FIRST DIVISION
March 27, 2017

No. 1-16-1296
2017 IL App (1st) 161296-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWABS, INC., ASSET-BACKED CERTIFICATES SERIES 2004-12,	
Plaintiff and Counterdefendant-Appellee,	Appeal from the Circuit Court of Cook County.
v.	
CATERINA MAR and MARCO MAR,	
Defendants and Counterplaintiffs -Appellants.	
	No. 13 CH 21006
CATERINA MAR and MARCO MAR,	
Third-Party Plaintiffs-Appellants,	
v.	
BANK OF AMERICA, N.A., individually and as Successor by Merger to Countrywide Home Loans Servicing, LP,	Honorable Anna M. Loftus,
Third-Party Defendant-Appellee.	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in denying mortgagors' motion for leave to file amended pleadings, including counterclaim, third-party complaint, and affirmative defense of unclean hands, where the proposed amended pleadings were defective and failed to state a cause of action for both breach of contract and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act due to the mortgagors' inability to allege damages.

¶ 2 This case stems from a residential mortgage foreclosure matter brought by plaintiff, Bank of New York Mellon (BNYM), against defendants, Caterina and Marco Mar (the Mars). In response to BNYM's complaint, the Mars filed affirmative defenses, a counterclaim against BNYM, and a third-party complaint against Bank of America, N.A. (BANA). All of the Mars' pleadings were dismissed with prejudice by the circuit court after it denied the Mars motion for leave to file amended pleadings. The Mars appeal, arguing that the circuit court abused its discretion in denying their motion for leave to file amended pleadings. For the reasons that follow, we affirm the decision of the court below.

¶ 3 BACKGROUND

¶ 4 On October 16, 2004, the Mars signed a promissory note in the amount of $276,800 and mortgage, which was later assigned to BNYM[1]. The mortgage loan was secured by property located at 5402 North Mobile Avenue in Chicago. The Mars subsequently defaulted on the loan, which led to the first foreclosure action being filed against the Mars on February 28, 2006. At the time of the first foreclosure action, Countrywide Home Loans, Inc. (Countrywide) was the mortgage's servicer. On February 14, 2007, Countrywide and the Mars entered into a loan modification agreement that brought the loan current and led to the dismissal of the first foreclosure action.

[1] On July 15, 2013, BNYM executed a corrected assignment of mortgage in order to correct a misnomer in its name.

¶ 5 Subsequently, the Mars defaulted on the first loan modification agreement and a second foreclosure action was filed against the Mars on August 6, 2008. On January 30, 2009, the Mars entered into a second loan modification agreement that brought the loan current to February 1, 2009. At approximately this time, BANA began servicing the loan. The second loan modification agreement also led to the dismissal of the second foreclosure action, with the option to reinstate should the Mars defaulted on the second loan modification agreement within one year. The second modification agreement reflected that the Mars' first payment would be due on March 1, 2009. However, BANA did not update its internal mortgage servicing systems to reflect the existence of the second loan modification agreement until June 25, 2009. The Mars never made a payment pursuant to the terms of the second loan modification agreement.

¶ 6 BNYM ultimately filed the foreclosure case that underlies the instant appeal on September 12, 2013. On September 29, 2014, the Mars filed an answer and the affirmative defense of unclean hands. Also on that date, they filed a verified counterclaim against BNYM for breach of contract, violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq*. (West 2012)), and a verified third-party complaint against BANA for breach of contract, tortious interference with contract, and violation of the Consumer Fraud Act. After a hearing on fully-briefed motions to dismiss from BNYM and BANA on July 20, 2015, the trial court dismissed the Mars' counterclaim and third-party complaint[2], and struck their affirmative defense. The court also granted the Mars leave to file a motion seeking leave to file amended pleadings. On September 24, 2015, the court denied the Mars leave to issue written discovery to BANA, but granted the Mars leave to issue written discovery to BNYM.

[2] The court's July 20, 2015, order reflects that the Mars were given leave to withdraw their third-party claim for tortious interference with contract against BANA.

