2014 IL App (1st) 131400-U

No. 1-13-1400

SIXTH DIVISION
September 12, 2014

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHERMER AVIATION, LLC, an Illinois Limited Liability Company; and REPUBLIC TECHNOLOGIES, N.A., LLC, a Delaware Limited Liability Company,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 CH 43707
DASSAULT FALCON JET CORP., a New Jersey Corporation,	)	The Honorable LeRoy K. Martin,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶1 *HELD*: In relation to the purchase agreement for a corporate aircraft, the circuit court properly dismissed plaintiffs' claims for rescission based on fraudulent misrepresentation, rescission based on mistake, violation of the New Jersey Consumer Fraud Act, and violation of the implied warranty of fitness for a particular purpose where plaintiffs failed to sufficiently state causes of action upon which relief could be granted. In addition, where no issues of genuine fact

existed, the circuit court properly granted summary judgment in favor of defendant, the seller, on plaintiffs' claim for breach of the express warranty.

¶2 Plaintiffs, Shermer Aviation, LLC (Shermer), an Illinois limited liability company, and Republic Technologies, N.A., LLC (Republic), a Delaware limited liability company, appeal the order of the circuit court dismissing four counts of their five-count complaint and granting summary judgment in favor of defendant, Dassault Falcon Jet Corp. (Dassault), a New Jersey corporation, on the remaining count. Plaintiffs[1] entered into a contract with defendant for the purchase of a corporate aircraft. However, the new corporate jet would not be ready for three years. In the meantime, defendant suggested, and plaintiffs agreed, to purchase an interim jet to satisfy their needs. The underlying case resulted from numerous service malfunctions with the interim jet. On appeal, plaintiffs contend the circuit erred in: (1) dismissing and denying their request to reassert their claims for rescission based on fraudulent misrepresentation, rescission based on mistake, and violation of the New Jersey Consumer Fraud Act; (2) dismissing their claim for breach of an implied warranty of fitness for a particular purpose; and (3) granting summary judgment in favor of defendant on their breach of the interim jet warranty claim. Based on the following, we affirm.

¶3 FACTS

¶4 According to plaintiffs' fourth amended complaint, in late 2007 and early 2008, Donald Levin, the chairman of Shermer and Republic, approached defendant to purchase a corporate jet to be used by the companies' executives for business travel. George Yundt, a Dassault salesman, testified at his deposition that Levin said "his business was flourishing, that he has some

[1] According to the complaint, Shermer was the formal owner of the trade-in jet and Republic was to be the formal owner of the new jet. Shermer and Republic are affiliated companies with common ownership and a common chairman, Levin. We refer to the companies in concert.

European operations and that he saw our airplane as a candidate for meeting those transport needs, both domestic and international *** [he] wanted to be able to go anywhere in North America nonstop and wanted to be able—frequently be able to go nonstop to France." Yundt advised Levin that Dassault had a plane to meet plaintiffs' needs, but the corporate jet would not be available until March 2011. For plaintiffs' interim needs, Yundt suggested they purchase a pre-owned Dassault 2000 EX EASy (trade-in jet), which defendant would purchase from plaintiffs once the Falcon 2000 LX (new jet) became available. According to plaintiffs' fourth amended complaint, Yundt promised the trade-in jet would provide a virtually identical level of quality and service as the new jet and they "would be entitled to the same benefits as if" they had acquired a new jet. Yundt testified that plaintiffs "would be in the Dassault family," adding that he would rather plaintiffs "be flying one of our products than a competitor product . . . and it cements a relationship more firmly usually."

¶5 According to plaintiffs' fourth amended complaint, defendant extended a number of guarantees regarding the company's superior quality jets and customer service to convince them to purchase a corporate jet. In particular, on December 28, 2007, Yundt sent Levin material about defendant company and the jets, along with an informational brochure entitled "12 Strategic Reasons Why a Falcon Is the Smartest Business Decision You Can Make Today." On February 28, 2009, Yundt again sent the "12 Strategic Reasons Why a Falcon Is the Smartest Business Decision You Can Make Today" informational brochure. The "12 Strategic Reasons Why a Falcon Is the Smartest Business Decision You Can Make Today" informational brochure provided that "Every aspect of a Falcon lives up to the industry's highest standard," offering "superb" customer service, such that "[y]our new Falcon will have 26 Service Centers and over 57 Field Service Representatives worldwide to call on 24/7—from day one. In addition, all our

production facilities and vendors are connected through a dedicated communications network—assuring speed and precision. The fact is, Falcon parts are delivered 'on time' to customers throughout the world over 97 percent of the time." The brochure also stated that defendant's "worldwide service facilities meet—and often surpass—ISO quality standards." According to plaintiffs' fourth amended complaint, two of defendant's press releases, issued on March 3, 2006, and August 8, 2007, claimed the company was registered as an ISO (Industrial Standards Organization) 9000 company. The ISO designation represented a "well-known and highly regarded standard[] for quality management systems, including procedures for 'meet[ing] customer requirements' and 'exceed[ing] customer expectations,' " as well as identifying "that customer needs and expectations include[d] dependability, availability, and post-realization activities."

