

SECOND DIVISION
October 30, 2012

No. 1-11-0775

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**

DONNA HARVEY AND LESTER HARVEY,) Appeal from the
Individually and as the next friend of DENISE) Circuit Court of
SCOTT, DONNA SCOTT, JONATHAN) Cook County.
SCOTT, MONA SCOTT, and GERTRUDE)
CLARK,)
)
)
Plaintiffs-Appellants,)
)
v.) No. 04 CH 4656
)
)
DENISE A. and ROBERT N. FITZPATRICK, and)
MARLYS M. MULLEN d/b/a MTM ,)
APARTMENT RENTAL CENTERS OF)
CHICAGO,) The Honorable
) Rita Novak,
Defendants-Appellees.) Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court. Justices Quinn and Connors concurred in the judgment.

ORDER

Held: We hold the circuit court properly dismissed, in part, plaintiffs' second amended complaint; denied plaintiffs' motion for summary judgment; granted, in part, defendants' motion for summary judgment; and dismissed plaintiffs' third amended complaint.

¶ 1 Plaintiffs, Donna Harvey, Lester Harvey, individually and as next friend of Denise Scott, Donna Scott, Jonathan Scott, Mona Scott, and Gertrude Scott,¹ entered into successive residential leases for an apartment owned by defendants Denise A. Fitzpatrick and Robert N. Fitzpatrick. The Fitzpatricks hired defendant, Marlys M. Mullen, doing business as MTM Apartment Rental Centers of Chicago, as their leasing agent.² Plaintiffs alleged multiple claims against defendants based on the leases plaintiffs entered into with the Fitzpatricks. The circuit court dismissed in part, and granted in part, defendants' motion to dismiss plaintiffs' second amended complaint brought pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2004)), leaving only one claim not dismissed, a claim for rescission based on the alleged failure to provide statutory notice of the possible presence of lead-based paint in the apartment. Plaintiffs did not seek to amend their complaint further, nor did they seek reconsideration. The parties filed cross-motions for summary judgment. The circuit court denied plaintiffs' motion for summary judgment, but granted, in part and denied in part, defendants' motion for summary judgment, allowing plaintiffs to file a third amended complaint. Defendants filed a motion to dismiss plaintiffs' third amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), which the circuit court granted, with prejudice.

¶ 2 At issue is whether the circuit court properly: (1) dismissed, in part, plaintiffs' second

¹We will refer to plaintiffs collectively, unless noted.

² We will refer to defendants both collectively and individually in this order because plaintiffs, in their pleadings, refer to defendants as such at different points in the proceedings. For the majority of this litigation, including during the pleadings at issue here, defendants presented a united defense.

amended complaint; (2) denied plaintiffs' motion for summary judgment; (3) granted, in part, defendants' motion for summary judgment; and (4) dismissed plaintiffs' third amended complaint with prejudice. We hold the circuit court properly dismissed, in part, plaintiffs' second amended complaint because it violated section 2-613(a) of the Code (735 ILCS 5/2-613(a) (West 2004)), by failing to separately designate and number the multiple claims. The circuit court properly denied plaintiffs' motion for summary judgment because defendants raised a genuine issue of material fact, *i.e.* whether Mullen provided statutory notice to plaintiffs of the alleged possible presence of lead-based paint in the apartment. We hold the circuit court properly granted, in part, defendants' motion for summary judgment because plaintiffs do not have a private cause of action based on the Chicago Municipal Code and plaintiffs failed to establish the elements of rescission based on fraud. Plaintiffs failed to properly preserve their claims that defendants failed to provide them notice according to section 9.1 of the Lead Poisoning Prevention Act (410 ILCS 45/9.1 (West 2010)), and their claim under Title 42, Section 4852 of the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. §4852). Finally, we hold that plaintiffs' third amended complaint was properly dismissed because plaintiffs again failed to distinctly number and designate their claims in violation of section 2-613(a) of the Code (735 ILCS 5/2-613(a) (West 2010)). Accordingly, the circuit court properly dismissed, in part, plaintiffs' second amended complaint; denied plaintiffs' motion for summary judgment; granted, in part, defendants' motion for summary judgment; and dismissed plaintiffs' third amended complaint.