¶ 7 On December 31, 2015, the Mars filed a motion for leave to file amended verified counterclaim, amended verified third-party complaint, and amended affirmative defenses. Neither BNYM, nor BANA filed a written response to the Mars' motion. Regarding the issue of economic damages, the Mars' proposed amended verified counterclaim and amended verified third-party complaint alleged the following:

> "A. The loss of any benefit from the Modification Agreement.;
>
> B. A "second default" of their mortgage, the acceleration of same, and late fees and other fees assessed as a result;
>
> C. The loss of the opportunity to fund other strategies to deal with their default and avoid foreclosure or perform an efficient breach to cut their losses;
>
> D. Adverse effects on their credit scores;
>
> E. Costs and fees incurred while defending the instant foreclosure proceedings, and
>
> F. Lost opportunities and monies they could have used to pursue other avenues for saving their home including the opportunity to restructure their debt under the bankruptcy code, sell their home on favorable terms, pursue refinancing with other lenders, take other steps to address their financial hardship and threatened loss of their home, or perform and efficient breach to cut their losses."

Additionally, the amended pleadings asserted the following as noneconomic damages: "depression; anxiety; exacerbation of medical conditions; detriment to their marital relationship; and adverse effects on parental attentiveness and abilities."

¶ 8 On January 7, 2016, the court heard argument on the Mars' motion. Counsel for BANA was not present at the hearing. Counsel for the Mars asserted that they had been able to correct the pleading defects from their initial filings by adding dates and times in which BANA was

allegedly negligent in applying the second loan modification agreement to the Mars's mortgage that created arrearages the Mars were unable to pay. Counsel for BNYM acknowledged that the crux of the amended pleadings is "that there was a delay in actually implementing the terms of the modification." Also, BNYM stressed that the fact that either way, the same amount was due under the mortgage, because "[t]he amount provided in that modification plus the escrow for the taxes and insurance that came due in those intervening months was the same amount that they would have paid each month or if they had paid it as a lump sum in September." BNYM further argued that the Mars's proposed amended pleadings did not correct any of the defects that the court ruled on at the previous hearing. BNYM's counsel also pointed out that although the Mars allege that BANA sent a letter stating that it would not honor the second loan modification agreement, they have been unable to produce such a letter. When asked by the court to explain the Mars' damages, their counsel stated, "[t]he damages are the loss of the ability to pay monthly and the resultant foreclosure, the resultant attorney['s] fees, the resultant telephone calls, the resultant emotional distress that ensued when she's getting hammered on the phone by Bank of America all the time when she's trying to fruitlessly modify, modify, modify, modify because they keep sending these things to her every single month."

¶ 9 After hearing argument, the court found that the Mars' amended pleadings were "insufficient at law," specifically finding that, "[t]he fact that the defendants were unable to make the payment because of a bureaucratic snafu on the part of the plaintiff between March and June resulting in the requirement to pay the entire amount owed at one time does not constitute damages." The court went on to note that, "[t]he defendants owed a certain amount per the modification and the plaintiff sought that amount albeit in a lump sum. If there had been additional charges instituted against the Mars during this period for the Bank's bureaucratic, I'm

calling it, snafu, then that would be another story." The court stated to counsel for the Mars that, "it must have been frustrating for your clients, I understand, and I certainly don't think that the plaintiff's counsel or the client -- his client itself would have wanted that to be how things went, but I don't see that there are damages that can be alleged with respect to the facts that I have before me."

¶ 10 At the conclusion of the hearing, counsel for the Mars attempted to clarify his position that BANA breached the second loan modification agreement when it failed to honor the agreement on March 1, 2009, which resulted in an arrearage that the Mars were required to pay in a lump sum. The court responded to this position by noting that the lump sum arrearage was, "[t]he same amount that they were required to pay if they had paid on a monthly basis, though. So the amount was going to be due one way or another and you're just saying because it came in a lump sum, they didn't save their money every month in order to pay the amount due all at once." Ultimately, the court denied the motion to file amended verified counterclaim, amended verified third-party complaint, and amended affirmative defense with prejudice for the reasons stated on the record.

