts in his complaint" may file an amended complaint "realleging, incorporating by reference, or referring to the claims set forth in the prior complaint").

¶ 33 In dismissing the common law unfair competition claim, the circuit court found that it was "the same exact tort being alleged" as the Consumer Fraud Act claim in the second amended complaint, which we note contained substantially the same allegations as those alleged in the Consumer Fraud Act claim in the third amended complaint.

¶ 34 AP argues that the circuit court erred in dismissing with prejudice its common law unfair competition claim (count II) in the second amended complaint, arguing that it was not duplicative of its Consumer Fraud Act claim. AP further contends that, although Illinois courts have not definitively established the elements of a common law unfair competition claim, the claim should not have been dismissed where it had alleged that the defendant competed unfairly against AP and AP had suffered damages in the form of decreased market shares and decreased business profits.

¶ 35 The defendants argue that the circuit court properly dismissed count II with prejudice, where it was duplicative of AP's Consumer Fraud Act claim (count I) because they both contained largely the same allegations. They contend that AP failed to plead any facts additional to those alleged in count I, to support a separate claim for unfair competition under count II.

¶ 36 When the same operative facts support actions resulting in the same injury to the plaintiff, the actions are identical and the later should be dismissed as duplicative. *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 273-74 (1995). The theory of common law unfair competition covers a wide range of tortious conduct; however, Illinois courts have not set forth defined

elements necessary to state a separate cause of action for unfair competition. *Custom Business Systems, Inc. v. Boise Cascade Corp.*, 68 Ill. App. 3d 50, 52 (1979). Illinois courts have held that allegations that are insufficient to state a cause of action under a specific statute or business tort are likewise insufficient to support a broader common law claim of unfair competition. See *The Film & Tape Works, Inc. v. JuneTwenty Films, Inc.*, 368 Ill. App. 3d 462, 473 (2006) (disposing of common law unfair competition claim without further analysis where summary judgment was granted on a tortious interference claim arising from the same allegations); *Custom Business Systems, Inc.*, 35 Ill. App. 3d at 52-53 (affirming dismissal of unfair competition claim where it relied on the same facts alleged in a previously dismissed statutory claim; "plaintiff does not set out *** a distinct theory under the common law which would entitle it to judgment separate and apart from issues cognizable under the Uniform Deceptive Trade Practices Act"; plaintiff "does not point out any aspect of this case which constitutes a separate common law tort, in addition to the allegations of violation of the Uniform Deceptive Trade Practices Act").

¶ 37 Count II alleged in five paragraphs that the "defendants' illegal actions described above constitute unfair competition and have damaged [AP];" that they "unfairly competed" with AP by soliciting referrals and customers through illegal means, such as offering remuneration to referring physicians, sports organizations, and patients; that the defendants' unfair competition had impaired AP's ability to compete in the "Chicagoland PT Marketplace"; and "[a]s a direct and proximate result of the defendants' unfair competition, [AP] has suffered actual damages in the form of a single, indivisible injury, including a decrease in market share, a decrease in patient referrals from physicians, lost profits, and diminution in the value of [AP's] business."

¶ 38 We find that the common law unfair competition claim arises largely from the same allegations in the Consumer Fraud Act claim, which we have already found to be insufficiently pled. AP pled no additional factual allegations in count II to support a separate claim for unfair competition, but instead pled the same allegations and sought the same exact relief in count II as in count I. Thus, AP has not set out a distinct theory under the common law which would entitle it to judgment separate and apart from issues cognizable under the Consumer Fraud Act. Because AP's allegations failed to state a claim for specific statutory relief under the Consumer Fraud Act, the same allegations were likewise insufficient to support the broader common law claim of unfair competition. See *The Film & Tape Works, Inc.*, 368 Ill. App. 3d at 473. Thus, we hold that the circuit court did not err in dismissing with prejudice count II of the second amended complaint.

¶ 39 We next determine whether the circuit court erred in dismissing the civil conspiracy claims in the second amended complaint. As noted, on August 5, 2013, the circuit court dismissed, without prejudice, the civil conspiracy claims (counts III, IV, and V) in the second amended complaint. However, instead of pleading new civil conspiracy claims in its third amended complaint, AP chose to only adopt the allegations in the second amended complaint as to those counts in order to preserve them for appellate review.

¶ 40 AP argues that it alleged valid claims for civil conspiracy against the defendants, and that the circuit court erred in dismissing counts III to V where the court failed to accept the truth of AP's allegations. Instead, AP asserts, the civil conspiracy claims should have been allowed to stand unless the defendants were later able to disprove the allegations. AP argues that the civil conspiracy claims should not have been dismissed because the defendants "never proved that a principal and agent relationship exists between any of them."