¶ 3

JURISDICTION

¶ 4 On February 14, 2011, the circuit court granted defendants' motion to dismiss pursuant to

section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), with prejudice. On March 14, 2011, plaintiffs timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5

BACKGROUND

¶ 6 Plaintiffs entered into a series of residential leases with defendants, Denise A. Fitzpatrick and Robert N. Fitzpatrick, beginning in April of 2000 and ending in March of 2003. On March 16, 2004, Plaintiffs filed their initial single count complaint against defendants. Mullen³ brought a combined motion to dismiss pursuant to sections 2-615, 2-619, and 2-619.1 of the Code. 735 ILCS 5/2-615 (West 2004); 735 ILCS 5/2-619 (West 2004); 735 ILCS 5/2-619.1 (West 2004). Mullen based her motion on several grounds, including that plaintiffs failed to plead multiple claims in separate and numbered counts pursuant to section 2-613(a) of the Code. 735 ILCS 5/2-613 (a) (West 2004). On August 30, 2004, the circuit court allowed plaintiffs leave to file an amended complaint, and allowed Mullen to withdraw her combined motion to dismiss.

¶ 7 On September 30, 2004, plaintiffs filed an amended complaint. Their amended complaint contained three counts. Plaintiffs' labeled the three counts: "Violations of City Ordinances, Conversion, and Accounting;" "Enjoining Statutory Negligence and Creation of Public Nuisance;" and "Breach of Residential Rental Agreement."

³ Only Mullen filed the combined motion to dismiss plaintiffs' initial complaint. Defendants presented a collective defense in all later proceedings.

¶ 8 On October 12, 2004, defendants⁴ brought a motion to dismiss pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2004). The basis of the motion was that plaintiffs violated section 2-613(a) of the Code (735 ILCS 5/2-613 (a) (West 2004)) by failing to plead distinct causes of action in separate and numbered counts. The circuit court granted defendants' motion to dismiss on April 29, 2005, but granted plaintiffs leave to file a second amended complaint.

¶ 9 On July 19, 2005, plaintiffs filed their second amended complaint seeking "to obtain equitable relief *** including rescission of all leases" entered into by the parties. Plaintiffs alleged that the Fitzpatricks owned real estate located at 1344 West Chase Avenue, in Chicago, Illinois, and hired Mullen as their real estate broker. According to plaintiffs, the property was constructed "employing lead bearing substances." Plaintiffs sought housing in a lead-free environment due to the minor plaintiffs' prior lead poisoning.

¶ 10 Plaintiffs labeled count one of their second amended complaint as "Rescission and Accounting." In count one, plaintiffs alleged they informed Mullen of their need to lease a lead-free apartment. According to plaintiffs, Mullen informed them that the property "met their needs to induce plaintiffs to execute a one year lease." Plaintiffs describe Mullen's conduct as "materially false in that Mullen knew or should have known upon personal inspection that the Fitzpatricks in breach of their duty to [plaintiffs] failed and refused to maintain the floors, interior walls and ceilings of [the apartment] in a sound condition and good repair and permitted *** [the apartment] to be maintained and to exist in a condition that violated Chicago Municipal

⁴ From this point forward in the proceedings, defendants provided a collective defense presented by a single law firm.

Code Chapter 7-4-030 and Chapter 13-196-540 (d)." Plaintiffs further alleged in count one that defendants "breached their duty with intent to deceive under circumstances creating the duty to speak pursuant to Chapter 7-4-060 of the City of Chicago Municipal Code imposing upon the Fitzpatrick's the duty to give the plaintiffs a warning statement of the risk of lead bearing substances." Also in count one, plaintiffs alleged the Fitzpatrick's failed to give them a warning "on the potential health hazards posed by lead in their dwelling units" in violation of section 9.1 of the Illinois Lead Prevention Act (410 ILCS 45/9.1 (West 2004)), and failed to "disclose to plaintiffs the risk of lead-based paint hazards" in violation of Title 42, Section 4852 of the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. §4852). Count one additionally contained allegations of fraud, "deliberate concealment," and theft for allegedly locking plaintiffs out of the property and removing plaintiffs' personal property. Plaintiffs maintained that their cause of action was brought in the chancery division because they had no adequate remedy at law and sought damages of "rents paid, security deposits taken and not returned, interest on all sums paid by plaintiffs to defendants for the privilege of living in lead hazardous real estate, the full actual value of all household goods, furnishings, clothing, and toys that defendants took and refuse to return." Plaintiffs also asked the circuit court to take an accounting and "to assess a reasonable sum not less than \$50,000.00 for defendants' failure to give plaintiffs the statutory warning required by statute."