¶ 11 On February 5, 2016, the Mars filed a motion to reconsider, arguing that the proposed amendments would cure the defective pleadings, the proposed pleadings would not subject the other parties to prejudice or surprise, the proposed pleadings were submitted in a timely fashion, and the proposed pleadings were the first amended pleadings proffered by the Mars in this case. Neither BANA, nor BNYM filed a written response to the motion to reconsider. On February 24, 2016, the trial court denied the Mars' motion to reconsider. The court's order reflects that, "the court having heard argument from counsel for [d]efendants, [p]laintiff, and [BANA]," however the record does not contain a transcript or other report of these proceedings. Thereafter,

the Mars filed a motion to amend the court's February 24, 2016, order seeking to amend the February 24, 2016, order to add language that the court finds no just cause for delay of appeal or enforcement of its order pursuant to Illinois Supreme Court Rule 304(a), or in the alternative, for certification of a question of law pursuant to Rule 308. On April 27, 2016, the court denied the Mars' motion for certification of a question and took the motion to amend under advisement. Ultimately, on May 6, 2016, the court granted the Mars' motion to amend its February 24, 2016, order to reflect that it was a final order and there was no just reason for delaying enforcement or appeal thereof.

¶ 12 The Mars filed their timely notice of appeal on May 19, 2016.

¶ 13 ANALYSIS

¶ 14 The sole issue in this appeal is whether the trial court abused its discretion when it denied the Mars' motion for leave to file an amended verified counterclaim, amended verified third-party complaint, and amended affirmative defenses. When reviewing a trial court's decision to allow or deny a motion to amend pleadings, we employ an abuse of discretion standard. *FHP Tectonics, Corp. v. American Home Assurance Co.*, 2016 IL App (1st) 130291, ¶ 34. "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." (Internal quotation marks omitted.) *CitiMortgage, Inc. v. Moran*, 2014 IL App (1st) 132430, ¶ 24.

¶ 15 Section 2-616(a) of the Code of Civil Procedure states that, "[a]t any time before final judgment amendments may be allowed on just and reasonable terms." 735 ILCS 5/2-616(a) (West 2012). In Illinois, courts are encouraged to freely and liberally permit pleadings to be amended. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). However, a party's right to amend is not absolute and unlimited. *Id.*

¶ 16 Here, the Mars' motion for leave to file amended pleadings encompassed an amended verified counterclaim and amended affirmative defense brought against BNYM, and an amended verified third-party complaint brought against BANA. Although BNYM and BANA filed separate response briefs, the counts asserted against both banks, *i.e.* breach of contract and violation of the Consumer Fraud Act are identical and we therefore address them concurrently. The only difference being that, as principal, BNYM is alleged to be liable for BANA's breach.

¶ 17 In order to determine whether the trial court abused its discretion in denying a motion for leave to amend, we look to the following four factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). Further, "[t]he plaintiff must meet all four *Loyola Academy* factors, and if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." (Internal quotation marks omitted.) *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 18 Turning to the first *Loyola Academy* factor, the Mars argue that their proposed amended pleadings cured any defect that was previously present and adequately stated claims for breach of contract and violation of the Consumer Fraud Act. BNYM and BANA respond, via separate briefs, that the trial court acted within its broad discretion in denying the Mars leave to amend because the proposed amendments did not cure the original pleading defects.

¶ 19 We find it pertinent to note that we are not privy to the precise initial defects identified by the trial court when it entered its July 20, 2015, order, granting BNYM's motion to strike the

Mars' affirmative defense and dismiss their counterclaims and granting BANA's motion to dismiss the Mars' third-party complaint, because the record does not contain a transcript or other report of proceedings for that hearing. Further, the July 20, 2015, order granting BNYM's and BANA's motions does not set forth the court's reasoning. It is well-settled that, "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). However, the record contains the transcript from the January 7, 2016, hearing which provides a sufficiently complete record for us to examine in order to determine whether the trial court abused its discretion in denying the Mars' leave to amend. As a result, we are able to reach a decision on the merits.