¶6 The fourth amended complaint also detailed "specific guarantees about customer service support provided to owners of every Dassault plane" as described on the company website. According to the fourth amended complaint, defendant's website, as of February 28, 2008, guaranteed three promises, *i.e.*, "The Promise to Support," "The Promise to Respond," and "The Promise to Help":

> "a. As part of the Dassault's 'Promise to Support,' Dassault stated, 'With "24/7/365" Account Representative support, you receive the assistance you need—from spare parts and tooling to computer aided troubleshooting and data processing.'
>
> b. As part of Dassault's 'Promise to Respond,' Dassault stated, 'Over 30 Field Service Representatives are based worldwide to provide the one-on-one technical assistance you may need … Your representative can provide you with

all your technical questions, along with aircraft bulletin analysis, your aircraft's service bulletin compliance record, latest modification adaptability, troubleshooting, and any special equipment needs.'

c. As part of Dassault's 'Promise to Help', Dassault stated, 'A network of authorized service centers stands [*sic*] ready around the world to ensure you factory-quality support and maintenance. Each center maintains our high standards for spare parts inventory levels, tooling, training, management and quality control.' "

¶7 On April 30, 2008, plaintiffs signed a purchase agreement for a $30 million new Falcon 2000 LX jet (new jet purchase agreement). Pursuant to the new jet purchase agreement, the new jet was scheduled for completion and delivery on or before March 31, 2011. The new jet purchase agreement contained a provision entitled "special conditions" wherein the parties specifically provided for the acquisition of the trade-in jet by plaintiffs and subsequent trade to defendant on conditions and at a price determined by the agreement. In October 2008, Levin and Yundt attended a National Business Aviation Association conference in Orlando, Florida, to look for an interim jet. While there, Yundt advised Levin he knew of a 2005 Falcon 2000 EX EASy that was available and was "a very good airplane." On December 1, 2008, plaintiffs purchased the trade-in jet from a non-party broker, L85 Acquisition, LLC.[2] According to plaintiffs' fourth amended complaint, the trade-in jet was inspected at Duncan Aviation, a Dassault-authorized service center, by an unnamed individual and was approved as up to date on maintenance and inspection "with all time life items or maintenance bulletins issued by Dassault." Pursuant to the

[2] The trade-in jet was covered by a warranty provided by defendant to the first purchaser of the aircraft, McClatchy Newspapers, Inc. (McClatchy). The warranty commenced upon delivery to McClatchy on March 7, 2005.

new jet purchase agreement, plaintiffs made $4,395,000 in payments to defendant between March 2008 and March 2009.

¶8 According to plaintiffs' fourth amended complaint, between December 31, 2008, and June 15, 2009, the trade-in jet experienced at least 21 significant unscheduled maintenance events. On February 12, 2009, while in Geneva, Switzerland, the trade-in jet experienced a crew alerting system message regarding an engine oil chip. Ultimately, the chip sensor required replacement and related oil service. The Geneva service center, however, did not have the necessary part and plaintiffs were instructed to fly to the main Dassault facility in France for service. Upon arriving in France, plaintiffs were informed the facility also did not have the necessary part and instead plaintiffs would need to fly to Luton, England. After flying to Luton, England and receiving the replacement part, plaintiffs were able to return to the United States. Plaintiffs' fourth amended complaint alleged that they lost thousands of dollars in "executive time" as a result of the delay. Moreover, the labor required to resolve the defect cost approximately $2,300. According to plaintiffs' fourth amended complaint, defendant knew of the defect, as it had occurred frequently on other Dassault aircraft, yet the company had not yet issued a related service bulletin.

¶9 In plaintiffs' fourth amended complaint, they alleged that in June 2009 the trade-in jet was used for a trip from Chicago to Washington, D.C. Before commencing the return trip, a computer screen failed and the plane could not take off. Although the computer screen was covered under the trade-in jet warranty agreement, defendant refused to pay for labor or provide a substitute plane during repair. According to plaintiffs' fourth amended complaint, substitute services are "standard within the private jet industry in these situations." As a result, plaintiffs were "forced to expend thousands of dollars in labor costs and to arrange to fly another plane, at

its own expense, from Chicago to Washington, D.C. to pick up the stranded passengers." Meanwhile, the trade-in jet was shuttled to Michigan for repairs. Within the month of June 2009, the trade-in jet experienced seven unscheduled service failures.

¶10 Plaintiffs further alleged, in their fourth amended complaint, that in August 2009 the trade-in jet was used on a European business trip. While in Europe, the trade-in jet was stored at Dassault's main service center at Le Bourget Airport in Paris, France. When the passengers were ready to depart for the return trip to the United States, the jet's computer system indicated a problem with the brake system, which was a covered item under the warranty agreement. The trade-in jet's crew contacted defendant's main service center, but was refused service for two days. One of defendant's servicemen explained, "Everything I have is an emergency, and my hanger is full," adding "[w]e can't create people." The president of defendant's service center in Paris was contacted and responded that plaintiffs had not gone through the proper channels to obtain service and were "not yet ready" to own a Dassault Falcon.

¶11 According to plaintiffs' fourth amended complaint, contrary to defendant's representation that its jets had an unavailability rate of less than one percent, the trade-in jet was unavailable 12 percent of the time due to the numerous defects, unscheduled maintenance incidents, and poor service response. On August 28, 2009, plaintiffs' representatives met with defendant's representatives. Defendant reported that the overall availability of its fleet was 99.5%; however, the availability for the trade-in jet was 88%. Plaintiffs alleged that defendant acknowledged having prior notice, through other aircrafts, of the defects that the trade-in jet experienced without disclosing the information to plaintiffs. According to the complaint, defendant also informed plaintiffs that it would issue related service bulletins in the future. Moreover, plaintiffs alleged in their fourth amended complaint that they discovered a service bulletin issued by

defendant in April 2009 related to the computer display problem the trade-in jet experienced in June 2009. The service bulletin advised customers to have the display replaced, which defendant estimated would take one hour. Plaintiffs, however, were not made aware of the service bulletin before the computer display of the trade-in jet malfunctioned, causing plaintiffs to "expend thousands of dollars in labor costs and to arrange to fly another plane, at its own expense, to pick up the stranded passengers." Plaintiffs learned that defendant gave preference to "high priority" customers for service-related problems and believed they failed to receive timely service bulletins and quality service because of their status as low priority customers.