¶ 11 Plaintiffs labeled count two of their complaint, "Breach of Implied Warranty of Habitability and Unconscionability." In count two, plaintiffs alleged the property was constructed before 1978 and that "the construction of such premises employed lead bearing

substances and lead paint." Plaintiffs stated "[t]he Municipal Code of the City of Chicago specifically bans the maintenance of the premises in question. Chapter 13-196-540 (d) requires the giving of a written warning stating the risk to prospective tenants which such notice was not given to plaintiffs (Chapter 7-4-60)." Count two also stated that defendants took out a mortgage on the property and that "[o]n information and belief defendants used unknown amount of these proceeds in an effort to remediate the hazardous condition of the premises." According to Plaintiffs, they also informed defendants of peeling paint. Count two stated further that "[b]y January 2004, the City of Chicago found the premises in question free of the hazardous lead bearing defects and conditions." Additionally, count two alleged defendants failed to return their security deposit, theft, and destruction of personal property. Plaintiffs reiterated they had no adequate remedy at law and asked the court to rescind the leases they entered into with defendants, to take an accounting, and to award damages of "not less than \$50,000" due to the alleged failure to give required statutory warnings, costs, and fees.

¶ 12 On July 22, 2005, defendants filed a motion to dismiss plaintiffs' second amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2004). Defendants alleged dismissal of plaintiffs' second amended complaint was proper because plaintiffs alleged multiple claims against three defendants which were not separately designated and numbered counts in violation of section 2-613(a) of the Code. 735 ILCS 5/2-613(a) (West 2004). Defendants pointed out that count one alone of the second amended complaint alleged violations of three sections of the Chicago Municipal Code, a violation of the Illinois Lead Poisoning Prevention Act (410 ILCS 45/9.1 (West 2004)), a violation of Title 42, Section 4852 of the

Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. §4852), fraudulent concealment, fraud, and theft. Defendants pointed out that count two contained the following allegations against three defendants: a violation of the Chicago Municipal Code, theft, " ' unconscionable treatment,' " and "what appears to be some sort of 'concealed remediation.' " As another basis for dismissal, defendants asserted that plaintiffs alleged a non-existent cause of action because there is no private right of action under the Illinois Lead Prevention Act or the Chicago Municipal Code. Finally, defendants maintained that plaintiffs' suit did not belong in the chancery division of the circuit court. Rather, defendants argued that it should be heard in the law division because plaintiffs sought monetary damages only. In the alternative, defendants requested that the matter be transferred to the law division.

¶ 13 On October 19, 2005, the circuit court granted in part, and denied in part, defendants' motion. The circuit court found "that plaintiffs Donna Harvey and Lester Harvey have stated a single claim for relief; that is specifically a claim for rescission based upon defendants' alleged failure to provide the plaintiffs with statutory notice regard[ing] the possible presence of lead-based paint." The circuit court allowed defendants to "answer plaintiffs' claim for rescission." Defendants answered plaintiffs' second amended complaint on November 7, 2005, and denied all material allegations of wrongdoing.

¶ 14 On January 6, 2010, defendants filed a motion for summary judgment pursuant to section 2-1005 of the Code. 735 ILCS 5/2-1005 (West 2010). Defendants' motion addressed plaintiffs' remaining claim for rescission based on defendants' alleged failure to provide plaintiffs with statutory notice regarding the possible presence of lead-based paint. Defendants based their

motion on three separate grounds: 1) that our supreme court has held that there is no private cause of action for the alleged statutory violations which plaintiffs based their rescission claim on; 2) that rescission is not warranted on the merits of the case; and 3) it would be impracticable to rescind the lease agreements in this case because the parties cannot be returned to the *status quo ante*. Defendants attached the following documents to their motion for summary judgment: plaintiffs' second amended complaint; defendants' July 22, 2005, motion to dismiss plaintiffs' second amended complaint; the circuit court's October 19, 2005, order granting in part, denying in part, defendants' motion to dismiss plaintiffs' second amended complaint; defendants' answer to plaintiffs' second amended complaint; defendants' amended affirmative defenses; plaintiffs' revised joint answers to interrogatories; various orders entered by the circuit court showing that discovery had closed; and plaintiffs' joint responses to defendants' request for documents.