¶ 41 The defendants counter that the circuit court properly dismissed AP's claims of civil conspiracy against them in the second amended complaint. Specifically, ATI argues that AP's civil conspiracy claim against it (count III) must fail as a matter of law "because ATI Holdings, LLC wholly owns the other ATI defendants and a parent company cannot conspire with its wholly-owned subsidiaries." Athletico argues that AP's allegations against it for civil conspiracy (count IV) were insufficient to show a "common scheme" between Athletico and its wholly-owned subsidiaries. Newsome argues that the circuit court properly dismissed AP's civil conspiracy claim against it (count V), where the claim was based upon the insufficient claims alleged in counts I and II, and where AP failed to plead facts sufficient to allege that Newsome knowingly and voluntarily participated in a common scheme.

¶ 42 Count III of the second amended complaint alleged that "[e]ach of the ATI defendants entered into an agreement with one another to participate in the unlawful competitive acts described above including, but not limited to, offering and paying remuneration to physicians to induce referrals, offering free transportation services to patients, and providing free or below-market-value athletic training services to sports organizations for the purpose of generating increased referrals for PT services to each of the ATI [d]efendants"; that "ATI [d]efendants" committed *** overt acts pursuant to and in furtherance of a common scheme"; and that "[a]s a direct and proximate result of these overt acts performed by one or more of the ATI [d]efendants and the acts of all the defendants described in this complaint, [AP] has suffered actual damages, in the form of a single, indivisible injury, including a decrease in market share, a decrease in patient referrals from physicians, lost profits, and diminution in the value of [AP's] business." The "overt acts" set forth under count III included the payment of cash and gifts to physicians as remuneration; the splitting of fees with physicians pursuant to written MSAs; and the payment of

remuneration by providing free transportation services or discounted athletic training services. Counts IV and V, which were directed against Athletico and Newsome, respectively, contained substantially the same allegations as those set forth in count III.[4]

¶ 43 On August 5, 2013, the circuit court, in dismissing the civil conspiracy counts in the second amended complaint pursuant to section 2-615 of the Code, found that they had not been adequately pled and that "more allegations" were needed to sustain the claims. The circuit court further noted that Newsome[5] had filed a section 2-619 motion to dismiss the civil conspiracy claim against it, denied the motion "without prejudice to re-raise," but granted AP leave to file discovery requests concerning the civil conspiracy issues on or before September 3, 2013. We may affirm the circuit court's decision on any basis supported by the record. *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 44 In order to state a claim for civil conspiracy, a plaintiff must allege facts establishing: (1) an agreement by two or more persons to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means; (2) a tortious act committed in furtherance of that agreement; and (3) an injury caused by the defendant. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999); *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927 (2010). The agreement is a "necessary and important" element of this cause of action. *McClure*, 188 Ill. 2d at 133. "The civil conspiracy theory has the effect of extending liability for a tortious act beyond the active tortfeasor to individuals who have not acted but have only planned, assisted, or encouraged the act." *Id.* Civil conspiracy is an intentional tort and requires

[4] AP did not allege a civil conspiracy claim against Accelerated.

[5] The record shows that all four defendants—Newsome, ATI, Athletico, and Accelerated—had filed separate section 2-619.1 motions to dismiss the second amended complaint.

proof that a defendant "knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner." *Id.* "Mere knowledge of the fraudulent or illegal actions of another is also not enough to show a conspiracy." *Id.* at 134. A defendant is liable as a conspirator only where it "understands the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do its part to further those objectives." (Internal quotation marks omitted.) *Id.* "The mere characterization of a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss." *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998); see also *Farwell v. Senior Services Associates, Inc.*, 2012 IL App (2d) 110669, ¶ 22 (plaintiff must allege sufficient facts to bring his claim for civil conspiracy and "conclusory allegations that the defendants agreed to achieve some illicit purpose are insufficient to sustain his claim"). Moreover, any circumstantial evidence offered to show a conspiracy must be clear and convincing. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 924 (2007).