¶ 20 Counterclaim and Third-Party Complaint

¶ 21 Both a breach of contract claim and a claim brought pursuant to the Consumer Fraud Act require a plaintiff to suffer some sort of damages or injury. Specifically, in order to state a claim for common law breach of contract, a plaintiff must allege: "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages. *MC Baldwin Financial Co. v. DiMaggio, Rosario & Veraja, LLC*, 364 Ill. App. 3d 6, 14 (2006). Additionally, in order to state a claim under the Consumer Fraud Act, a complaint must set forth specific facts showing: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) the deception occurred in the course of trade or commerce; and (4) the consumer fraud proximately caused the plaintiff's injury." *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278,

283 (2006). Further, in order to bring a civil suit for damages under the Consumer Fraud Act, a plaintiff must suffer "actual damages." *Id.*; 815 ILCS 505/10a(a) (West 2012).

¶ 22 Here, the trial court ultimately found that the Mars' amended pleadings were "insufficient at law" due to the lack of cognizable damages. The court specifically stated, "[t]he fact that the defendants were unable to make the payment because of a bureaucratic snafu on the part of the plaintiff between March and June resulting in the requirement to pay the entire amount owed at one time does not constitute damages. The defendants owed a certain amount per the modification and the plaintiff sought that amount albeit in a lump sum." Thus, the primary issue before this court is whether the proposed amended pleadings adequately set forth damages for both a breach of contract claim and a claim brought pursuant to the Consumer Fraud Act. We, like the trial court, find that the amended pleadings did not.

¶ 23 The Mars contend that they did, in fact, adequately plead damages by alleging that BANA's failure to apply the second modification agreement in a timely manner was the cause of pecuniary harm. See *supra* ¶ 7. Additionally, they asserted that federal courts have recognized that allegations similar to theirs have been found to sufficiently allege compensable pecuniary harm under the Consumer Fraud Act. In response, BNYM argues that the proposed amended pleadings did not cure the defects because the Mars have failed to allege that either BNYM or BANA charged them more than the exact amount of monthly payments due under the second loan modification if the Mars had begun making payments in March 2009, as was called for in the second loan modification agreement. BNYM stresses that the Mars have never alleged that they attempted to make a payment in accordance with the terms of the promissory note or the second loan modification agreement, both of which required the Mars to make their payments at a mailing address in Texas or "at such other place as the [l]ender may require." The record does

not contain any evidence that the lender ever required payment other than at the Texas addresses[3]. The Mars contend that they were prevented from making payments in person at a local bank branch, but cannot point to a clause in the note or modification agreements that would allow payment in such a manner. The Mars do not dispute that they have been residing in the property at issue without making a mortgage payment, or paying the property taxes or hazard insurance, since 2009.

¶ 24 BANA argues that the Mars' proposed amended third-party claim brought pursuant to the Consumer Fraud Act is barred by the three-year statute of limitations. Additionally, BANA asserts that the Mars cannot adequately plead a cause of action for both breach of contract and a violation of the Consumer Fraud Act, because a contract breach without something more is not actionable under the Consumer Fraud Act. However, BANA was not present at the January 7, 2016, hearing and did not file a written response to the Mars' motion for leave or the Mars' motion to reconsider, thus the trial court did not consider any of the arguments now raised by BANA. "A party may not raise on appeal arguments never raised in the trial court." *In re Marriage of Schneeweis*, 2016 IL App (2d) 140147, ¶ 46. We therefore decline to consider BANA's arguments.

¶ 25 Even without considering BANA's appellate arguments, we still conclude that the trial court did not abuse its discretion in denying the Mars' leave to amend their pleadings, including the third-party complaint against BANA. In affirming the trial court, we stress that "[a]n abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." (Internal quotation marks omitted.)

[3] We say "addresses" because the note and second modification agreement each had a different address in Texas listed as the location to which the Mars were required to mail their payment. There is no evidence in the record that the Mars ever attempted to send their payment to either address after March 1, 2009.

CitiMortgage, Inc., 2014 IL App (1st) 132430, ¶ 24. Here, we find that it is likely that a reasonable person would take the same view as the trial court and do not find the trial court's decision to be arbitrary, fanciful, or unreasonable. Conversely, the trial court's decision was well-reasoned and supported by the defects still present in the proposed amended pleadings.