¶ 15 On January 22, 2010, plaintiffs filed their own motion for summary judgment. Plaintiffs argued they were entitled to summary judgment because defendants did not establish any evidentiary facts that would allow them to terminate the lease between the parties. Plaintiffs asserted that they were entitled to rescission of the leases because defendants illegally locked them out of the apartment. Plaintiffs asserted that the Fitzpatricks, based on their requests to admit, admitted that they did not give plaintiffs notice of the possible presence of lead-based paint. Plaintiffs attached to their motion the following documents: an application, certification, and order to sue or defend as an indigent person entered by the circuit court on March 16, 2001; their second amended complaint; defendants' answer to their second amended complaint; the Fitzpatricks' answers to their requests to admit relevant facts; defendants' amended response to

plaintiffs' request to admit; Denise Fitzpatrick's evidence deposition; and a copy of the *lis pendens* plaintiffs filed on October 29, 2004.⁵

¶ 16 On March 2, 2010, defendants filed their response to plaintiffs' motion for summary judgment. In their motion, defendants asserted that plaintiffs ignored the only remaining issue in the litigation, the claim for rescission based on defendants' alleged failure to provide plaintiffs with statutory notice regarding the possible presence of lead-based paint. Defendants argued that plaintiffs' argument that statutory notice of the possibility of lead paint was flawed because it relied upon defendants' amended responses to plaintiffs' request to admit wherein the Fitzpatricks admitted to "not giving the Plaintiffs information relative to potential risks and hazards of being exposed to lead bearing substances before the parties signed the lease agreement." Defendants pointed out that the Fitzpatricks hired a leasing agent, Mullen, who did provide the proper statutory notice to plaintiffs. Defendants relied upon Mullen's deposition testimony, which they argued presents a genuine issue of material fact such that plaintiffs' motion for summary judgment should be denied.⁶

¶ 17 On March 12, 2010, plaintiffs filed a motion for sanctions in lieu of a response to defendants' motion for summary judgment.

⁵ On October 19, 2005, the circuit court granted defendants' motion to void the notice of *lis pendens* and declared it to be void.

⁶ Defendants did not attach Mullen's deposition testimony to their response, but noted in their response that once a copy of the deposition became available they would provide the court with a copy. Defendants subsequently attached Mullen's deposition to their reply in support of their motion for summary judgment filed March 25, 2010.

¶ 18 In reply, defendants asserted that plaintiffs continued to ignore the circuit court's October 19, 2005, order which dismissed plaintiffs' complaint except for the sole remaining claim that defendants allegedly failed to provide statutory notice to plaintiffs of the possible presence of lead-based paint in the apartment. Defendants attached to their reply Mullen's evidence deposition in which she stated that she did give plaintiffs the proper statutory notice. Relevant to this appeal, the following exchange occurred at Mullen's evidence deposition:

"Mr. Moenning [plaintiffs' counsel]: Now, in this case [Mullen], [plaintiffs] make the statement which is that you failed to give them any paperwork regarding the condition of the apartment with respect to lead-based paint.

Mullen: That's not true.

Q. Did you give them - -

A. Yes.

Q. -documentation?

A. Yeah.

Q. Do you know where you were when it was given?

A. In the office, I would assume. That was the only place I ever saw them.

Q. No, I'm asking you specifically. Do you remember doing this?

A. It would have been given them at the time of the lease

signing.

Q. Which would have been...

A. Whatever is the date on the lease.

* * *

Q. And is that your testimony that's the date that you gave them the documents?

A. Right.

Q. Do you have any recollection of what the documents said or what form it was?

A. They were just the standard pamphlet and the forms, the little form that they just checked off that they have seen it, have received it."

¶ 19 On March 25, 2010, plaintiffs filed a reply in support of their own motion for summary judgment. In their reply, plaintiffs argued defendants' response improperly relied upon the circuit court's October 19, 2005, order.

¶ 20 On July 9, 2010, the circuit court issued its memorandum decision and order, denying plaintiffs' motion for summary judgment, granting in part and denying in part defendants' motion for summary judgment, and denying plaintiffs' motion for sanctions. The circuit court found "[t]he [second amended complaint], as curtailed by the October 19, 2005 order, is the operative complaint. Thus the only claim before the Court on the motion for summary judgment is a claim for rescission based on Defendants' failure to provide Plaintiffs with statutory notice regarding

the possible presence of lead-based paint." The circuit court further found, "Plaintiffs have presented no evidence that Defendants deliberately or knowingly failed to provide them with the required notices." The circuit court noted that instead of providing any affidavits in which plaintiffs attest that they did not receive the proper notice, they rely solely on the statements of the Fitzpatricks who, in their answers to plaintiffs' requests to admit, state that they did not give plaintiffs the proper notice. However, the circuit court pointed out that Mullen, in her deposition testimony, stated that she did provide the required notices. Accordingly, the circuit court found this created an issue of fact such that plaintiffs' motion for summary judgment should be denied.