¶ 45 Taking as true the allegations in counts III to V, we find that the circuit court did not err in dismissing AP's civil conspiracy claims in the second amended complaint. Though the civil conspiracy claims were not subjected to a heightened pleading standard as required for the Consumer Fraud Act claim, AP's allegations for counts III to V were nevertheless insufficient to sustain those claims under Illinois' fact-pleading standard. See *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 696 (2004) (Under Illinois' fact-pleading standard, the pleader is required to set out ultimate facts that support his or her cause of action; notice pleading, conclusions of law, and conclusions of fact are insufficient). AP's allegations, even when liberally construed, failed to plead specific facts to indicate that a conspiracy existed. AP asserted that each ATI defendant entered into an agreement with one another, that each Athletico

defendant entered into an agreement with one another, and that each Newsome defendant entered into an agreement with one another, to participate in unlawful competitive acts—such as offering and paying remuneration to doctors to induce referrals, offering free transportation services, and providing discounted athletic training services to sports organizations. This mere characterization of a combination of acts by the defendants as a conspiracy is insufficient to withstand a motion to dismiss. Nor did AP's allegations set forth factual allegations to establish that ATI, Athletico, and Newsome understood the general objectives of the conspiratorial scheme and accepted them by acting in furtherance of those objectives. Thus, we conclude that the circuit court properly dismissed AP's civil conspiracy claims under section 2-615 of the Code, where AP failed to allege sufficient facts to bring its claim within a legally recognized cause of action.

¶ 46 Moreover, we find that the civil conspiracy claim against ATI (count III) could have been dismissed under section 2-619 of the Code. A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise from those facts. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Further, in ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.* In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984), the Supreme Court recognized that a corporation is incapable of conspiring with its wholly-owned subsidiary: "[a] parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one." The Supreme

Court further noted that "a parent and a wholly owned subsidiary always have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Id.* at 771-72.

¶ 47 As noted, AP alleged in count III that each ATI defendant entered into an agreement to conspire with one another; alleged in count IV that each Athletico defendant entered into an agreement to conspire with one another; and alleged in count V that each Newsome defendant entered into an agreement to conspire with one another. AP did not allege that ATI, Athletico, and Newsome conspired with each other. On appeal, AP does not dispute that a parent company may not conspire with its wholly-owned subsidiaries. Rather, AP argues that ATI has not established that its parent company, ATI Holdings, LLC, wholly owned each of the other affiliated ATI defendants. However, the record shows that ATI attached an affidavit of its Chief Operating Officer (COO), Dylan Bates, to ATI's reply in support of its motion to dismiss the second amended complaint. Bates' affidavit stated that ATI Holdings, LLC, a named defendant, wholly owned all of the other affiliated ATI entities that were also named as defendants in the lawsuit. We find that AP has never rebutted Bates' affidavit in the circuit court proceedings. Instead, AP now complains on appeal that it had no opportunity to challenge Bates' affidavit because the circuit court "accepted everything ATI said at face value and dismissed the count" without "permitting discovery to determine these questions." We reject this argument. On August 5, 2013, in dismissing, without prejudice, counts III to V in the second amended complaint, the circuit court specifically allowed AP to obtain the very discovery that it now claims it had no opportunity to seek. AP failed to avail itself of the opportunity to conduct

discovery on the civil conspiracy claims, and merely adopted the same exact allegations for civil conspiracy into the third amended complaint without setting forth any new allegations.

¶ 48 In its reply brief, AP claims that its failure to depose Bates or obtain any documents showing ATI's ownership structure was excusable, arguing that AP *had* in fact served discovery requests on all the defendants "early in the litigation," but that the circuit court had stayed discovery over AP's objection and the discovery stay was never lifted. We reject this contention. The record reveals that a discovery stay was imposed by the circuit court in February 2013, but that the court's subsequent August 5, 2013 order specifically granted AP "leave to file discovery requests concerning civil conspiracy issues only on or before September 3, 2013." Given that AP was expressly permitted by the circuit court to seek discovery and depose Bates, which it opted not to do, the statements in Bates' affidavit that ATI Holdings, LLC wholly owned each of the other ATI defendants named in the lawsuit remained unrebutted. Because ATI Holdings, LLC, wholly owned each of the other ATI entities named in the lawsuit, AP's civil conspiracy claim against ATI was barred as a matter of law under *Copperweld Corp.* See 735 ILCS 5/2-619(a)(9) (West 2012) (an action may be involuntarily dismissed where a claim "is barred by other affirmative matter avoiding the legal effect of or defeating the claim").

¶ 49 Accordingly, because we hold that the circuit court did not err in dismissing the Consumer Fraud Act claim (count I) in the third amended complaint, the common law unfair competition claim in the second amended complaint (count II), and the civil conspiracy claims in the second amended complaint (counts III to V), we need not address the defendants' remaining arguments for relief.

¶ 50 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 51 Affirmed.