¶12 Within days of the August 28, 2009, meeting, plaintiffs ceased making payments on the new jet and cancelled the new jet purchase agreement. Defendant retained $2,100,000 of the $4,395,000 plaintiffs had paid, citing its alleged contractual right to retain payments up to a maximum amount of 7% of the fully outfitted price of the aircraft.

¶13 On November 5, 2009, plaintiffs filed a complaint for rescission to recover the $2,100,000, as well as for other damages and costs. Defendant filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). On March 29, 2010, the circuit court granted defendant's motion to dismiss without prejudice. On May 14, 2010, plaintiffs filed an amended complaint alleging: (1) rescission of the new jet purchase agreement based on fraud/misrepresentation; (2) rescission of the new jet purchase agreement based on mistake; (3) violation of the New Jersey Consumer Fraud Act; and (4) breach of the trade-in jet warranty agreement. Defendant responded by filing a section 2-615 motion to dismiss the amended complaint. On August 30, 2010, the circuit court granted the motion to dismiss as to the two rescission claims and the fraud act claim, but denied the motion as to the breach of the trade-in jet warranty claim.

¶14 The parties then proceeded to limited discovery, after which plaintiffs again amended their complaint to add a claim for breach of the implied warranty of fitness for a particular purpose. In addition, plaintiffs filed a motion to reassert their claims for rescission and violation of the consumer fraud act. In plaintiffs' fourth amended complaint,[3] the subject of which underlies this appeal, plaintiffs alleged: (1) rescission of the new jet purchase agreement based on fraud/misrepresentation; (2) rescission of the new jet purchase agreement based on mistake; (3) violation of the New Jersey Consumer Fraud Act; (4) breach of the implied warranty of fitness for a particular purpose; and (5) breach of the trade-in jet warranty agreement. In response, defendant filed a section 2-619.1 motion to dismiss (735 ILCS 5/2-619.1 (West 2008)) plaintiffs' claim for breach of the implied warranty of fitness for a particular purpose for failing to state a sufficient claim and for failing to bring the claim within the applicable statute of limitations and a motion for summary judgment on plaintiffs' breach of the trade-in jet warranty claim.

¶15 On February 8, 2013, the circuit court granted defendant's motion to dismiss the breach of the implied warranty of fitness for a particular purpose claim because the allegations were inadequate, the claim was premature as the new jet was never delivered, and the warranty was expressly disclaimed, and granted summary judgment in favor of defendant on the breach of the trade-in jet warranty claim because there were no genuine issues of material fact regarding the timeliness of the repairs made to the trade-in jet repairs. The circuit court entered and continued plaintiffs' request to reassert the rescission claims and the consumer fraud claim, providing plaintiffs an opportunity to resubmit a sufficient proposed amended complaint in support of the remaining claims. However, on March 15, 2013, after plaintiffs chose to stand on their fourth amended complaint, the circuit court denied plaintiffs' motion to reassert the rescission and

[3] Plaintiffs' second amended and third amended complaints are not at issue.

breach of warranty claims and dismissed those claims as pled in plaintiffs' fourth amended complaint because the allegations were conclusory and failed to amount to more than nonactionable "puffery." This appeal followed.

¶16 ANALYSIS

¶17 Plaintiffs contend the circuit court erred in dismissing four of the five claims in their fourth amended complaint and in granting summary judgment on the remaining claim.

¶18 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. 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. *Id*. at ¶ 16. A court should grant a section 2-615 dismissal only where no set of facts can be proved entitling the plaintiff to recovery. *Id*. A plaintiff, however, may not rely on factual or legal conclusions that are not supported by factual allegations. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682, 900 N.E.2d 698 (2008). We review the dismissal of a complaint *de novo*. *Jane Doe-3*, 2012 IL 112479 at ¶ 15.

¶19 Summary judgment is proper where the pleadings, admissions, depositions, and affidavits on file demonstrate there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008). All evidence is construed strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008). Summary judgment is a drastic measure that should only be granted if the movant's right thereto is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). However,

if the plaintiff fails to establish any element of his claim, summary judgment is deemed appropriate. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review a trial court's decision granting summary judgment *de novo*. *Outboard Marine Corp.*, 154 Ill. 2d at 102.

¶20 I. Rescission Based on Fraudulent Misrepresentation

¶21 Plaintiffs contend the circuit court erred in denying their motion to reassert and in dismissing their claim for rescission based on fraudulent misrepresentation. Plaintiffs maintain their allegations demonstrated material misrepresentations made by defendant.

> "Rescission is the canceling of a contract so as to restore the parties to their initial status. (Internal quotation marks omitted.) [Citation.] Where a contract is rescinded, the rights of the parties under that contract are vitiated or invalidated. [Citation.] It is an equitable doctrine, and a party seeking rescission must restore the other party to the status quo existing at the time the contract was made. (Internal quotation marks omitted.) [Citations.] A court of equity may grant the remedy of rescission where there has been some fraud in the making of a contract, such as an untrue statement or the concealment of a material fact, or where one party enters into a contract reasonably relying on the other party's innocent misrepresentation of a material fact. [Citation.]" *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregin Insurance Co.*, 355 Ill. App. 3d 156, 165 (2004).

¶22 To state a claim for fraudulent misrepresentation, also known as common law fraud, the facts must establish the representation was: (1) of a material fact; (2) made for the purpose of inducing the other party to act; (3) known to be false by the maker, or not actually believed to be true by him on reasonable grounds, but reasonably believed to be true by the other party; and (4) relied upon by the other party to his detriment. *Jordan v.*

Knafel, 378 Ill. App. 3d 219, 229 (2007); *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496 (1996). "A successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary and probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick*, 174 Ill. 2d at 496-97. "A promise to perform an act accompanied by an intention not to perform is a misrepresentation upon which fraud can be based if the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud. [Internal quotation marks omitted.]" *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 349 (2011). The plaintiff must plead he was actually deceived by the misrepresentation to establish proximate cause. *Pappas v. Pella Corp.*, 363 Ill. App. 3d 795, 804 (2006).