¶ 21 Regarding defendants' motion for summary judgment, the circuit court found that plaintiffs did not possess a private cause of action for rescission under either the Illinois Lead Poisoning Prevention Act or the Chicago Municipal Code. The circuit court based its decision on *Abbasi v. Paraskevoulakos* (187 Ill. 2d 386 (1999)) which, the circuit court explained "held that the claims for violation of the [Illinois Lead Poisoning Prevention Act] itself could not proceed because the legislature did not create a direct cause of action in the statute and because it was not necessary for the Court to imply a private right of action since an injured party had a sufficient remedy under traditional tort claims." The circuit court found this rationale also applied to allegations of violations of the Chicago Municipal Code. The circuit court, however, noted that "to the extent that the [second amended complaint] purports to set out claims by which the requirements of the statute and ordinance merely give rise to a duty, the breach of which in turn constitutes some other cognizable cause of action, the claims are not barred by the *Abbasi* decision." The circuit court found that "Plaintiffs have no cognizable claim for rescission or

restitution under [the Residential Lead-Based Paint Hazard Reduction Act], 42 U.S.C. §4852 d, and only the lessee is entitled to proceed under that statute." The circuit court explained that defendants were correct in that the Residential Lead-Based Hazard Reduction Act did not confer standing on the minor plaintiffs and only permitted a private right of action for damages, not the equitable relief plaintiffs sought. The circuit court further explained that it is unclear if plaintiffs even intended to invoke the Residential Lead-Based Paint Hazard Reduction Act. Finally, the circuit court found that plaintiffs failed to establish rescission on the basis of fraud. Specifically, plaintiffs failed to establish the required elements of rescission, stating,

"Plaintiffs have presented no evidence to support their contention that Mullen deliberately or fraudulently withheld information about lead hazards in the apartment at any time during her interactions with Plaintiffs. Mullen's deposition testimony provides the only evidence on this point, and she testified that she gave Plaintiffs the required notices. In any event, no evidence establishes that her statement was false or that she intended to mislead."

Accordingly, the circuit court granted defendants' motion for summary judgment in part, denied it in part, and allowed plaintiffs to file an amended complaint.

¶ 22 The circuit court noted the difficulty in resolving defendants' motion due to the fact that plaintiffs failed to amend their complaint "to define a coherent cause of action." The circuit court also made the following comments in its order:

"In closing, some comments are warranted. This case is now six years old. As far as can be determined, very limited discovery has taken place. Discovery closed long ago. Plaintiffs have adhered to a complaint that was made obsolete by an order entered over four years ago. In order to proceed to trial, both the Court and the Defendants will have to know the precise cause of action Plaintiff intends to proceed on. Many of their chosen theories have been foreclosed either by the Court's determinations today or by their failure to seek modification or clarification of the October 19, 2005 order. On the other hand, Defendants have not persuaded the Court that they are entitled to judgment on all claims. Accordingly, Plaintiffs may file an amended complaint that conforms to causes of action still available to them by this order."

¶ 23 On September 3, 2010, plaintiffs filed their third amended complaint. Plaintiffs' third amended complaint contained one count, but made the following allegations: that Mullen made false statements and acted recklessly and negligently to induce plaintiffs into signing a lease; that Mullen wrongfully induced plaintiffs to sign a lease "without sufficient professional knowledge or inspection of the premises;"⁷ that Mullen violated both "Chicago Municipal Code Chapter 7-

⁷ Plaintiffs made this allegation in the alternative.

4-030 and Chapter 13-196-540(d);" that plaintiffs received no warnings that the apartment was "other than as represented;" that defendants both materially misrepresented and concealed that the apartment was lead free; that defendants concealed "unlawful and dangerous conditions;" defendants locked plaintiffs out of the apartment; theft; constructive fraud; mistake of fact; that defendants intentionally concealed "their non-compliance with minimum building and housing requirements;" that the leases entered into by the parties are void or voidable; and defendants' failure "to comply with minimum housing and building requirements" violated "public policy." Plaintiffs asked for the following relief: rescission of all leases entered into by the parties; mandatory injunctive relief for the alleged theft; an "equitable accounting and prove up of all damage arising from defendant Denise Fitzpatrick's pattern of misconduct;" that defendants replace all personal property allegedly stolen by defendants; damages for rents paid and security deposits paid; "equitable relief" for living in allegedly unsafe conditions; to deny defendants "any restoration;" damages in excess of \$50,000 for failing to provide statutory warnings; and the payment of plaintiffs' costs, and fees, including attorneys fees.

¶ 24 On October 12, 2010, defendants filed their motion to dismiss plaintiffs' third amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010). In their motion, defendants argued that plaintiffs' third amended complaint should be dismissed because plaintiffs' claims were not separately numbered and designated in violation of section 2-613(a) of the Code (735 ILCS 5/2-613(a) (West 2010)), and because plaintiffs were pursuing claims which had already been resolved by the circuit court.

¶ 25 On February 14, 2011, the circuit court granted defendants' motion to dismiss, with

prejudice. On March 14, 2011, plaintiffs timely appealed.

¶ 26

ANALYSIS

¶ 27 At issue is whether the circuit court properly: (1) dismissed, in part, plaintiffs' second amended complaint; (2) denied plaintiffs' motion for summary judgment; (3) granted, in part, defendants' motion for summary judgment; and (4) dismissed plaintiffs' third amended complaint with prejudice. We will address each issue in turn below.

¶ 28

(1) Plaintiffs' Second Amended Complaint

¶ 29 A section 2-615 motion to dismiss challenges the sufficiency of a complaint by asserting defects on the face of the complaint. *Vitro v. Mihelcic, M.D.*, 209 Ill. 2d 76, 81 (2004). Well-pleaded facts in a complaint, as well as all reasonable inferences drawn from those well-pleaded facts, must be accepted as true when ruling on a section 2-615 motion to dismiss. *Id.* "The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Id.* Our review is *de novo*. *Id.*

¶ 30 Section 2-613(a) of the Code provides:

"Separate counts and defenses. (a) Parties may plead as many causes of action, counterclaims, defenses, and matters in reply as they may have, and each shall be separately designated and numbered." 735 ILCS 5/2-613(a) (West 2010).

¶ 31 This court, in *Herman v. Hamblet*, held that a complaint "was properly dismissed because it improperly purported to allege multiple cause of action in a single count." *Herman v. Hamblet*,

81 Ill. App. 3d 1050, 1056 (1980). In *Herman*, the operative count in the complaint contained 53 paragraphs which contained allegations against five defendants, jointly and severally, for multiple causes of action including conflict of interest, conspiracy, failure to perform an agreement, interference with a contractual relationship, and burglary. *Id.* This court noted that the plaintiff never sought to amend the complaint to cure the defective pleadings. *Id.*

¶ 32 In this case, like the plaintiff in *Herman*, plaintiffs' allegations in their second amended complaint contain multiple causes of action against several defendants. *Id.* We hold the circuit court did not err in dismissing, in part, plaintiffs' second amended complaint because plaintiffs failed to plead their claims in a separate and numbered fashion in violation of section 2-613(a) of the Code. 735 ILCS 5/2-613(a) (West 2004). We note that, like the circuit court, we had difficulty reviewing plaintiffs' second amended complaint because of plaintiffs' failure "to define a coherent cause of action."⁸ Plaintiffs' second amended complaint contained two counts. Our review of count one shows plaintiffs made at least the following claims in one count against multiple defendants: three violations of the Chicago Municipal Code;⁹ a violation of section 9.1 of the Illinois Lead Prevention Act; a violation of Title 42, Section 4852 of the Residential Lead-Based Paint Hazard Reduction Act; fraud; and theft. The above claims are, at various points in

⁸ In its order granting in part, denying in part, defendants' motion for summary judgment, the circuit court stated "[t]he failure of Plaintiffs to amend their complaint following the October 19, 2005, order and to define a coherent cause of action, as permitted by that order, makes resolution of Defendants' motion unduly difficult."

⁹ Plaintiffs list them as "Chicago Municipal Code Chapter 7-4-030 and Chapter 13-196-540(d)," and "Chapter 7-4-060 of the City of Chicago Municipal Code."

count one of the second amended complaint, made against either one or all of the defendants. Our review of count two of plaintiffs' complaint shows plaintiffs made at least the following claims in one count against multiple defendants: breach of implied warranty of habitability; unconscionable treatment of plaintiffs; violations of two sections of the Chicago Municipal Code;¹⁰ and destruction and theft of personal property.¹¹ The allegations in count two appear to be directed at defendants collectively. Accordingly, plaintiffs failed to properly plead their multiple causes of actions in violation of section 2-613(a) of the Code. 735 ILCS 5/2-613(a) (West 2010). Plaintiffs in this case, like the plaintiff in *Herman*, did not attempt to amend their second amended complaint to cure this defect even though they were given the opportunity to do so. *Herman*, 81 Ill. App. 3d at 1056. Therefore, the circuit court did not err when it dismissed, in part, plaintiffs' complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2004).

¶ 33 (2) Plaintiffs' Motion for Summary Judgment

¶ 34 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with any affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine

¹⁰ Plaintiffs cite the violations as violations of "Chapter 13-196-540(d)" and "Chapter 7-4-60" of the Chicago Municipal Code.