¶23 According to plaintiffs, their fourth amended complaint established that defendant made five fraudulent misrepresentations regarding: (1) its status as having ISO-certified service facilities; (2) the condition of the trade-in jet; (3) its customer service capabilities; (4) the issuance of timely service bulletins; and (5) its policy of giving preference to "high priority" customers. We discuss each in turn.

¶24 A. ISO Status

¶25 Plaintiffs argued that one of the "key" representations made by defendant in its sales materials, and relied upon by plaintiffs, was the "worldwide service facilities [that] meet—and often surpass—ISO quality standards" and that it was registered as an "ISO 9000 Company." According to plaintiff, Yundt sent Levin written materials on December 27, 2007, and February 28, 2008, containing the promise of "worldwide service facilities [that] meet—and often surpass—ISO quality standards." The assertion that defendant was a registered ISO 9000

company was in defendant's press releases from March 3, 2006, and August 8, 2007. Plaintiffs alleged that the statements were demonstrated to be "patently false" when one of defendant's employees testified during his deposition that "not all of our locations are ISO certified."

¶26 We find the plaintiffs' allegation lacks the requisite specificity to sustain a claim for fraudulent misrepresentation. *Connick*, 174 Ill. 2d at 496-97. Taking the statements out of order, the representation regarding defendant's alleged ISO 9000 registration was in press releases. Plaintiffs, however, provided no factual support to demonstrate they knew about or relied on the press releases or read their contents prior to entering the underlying contract. *Id*. As a result, there is no basis for a claim of fraudulent misrepresentation regarding the press releases. Turning to the representation that defendant had "worldwide service facilities [that] meet—and often surpass—ISO quality standards," plaintiffs' fourth amended complaint failed to allege facts demonstrating their reliance on the misrepresentation. *Id*. Rather, plaintiffs merely provided a conclusory statement that the representation was relied upon. Moreover, in the fourth amended complaint, plaintiffs alleged defendant's employee, Frank Youngkin, vice president of customer service, testified at his deposition that "not all of our locations are ISO certified…Some are, some are not." Youngkin's testimony, however, does not negate the representation that defendant's service facilities meet and often surpass ISO quality standards where there was no promise of ISO certification. In sum, plaintiffs failed to adequately allege facts from which fraud is the necessary and probable inference. *Id*. Plaintiffs, therefore, did not sufficiently state a claim for fraudulent misrepresentation based on the ISO status.

¶27 B. Condition of Trade-In Jet

¶28 Plaintiffs contend their fourth amended complaint sufficiently stated a claim for defendant's fraudulent misrepresentation of the trade-in jet's condition. In their fourth amended

complaint, plaintiffs alleged that, in order to "cement" the parties' "relationship," defendant urged plaintiffs to purchase the trade-in jet while waiting for the completion of the new jet. Yundt assured Levin that the trade-in jet was "a very good airplane." Plaintiffs, however, alleged they learned during discovery that defendant was aware the trade-in jet was "a terrible plane with numerous problems." In particular, plaintiffs maintained defendant knew that the previous owner of the trade-in jet expressed intense dissatisfaction with the plane and that the trade-in jet experienced a "very rare" defect wherein all four of its "aileron servos" failed at the same time. Moreover, the authorized service center recommended by defendant for the trade-in jet's pre-delivery maintenance failed to comply with the purchase agreement in providing "up to date *** manufacturers' recommended maintenance and inspection schedules" (known as section 3.1 of the new jet purchase agreement) and issuing a report "listing discrepancies necessary for the Aircraft to be in the condition required by section 3.1" (known as section 3.3 of the new jet purchase agreement). Instead, a report issued by defendant in August 2009 identified 11 service bulletins predating the December 2008 pre-delivery inspection that were not applied to the trade-in jet.

¶29 We find plaintiffs have failed to state a claim with the requisite specificity. *Id.* In their fourth amended complaint, plaintiffs alleged that defendant knew the trade-in jet had an "abysmal" service record because it was documented on the company computer system and was known to defendant's "executives." Plaintiffs, however, failed to include any factual details, such as who knew, when they knew, and whether and when the information was withheld by defendant. In the fourth amended complaint, plaintiffs merely cited to deposition testimony after making the conclusory statements that the malfunctions and defects were known before plaintiffs took possession of the trade-in jet on December 1, 2008. The citations, however, are of no value

where plaintiffs did not provide actual facts from the testimony to support the allegation that defendant knew Yundt's statement regarding the condition of the trade-in jet was a misrepresentation. Plaintiffs failed to allege facts from which fraud is the necessary and probable inference. *Id.* Plaintiffs did not sufficiently state a claim that defendant fraudulently misrepresented the condition of the trade-in jet.