¹¹ Interestingly, plaintiffs also assert in count two that "[b]y January of 2004, the City of Chicago found the premises in question free of the hazardous lead bearing defects and conditions."

issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). When determining whether a genuine issue of material fact exists, the pleadings are to be liberally construed in favor of the nonmoving party. *Id.* A party opposing a motion for summary judgment "must present a factual basis which would arguably entitle him to a judgment." *Allegro Services, Ltd. v. The Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). Summary judgment in favor of a defendant is proper where the plaintiff fails to establish an element of a cause of action. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). We review summary judgment rulings *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 35 Initially, we note that the only claim before the circuit court at the time it denied plaintiffs' motion for summary judgment was a rescission claim based on defendants' alleged failure to give plaintiffs the proper statutory notice regarding lead-based paint on the premises. In their motion, plaintiffs rely on answers of the Fitzpatricks contained in plaintiffs' requests to admit to argue that defendants failed to provide them with notice of the possible presence of lead-based paint in the apartment. Defendants however, point to Mullen's evidence deposition, which they attached to their motion, in which she states she provided plaintiffs the required notices. We agree with the circuit court that this is a genuine issue of material fact precluding the grant of summary judgment in plaintiffs' favor. *Allegro Services, Ltd.*, 172 Ill. 2d at 256 (a party opposing a motion for summary judgment "must present a factual basis which would arguably entitle him to a judgment.") Therefore, the circuit court did not err when it denied plaintiffs' motion for summary judgment.

¶ 36 (3) Defendants' Motion for Summary Judgment

¶ 37 The circuit court, in ruling on defendants' motion for summary judgment, found plaintiffs did not have a private cause of action for rescission under the Illinois Lead Poisoning Prevention Act or the Chicago Municipal Code, that plaintiffs did not make a cognizable claim for rescission or restitution under the Residential Lead-Based Paint Hazard Reduction Act, and that plaintiffs failed to establish the required elements of rescission. We will address each finding in turn.

¶ 38 Initially, we hold that plaintiffs have waived any objection to the circuit court's rulings pertaining to either the Illinois Lead Poisoning Prevention Act or the Residential Lead-Based Paint Hazard Reduction Act, for failing to properly preserve those claims for our review.

Recently, our supreme court explained:

"The rules governing the preservation of dismissed claims for purposes of appellate review are clear and well settled. This court has clearly and consistently explained that 'a party who filed an amended pleading waives any objection to the trial court's ruling on the former complaints,' and ' "[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." ' "

Bonhomme v. St. James, 2012 IL 112393, ¶17 (quoting *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150,153-54 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d

268, 272 (1963)).

As discussed above, plaintiffs, in their second amended complaint, made allegations addressing both the Illinois Lead Poisoning Prevention Act and the Residential Lead-Based Paint Hazard Reduction Act. However, in their third amended complaint, they make no mention of, nor do they adopt, any claims based on either the Illinois Lead Poisoning Prevention Act or the Residential Lead-Based Paint Hazard Reduction Act. Therefore, plaintiffs have waived these contentions and we need not consider them further.

¶ 39 The first circuit court finding plaintiffs properly preserved for our review, is the circuit court's finding that plaintiffs did not possess a private cause of action under the Chicago Municipal Code based on our supreme court's decision in *Abbasi v. Paraskevoulakos* (187 Ill. 2d 386, 396-97 (1999)). We have reviewed *Abbasi* and agree with the circuit court that plaintiffs do not possess a private right of action under the Chicago Municipal Code. *Abbasi*, 187 Ill. 2d at 396-97 ("a cause of action should not be implied under the [Chicago Municipal Code] because it is not necessary to provide an adequate remedy for violations of the [Chicago Municipal Code.] Plaintiff's common law negligence action pending in the circuit court constitutes an adequate remedy without need to create a private cause of action under the [Chicago Municipal Code.]") We also agree with the circuit court's finding that "to the extent that the [second amended complaint] purports to set out claims by which the requirements of the *** ordinance merely give rise to a duty, the breach of which in turn constitutes some other cognizable cause of action, the claims are not barred by the *Abbasi* decision." See *Id.* at 395-97 (explaining that the plaintiff's common law negligence claim in *Abbasi* provided an adequate remedy without creating a private

cause of action under the Chicago Municipal Code). Accordingly, the circuit court did not err when it found plaintiffs did not possess a private right of action under the Chicago Municipal Code.