¶30 C. Customer Service Capabilities

¶31 Plaintiffs contend their fourth amended complaint stated a claim for fraudulent misrepresentation based on defendant's promises of its customer service capabilities. In their fourth amended complaint, plaintiffs argued that in its written materials sent on December 27, 2007, and February 28, 2008, from Yundt to Levin defendant promised "superb" customer service, adding "[y]our new Falcon will have 26 Service Centers and over 57 Field Service Representatives worldwide to call on 24/7—from day one. In addition, all of our production facilities and vendors are connected through a dedicated communication network—assuring speed and precision. The fact is, Falcon parts are delivered 'on time' to customers throughout the world over 97 percent of the time." In addition, plaintiffs alleged defendant's offered "three promises" to support, respond, and help through its website, which were specific representations about its customer service program. Plaintiffs argued that the false representations were of material facts made to induce plaintiffs to buy a plane and were known to defendant to be false. According to plaintiffs, they "reasonably relied on" defendant's representations. Notwithstanding, defendant failed to provide the promised customer service, as demonstrated by the three major incidents causing the trade-in jet to be grounded, namely, in February 2009 in Geneva, Switzerland for the faulty engine oil chip, in June 2009 in Washington, D.C., for the faulty computer screen, and in August 2009 in Paris, France for the faulty brake systems, as well

as the numerous unscheduled maintenance failures. Specifically, plaintiffs alleged that defendant's employees admitted plaintiffs did not receive the service they deserved during the incident in Paris and conceded defendant failed to live up to its "three promises." Moreover, defendant conceded that the availability of the trade-in jet was 88% whereas the availability of its Falcon fleet of jets generally was over 99.5%.

¶32 We conclude that plaintiffs failed to state their claim with the requisite specificity. *Id.* Primarily, plaintiffs failed to demonstrate defendant's representations were known to be false. Rather, if anything, the facts demonstrated that later defendant did not satisfy its customer service promises. However, there were no facts alleged that defendant's representations were known to be false at the time of contracting in order to induce plaintiffs to enter the contract. As stated, "[a] promise to perform an act accompanied by an intention not to perform is a misrepresentation upon which fraud can be based if the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud. [Internal quotation marks omitted.]" *Hassan*, 408 Ill. App. 3d at 349. Yundt's deposition testimony that "I would rather him be flying one of our products than a competitor product…and it cements a relationship more firmly usually," as alleged in the fourth amended complaint, does not demonstrate the customer service representations were fraudulent. Plaintiffs have not alleged facts to show defendant had the intention not to perform its customer service promises. Yet again, plaintiffs failed to allege facts from which fraud is the necessary and probable inference. *Connick*, 174 Ill. 2d at 496-97. Plaintiffs, therefore, have failed to establish defendant fraudulently misrepresented its customer service capabilities.

¶33 D. Service Bulletins

¶34 Plaintiffs contend their fourth amended complaint sufficiently alleged defendant failed to provide timely service bulletins despite having previous knowledge of at least two of the defects, *i.e.*, the oil chip sensor and the computer display, which caused the grounding of the trade-in jet. According to plaintiffs, one of defendant's "three promises" included the "Promise to Respond," which promised "aircraft bulletin analysis, [] aircraft's service bulletin compliance record, latest modification adaptability, troubleshooting, and any specific equipment needs."

¶35 We find plaintiffs again failed to state their claim with the requisite specificity. *Id*. The alleged misrepresentation was made on defendant's website. Plaintiffs', however, provided no factual support demonstrating who read the website, when he or she read the website, and how the information on the website affected their decision to enter the purchase agreement. Moreover, plaintiffs did not allege that defendant promised to issue service bulletins within any designated time frames with knowledge of the falsity of the promises in an effort to induce plaintiffs to enter into the contract. *Hassan*, 408 Ill. App. 3d at 349. In their fourth amended complaint, plaintiffs failed to allege facts from which fraud is the necessary and probable inference. *Connick*, 174 Ill. 2d at 496-97. As a result, plaintiffs have failed to establish defendant fraudulently misrepresented its promise to issue service bulletins.

¶36 E. Tiered Customer Preference System

¶37 Finally, plaintiffs contend defendant misrepresented the customer service support they would receive by failing to notify plaintiffs of defendant's two-tiered service system wherein its "high priority" customers received preferential service. Plaintiffs argue that the two-tiered system violated defendant's "Promise to Respond," as represented on the company website.

¶38 We find plaintiffs failed to plead their claim with the specificity required. *Id*. Plaintiff did not allege facts demonstrating the "Promise to Respond" was false nor did they allege facts supporting their conclusory argument that a two-tiered system violated defendant's promises. As with the service bulletin contention, plaintiffs failed to provide details regarding who read the website, when he or she read the website, and how the information on the website affected their decision to enter the purchase agreement. Once again, plaintiffs failed to allege facts from which fraud is the necessary and probable inference. *Id*. Plaintiffs, therefore, did not sufficiently present a claim for fraudulent misrepresentation based on defendant's tiered-customer service policy.

¶39 F. Motion to Reassert Claim

¶40 Where we concluded that plaintiffs' fourth amended complaint failed to sufficiently state a claim for fraudulent misrepresentation on the bases discussed, we find the circuit court did not abuse its discretion in denying plaintiffs' motion to reassert the claim. Generally, amendments to pleadings should be granted liberally; however, a party's right to amend is not absolute and unlimited. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 41. When assessing whether to grant an amendment, a circuit court considers whether: (1) the proposed amendment would cure a defect in the pleadings; (2) the proposed amendment would prejudice or surprise the other party; (3) the proposed amendment is timely; and (4) there were previous opportunities to amend the pleading. *Id*. at ¶ 42. In this case, plaintiffs' claim for rescission based on fraudulent misrepresentation as pled in the fourth amended complaint would not cure the defects in their prior pleadings. Moreover, the circuit court provided plaintiffs numerous prior opportunities to sufficiently amend their complaint without success.

¶41 II. Rescission Based on Mistake

¶42 Plaintiffs next contend the circuit court erred in dismissing their claim for rescission based on mistake regarding defendant's customer service capabilities. Plaintiffs maintain the facts established defendant did not have a service organization capable of achieving the industry, ISO, and advertised standards that were promised. According to plaintiffs, defendant's inability to provide the timely, ISO-level service, as promised, supports rescission based on mistake.

¶43 As previously stated, "[a] court of equity may grant the remedy of rescission where there has been some fraud in the making of a contract, such as an untrue statement or the concealment of a material fact, or where one party enters into a contract reasonably relying on the other party's innocent misrepresentation of a material fact. [Citation.]" *Illinois State Bar Ass'n Mutual Insurance Co.*, 355 Ill. App. 3d at 165. Plaintiffs incorrectly alleged that they simply needed to plead facts demonstrating defendant's substantial nonperformance of the agreement. Instead, to establish a claim for rescission based on mistake, the mistake must be fundamental in character and relate to an essential element of the contract, thereby preventing a meeting of the minds and necessarily preventing an agreement. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 871 (2008). Rescission based on mistake has also been found where the facts demonstrate a mistake regarding a material feature of the contract that is of such grave consequence that to enforce the contract would be unconscionable and the mistake occurred notwithstanding the exercise of due care on the party seeking rescission. *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539, 548 (1989). Something is material if the party seeking rescission would have acted differently had he been aware of the fact in question, or if it concerned information upon which he would be expected to rely when making his decision. *Jordan*, 378 Ill. App. 3d at 229.

¶44 We find that plaintiffs failed to sufficiently allege their claim. Plaintiffs did not plead facts demonstrating that defendant's failure to follow-through on promises of performance was so material and fundamental to the contract that it would be unconscionable to enforce the parties' contract. We, therefore, conclude the claim for rescission based on mistake was properly dismissed.

¶45 Further, where plaintiffs' fourth amended complaint failed to sufficiently state a claim for rescission based on mistake, we find the circuit court did not abuse its discretion in denying plaintiffs' motion to reassert the claim. *Kay*, 2013 IL App (1st) 112455, ¶ 41, ¶ 42. As pled in the fourth amended complaint, plaintiffs' claim for rescission based on mistake would not cure the defects in their prior pleadings.

¶46 III. Violation of the New Jersey Consumer Fraud Act

¶47 A claim for violation of the New Jersey Consumer Fraud Act is established by the same elements as common law fraud, without the element of reliance. See *Varacallo v. Massachusetts Mutual Life Insurance Co.*, 752 A.2d 807, 813-14 (N.J. Sup. Ct. 2000). "A complaint alleging a violation of consumer fraud must be pled with the same particularity and specificity as that required under common law fraud."[4] *Connick*, 174 Ill. 2d at 501. "A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act. [Citations.]." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 169 (2005). This court has instructed:

> "What plaintiff calls 'consumer fraud' or 'deception' is simply defendants' failure to fulfill their contractual obligations. Were our courts to accept plaintiff's assertion that promises that go unfulfilled are actionable under the Consumer

[4] The Illinois Consumer Fraud and Deceptive Business Act essentially mimics the New Jersey Consumer Fraud Act. Compare 815 ILCS 505/2 (West 2008) and N.J.S.A. 56:8-2.

> Fraud Act, consumer plaintiffs could convert any suit for breach of contract into a consumer fraud action. However, it is settled that the Consumer Fraud Act was not intended to apply to every contract dispute or to supplement every breach of contract claim with a redundant remedy. [Citations.] We believe that a 'deceptive act or practice' involves more than the mere fact that a defendant promised something and then failed to do it. That type of 'misrepresentation' occurs every time a defendant breaches a contract." *Zankle v. Queen Anne Landscaping*, 311 Ill. App. 3d 308, 312 (2000).

¶48 We find plaintiffs did not sufficiently state a claim for violation of the New Jersey Consumer Fraud Act. In addition to the reasons that plaintiffs failed to establish their claim for common law fraud based on fraudulent misrepresentation, plaintiffs also failed to establish a claim for violation of the consumer fraud act where the allegations essentially involve defendant's failure to fulfill its promises. *Connick*, 174 Ill. 2d at 501; *Avery*, 216 Ill. 2d at 169; *Zankle*, 311 Ill. App. 3d at 312.

¶49 Again, where we concluded that plaintiffs' fourth amended complaint failed to sufficiently state a claim for violation of the New Jersey Consumer Fraud Act, we find the circuit court did not abuse its discretion in denying plaintiffs' motion to reassert the claim. *Kay*, 2013 IL App (1st) 112455, ¶ 41, ¶ 42. Based on the fourth amended complaint, plaintiffs' fraud act claim as pled would not cure the defects in their prior pleadings.

¶50 IV. Breach of the Implied Warranty of Fitness for a Particular Purpose

¶51 Plaintiffs additionally contend the circuit court erred in dismissing their claim for breach of the implied warranty of fitness for a particular purpose. In the fourth amended complaint, plaintiffs alleged defendant "was at all times aware of Plaintiffs' special need for a reliable and

efficient business aircraft able to achieve the industry-standard 99% dispatch rate for long, medium and short haul flights worldwide." As a result, the parties entered into the new jet purchase agreement on April 30, 2008, expressly contemplating the purchase and use of the trade-in jet until the new jet was ready for delivery in 2011. Plaintiffs alleged defendant "was at all times aware that Plaintiffs agreed to take delivery of the New Jet in 2011 because Dassault promised that the Trade-In Aircraft would perform virtually the same as the New Jet, and provide reliable, efficient service and meet the Plaintiffs' particular needs for nonstop flights throughout North America and to Western Europe." According to the fourth amended complaint, despite defendant's promise to satisfy plaintiffs' needs for "reliable, efficient, frequent, nonstop domestic and international flights," its response to the trade-in jet's malfunctions and defects was "abysmal" making it unfit for the "specific missions for which it was purchased." Where defendant's promise that the trade-in jet would receive the same level of service as the new jet, plaintiffs concluded the new jet "would be unfit for the specific missions for which it was purchased." Plaintiffs, therefore, allege defendant breached the implied warranty of fitness for a particular purpose.

¶52 Section 2-315 of the Uniform Commercial Code (UCC) (810 ILCS 5/2-315 (West 2008)) provides:

> "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." 810 ILCS 5/2-315 (West 2008).