¶ 40 Lastly, plaintiffs properly preserved for our review the circuit court's finding that plaintiffs failed to establish the elements of rescission. Rescission typically restores the parties to their initial status by cancelling the operative contract between them. *Horwitz v. Sonnenschein, Nath, and Rosenthal, LLP.*, 399 Ill. App. 3d 965, 973 (2010). The parties' contractual rights are invalidated or vitiated when a contract is rescinded. *Id.* "A claim for rescission is sufficient if it alleges: (1) substantial nonperformance or breach by the defendant; and (2) that the parties can be restored to the *status quo ante*." *Id.* For rescission based on fraud or misrepresentation, as plaintiffs' seek here, this court has held that the following elements must be proven: "(1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intended to induce the other party to act; (4) acted on by the other party in reliance on the truth of the representation; and (5) resulting damage." *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 758 (2008). "A misrepresentation is 'material' if the recipient would have acted differently had he been aware of the falsity of the statement, or if the person making it knew the statement was likely to induce the recipient to engage in the conduct in question." *Id.*

¶ 41 We hold plaintiffs failed to establish the elements of rescission, and therefore, the circuit court properly found that defendants were entitled to summary judgment on plaintiffs' rescission claim. We agree with the circuit court's findings that plaintiffs failed to present any evidence "that Mullen deliberately or fraudulently withheld information about lead hazards in the

apartment at any time during her interactions with Plaintiffs." We further agree that the only evidence presented on this issue was Mullen's deposition testimony in which she clearly stated she provided plaintiffs the proper notices. Plaintiffs did not refute Mullen's statements.

Accordingly, plaintiffs failed to establish the elements of rescission by failing to prove Mullen acted intentionally, deliberately, or fraudulently. See *Allegro Services, Ltd*, 172 Ill. 2d at 256 (a party opposing summary judgment "must present a factual basis which would arguably entitle him to a judgment.") Accordingly, the circuit court's findings regarding plaintiffs' rescission claim based on fraud were not in error.

¶ 42 (4) Plaintiffs' Third Amended Complaint

¶ 43 Like our holding concerning plaintiffs' second amended complaint, we hold that plaintiffs' third amended complaint was also properly dismissed by the circuit court pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), because it violated section 2-613(a) of the Code (735 ILCS 5/2-613(a) (West 2010)), by pleading multiple causes of action against several defendants in a sole count of the third amended complaint. Our review of plaintiffs' third amended complaint shows plaintiffs made, at least, the following claims¹² against defendants in a single count: rescission; restoration of personal property; constructive fraud; "mistake of fact arising from concealment or misplaced confidence on statements made by" Mullen; that Denise Fitzpatrick destroyed personal property; that "defendants failed to provide a suitable habitation

¹² As with plaintiffs' second amended complaint, we again had difficulty reviewing plaintiffs' third amended complaint because plaintiffs failed to coherently define their causes of action.

and required plaintiffs to live with minor children in the presence of peeling paint deemed by public policy a public nuisance;" that the Fitzpatricks committed "misconduct towards plaintiffs' contractual rights to live in safe and clean housing;" that Mullen made false statements, was negligent and reckless; that Mullen made representations "without sufficient professional knowledge or inspection of the premises;"¹³ that defendants violated "Chicago Municipal Code Chapter 7-4-030 and Chapter 13-196-540(d);" that they "received no written or oral warning or other notice that Unit 3S was other than as represented" by Mullen; that Mullen made material misrepresentations; that the Fitzpatricks actively concealed Mullen's misrepresentations; that defendants concealed unlawful and dangerous conditions in the apartment; that the Fitzpatricks locked plaintiffs out of the apartment and "emptied the unit of all plaintiffs' personal property;" theft; that defendants failed to provide notice that the apartment was "not 'lead free;' " and that defendants intentionally concealed "their non-compliance with minimum building and housing requirements," which also violated public policy.

¶ 44 Plaintiffs' third amended complaint clearly did not set out their claims in a proper fashion according to section 2-613(a) of the Code. 735 ILCS 5/2-613(a) (West 2010). Plaintiffs made numerous allegations and claims against several defendants in a single count of their third amended complaint. Plaintiffs alternated referring to defendants individually and collectively, which added further confusion. Plaintiffs' third amended complaint violated section 2-613(a) of the Code (735 ILCS 5/2-613(a) (West 2010)), by failing to distinctly separate and number their

¹³ Plaintiffs made this allegation in the alternative.

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various claims. Accordingly, the circuit court did not err when it dismissed plaintiffs' third amended complaint.

¶ 45

CONCLUSION

¶ 46 The judgment of the circuit court is affirmed.

¶ 47 Affirmed.