To successfully plead a claim for breach of an implied warranty of fitness for a particular purpose, a plaintiff must present facts alleging: (1) a sale of goods; (2) the seller had reason to know of any particular purpose for which the goods are required; (3) the plaintiff, as the buyer of the goods, was relying upon the seller's skills or judgment to select suitable goods; and (4) the goods were not fit for the particular purpose for which they were used. *Maldonado v. Creative Woodworking Concepts, Inc.*, 342 Ill. App. 3d 1028, 1034 (2003). A plaintiff must show that the goods are "unmerchantable or unfit for their intended purpose, regardless of whether they contain a 'defect.' " *Id.*

¶53 Plaintiffs argue that the circuit court erred in finding the implied warranty of fitness for a particular purpose was never activated because the new jet was never delivered. Plaintiffs maintain the implied warranty "activates" upon contracting for the product at issue, not upon delivery, and, therefore, a breach of the implied warranty may arise any time after the time of contracting. Defendant, instead, argues the claim for breach of the implied warranty of fitness for a particular purpose was premature because a breach could not have occurred until the new jet was delivered.

¶54 Whether plaintiffs sufficiently pled a cause of action for breach of the implied warranty of fitness for a particular purpose requires interpretation of the UCC. The principles of statutory interpretation are familiar. The primary goal of statutory interpretation is to ascertain and give effect to the true intent of the legislature, which is best found by applying the plain, ordinary, and popularly understood meaning to the language used in the statute. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 23. "The statute should be evaluated as a whole, with each provision construed in connection with every other relevant section." *Id.*

¶55 Our reading of the language of section 2-315 of the UCC, using its plain, ordinary, and popularly understood meaning, provides that the challenged language "at the time of contracting" refers to the time at which the seller has knowledge that the buyer seeks to purchase the goods for a particular purpose. The statute "imposes two requirements: first, that the seller know of the particular purpose for which the goods are required, and second, that the buyer rely on seller's skill or judgment in selecting the product." *Siemen v. Alden*, 34 Ill. App. 3d 961, 965 (1975) (finding the first requirement for the implied warranty of fitness for a particular purpose was satisfied because the defendant knew the plaintiff's purpose for purchasing a saw from the defendant at the time of purchase, but the second requirement was not satisfied because the facts did not establish the plaintiff relied on the defendant's judgment in selecting the particular saw). Contrary to plaintiffs' argument, the language does not indicate that the implied warranty and any cause of action related thereto arise at the time of contracting. Rather, as section 2-725(2) of the UCC provides: "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." 810 ILCS 5/2-725 (West 2008). Therefore, a cause of action accrues upon delivery.

¶56 In this case, plaintiffs' breach of the implied warranty of fitness for a particular purpose was premature because plaintiffs had not yet received the new jet.[5] We recognize that section 2-725 of the UCC concerns the statute of limitations for contracts. The statute, however, remains applicable because it defines generally when a cause of action accrues and, though not at issue,

[5] There is no dispute that the claim was for the new jet and not the trade-in jet.

more specifically provides the time frame within which a cause of action can be raised once it does accrue. See 810 ILCS 5/2-725 (West 2008). We, therefore, conclude that plaintiffs could not state a claim for breach of the implied warranty of fitness for a particular purpose and need not address the other bases for dismissal submitted by defendant. As a result, the circuit court properly dismissed the claim.

¶57 V. Breach of Express Trade-In Jet Warranty

¶58 Plaintiffs finally contend the circuit court erred in granting summary judgment in favor of defendant on plaintiffs' claim for breach of the trade-in jet warranty agreement. Plaintiffs argue that there were genuine issues of material fact preventing summary judgment regarding the scope of defendant's obligations under the warranty and whether defendant fulfilled those obligations.[6]

¶59 In the fourth amended complaint, plaintiffs alleged the warranty agreement provided that the trade-in jet "shall be free from defects in material and workmanship for" a period of "ten years or the accumulation of ten thousand flying hours or flight cycles after delivery, whichever occurred first, and a warranty against defects in non-primary structural parts for a period of five years or five thousand hours of operation after delivery, whichever occurred first." According to the fourth amended complaint, the trade-in jet suffered numerous defective parts leading to over 21 unscheduled failures in the first six months of ownership. Plaintiffs alleged defendant failed to properly and timely make repairs covered under the warranty agreement in accordance with accepted industry standards, leading to significant periods of time during which the trade-in jet was not functional. According to the fourth amended complaint, defendant's breach of the trade-in jet warranty agreement resulted in "substantial damages" for plaintiffs, including out of pocket

[6] There is no dispute that the trade-in jet was covered under the warranty initially extended to the original owner, McClatchy, as of March 7, 2005.

expenses for labor and parts not covered by the warranty, consequential damages for lost revenues and employee time, and the cost of a substitute airplane.

¶60 To address plaintiffs' contention, we must interpret the trade-in jet warranty agreement. The primary goal of contract interpretation is to give effect to the intent of the parties *vis a vis* the language of the contract. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75.

> "[T]he rights of parties to a contract are limited by the terms of their contract. [Citation.] A court must not rewrite a contract to suit one of the parties and must enforce the contract as written. [Citation.] 'There is a strong presumption against provisions that easily could have been included in the contract but were not.' [Citation.] Accordingly, when a contract is clear and unambiguous, a court will not add terms in order to reach a more equitable agreement. [Citation.]" *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 417 (2003).

The interpretation of a contract is a question of law that is suitable for decision on summary judgment. *Palm*, 2014 IL App (1st) 1112920, ¶ 75.

¶61 Plaintiffs' arguments regarding defendant's failure to make its repairs in a timely manner, to fix known defects without request, and to comply with "industry" standards by apprising them of known defects and offering "basic assistance" while the trade-in jet was out of service, as well as their request for consequential or incidental damages, are all obligations that cannot be found in the express language of the warranty agreement. The warranty agreement provided that "SELLER'S RESPONSIBILITIES" were "limited to repairing or replacing the defective item with a new, overhauled or serviceable replacement item during the applicable term of the

warranty. The decision to repair or replace the defective item is solely at the discretion of the Seller" and included that "[s]eller shall bear the labor cost (at straight time rate) incurred in removing defective parts and reinstalling repaired or replacement parts on the Aircraft during the first six (6) months or five hundred (500) flying hours of operation after Delivery, whichever occurs first, provided such labor is performed at a repair facility authorized by [s]eller." The warranty agreement expressly stated in "BUYER'S OBLIGATIONS" that "the [b]uyer must notify [s]eller of any defect by sending a detailed Service Report/Warranty Claim form to [s]eller within thirty (30) days after its discovery using [s]eller's standard form." In addition, the warranty agreement contained a disclaimer that provided:

> "ALL OTHER OBLIGATIONS OR LIABILITIES OF SELLER, INCLUDING CONSEQUENTIAL OR OTHER DAMAGES, ARISING OUT OF THE SALE, USE OR OPERATION OF THE AIRCRAFT, ARE EXPRESSLY EXCLUDED BY SELLER AND ARE HEREBY WAIVED BY BUYER."

Finally, the warranty agreement stated that "[n]o alteration, amendment or modification of this warranty will be honored by [s]eller." Based on the language of the warranty agreement, plaintiffs were granted the service that was warranted, namely, the repair and/or replacement of the eight claims they submitted. See *Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill. App. 3d 248, 258 (2000) (summary judgment granted in favor of the seller where the buyer "received the only remedy to which it was entitled under the contracts").

¶62 With regard to plaintiffs' timeliness argument, there was no time frame governing the completion of repairs in the language of the warranty. The warranty agreement is limited to its terms. *Miner*, 342 Ill. App. 3d at 417. Moreover, the case cited by plaintiffs for support, *Overland Bond & Investment Corp. v. Howard*, 9 Ill. App. 3d 348 (1972), is distinguishable

where the court held that the buyer was entitled to revoke the parties' contract for the sale of a vehicle when the transmission fell out and the brakes completely failed during the seven days that the buyer had possession of the vehicle, yet the seller failed to make repairs for approximately three weeks in violation of warranties. *Overland Bond & Investment Corp.*, 9 Ill. App. 3d at 360. Here, in contrast, plaintiffs do not argue that they are entitled to a revocation of the purchase agreement. Further, the longest delay experienced by plaintiffs' to repair the plane was 9 days, which does not rise to the level of egregiousness experienced by the buyer in *Overland Bond & Investment Corp*.

¶63 With regard to plaintiffs' argument that defendant was obligated to perform repairs for defects known to defendant but unknown to plaintiffs, the warranty agreement expressly detailed the procedure for providing notice of repairs. It was plaintiffs' obligation to notify defendant of necessary repairs. See *Avery*, 216 Ill. 2d at 176 ("[e]very guarantee places a burden on the consumer—the manufacturer or retailer must be notified when there is a problem with the product that is produced or sold and the guarantee must be invoked"). The warranty agreement did not contain any language obligating defendant to perform repairs of which it may have been aware absent an express request within the defined procedure. The parties could have easily contracted for such a provision and did not. We will not add language or rewrite the agreement. See *Miner*, 342 Ill. App. 3d at 417.

¶64 With regard to plaintiffs' argument regarding the "industry" standards, we find the warranty language failed to extend the services described. According to plaintiffs, defendant, by creating a system of using service bulletins and on unknown occasions providing "basic assistance" to stranded customers including replacement aircraft, created warranty obligations to plaintiffs and failed to comply therewith. Plaintiffs argue that "it is industry standard" to provide

a method of notifying customers of recurring service problems and to provide alternative replacement aircraft. In support of their argument that defendant breached the warranty by failing to abide by industry standards, plaintiffs cite to *Intersport, Inc. v. National Collegiate Athletic Ass'n*, 381 Ill. App. 3d 312, 319 (2008). *Intersport, Inc.*, however, does not support plaintiffs' contention; rather, *Intersport, Inc.*, expressly upheld the tenants of contract construction, merely elaborating that "*contract terms* should also be interpreted in accordance with the custom and usage of those particular terms in the trade or industry of the parties." (Emphasis added.) *Id*. There are no contract terms in the parties' warranty agreement that support plaintiffs' argument.

¶65 With regard to plaintiffs' request for consequential or incidental damages, the warranty agreement expressly disclaimed such damages. Moreover, section 2-719(1)(a) of the UCC (810 ILCS 5/2-719(1)(a) (West 2008)) supports the limitation of remedies to repair and replacement, such as in this case. As stated, "when a contract is clear and unambiguous, a court will not add terms in order to reach a more equitable agreement." *Miner*, 342 Ill. App. 3d at 417. Plaintiffs' argument that the repair and replace remedy offered by the warranty failed in its essential purpose is flawed where they presented no allegations that the repairs did not fix the faulty systems.

¶66 In sum, there were no genuine issues of material fact preventing summary judgment in favor of defendant on plaintiffs' claim for breach of the express warranty for the trade-in jet.

¶67 CONCLUSION

¶68 We conclude that the circuit court properly denied plaintiffs' motion to reassert their rescission claims and consumer fraud act claim. We further conclude the circuit court properly dismissed plaintiffs' rescission claims, consumer fraud act claim, and breach of the implied

warranty of fitness for a particular purpose claim. We finally conclude the circuit court properly granted summary judgment in favor of defendant on plaintiffs' claim for breach of the express trade-in jet warranty.

¶69 Affirmed.