¶ 26 In their motion to reconsider, which the Mars incorporate by reference into their appellate brief, they argued that they "alleged dozens of fees assessed to the Mars' account after March 1, 2009." However, at the January 7, 2016, hearing, the following exchange occurred:

> "THE COURT: You're not saying that there are not enough facts pled but that there is no claim because the amount due is simply the amount that would have been due even if everybody was communicating properly at the beginning?
>
> MR. CREES [BNYM's attorney]: Yes, your Honor.
>
> THE COURT: And--Okay. Why don't we have you go and then if we -- maybe you have to go further.
>
> MR. SARTELL [the Mars' attorney]: Sure. I think that's -- that is a fact on which there is no dispute at this point that as far as we can tell that the math does add up as Counsel represents. However, that was not the contract that Bank of America's predecessor Countrywide offered to the Mars."

¶ 27 Thus, it is clear from the foregoing exchange that counsel for the Mars admitted that the amount due after BANA acknowledged the second modification agreement in June 2009 was the same as it would have been had the Mars begun monthly payments on March 1, 2009. There were not any additional fines or fees as represented in the Mars' motion to reconsider. Thus, we believe the trial court aptly found that the Mars' proposed amended pleadings were still defective as to the element of damages.

¶ 28 The Mars rely on *Wigod v. Wells Fargo Bank, N.A.*, 673 F. 3d 547 (2012), as support for their contentions regarding the issue of damages. In *Wigod*, the plaintiff mortgagor brought claims against the defendant mortgage servicer for its refusal to modify her loan pursuant to the federal Home Affordable Mortgage Program (HAMP)[4]. *Id.* at 554. The plaintiff alleged that the defendant issued her a four-month "trial" loan modification, pursuant to which the defendant agreed to permanently modify the loan if she qualified under the HAMP guidelines. *Id.* The plaintiff alleged she did, in fact, qualify but that the defendant refused to grant her the permanent modification. *Id.* at 554-55. The *Wigod* court found that the plaintiff had adequately stated, *inter alia*, a common law breach of contract claim and a claim brought under the Consumer Fraud Act. *Id.* at 566, 574. Specifically regarding the issue of damages in the context of a claim under the Consumer Fraud Act, *Wigod* held that the plaintiff had adequately pled damages by alleging, "that she incurred costs and fees, lost other opportunities to save her home, suffered a negative impact to her credit, never received a Modification Agreement, and lost her ability to receive incentive payments during the first five years of the modification." *Id.* at 575.

¶ 29 BNYM argues that *Wigod* is factually inapposite and does not apply here. BNYM specifically asserts that in *Wigod* the court determined that the plaintiff stated a claim for breach of contract where she complied with the terms of a trial period plan but the defendant refused to grant the permanent loan modification. Unlike that scenario, BNYM contends that in this case, the Mars admit that BNYM honored the second loan modification agreement. BNYM also asserts that the offer here was contingent upon the Mars' income being verified by BNYM (through its agent BANA), and that there was no specific date by which the income verification had to be completed.

[4] HAMP was a federal program instituted by the U.S. Department of Treasury to assist homeowners avoid foreclosure during the sharp decline in the housing market in 2008. *Id.*

¶ 30 We agree with BNYM. Here, it is clear that BNYM honored the second loan modification. The Mars allege that BNYM would not accept a payment until June 2009 even though the loan modification agreement was to begin on March 1, 2009. However, the Mars ignore the fact that the amount that BNYM asked for in June 2009 was the exact amount of monthly payments that had become due since March 1, 2009, pursuant to the second loan modification agreement. As admitted by the Mars' counsel at the January 7, 2016, hearing, the amount asked for in June 2009 did not include any additional charges or fees. Thus, we find the facts surrounding the formation of the agreement at issue in this case diverge from those of *Wigod*, and as a result, we do not find that the Mars have adequately pled economic or pecuniary damages.

¶ 31 The Mars also argue that they have adequately alleged noneconomic damages. The Mars cite to *Roche v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 235 Ill. App. 3d 70, 86 (1992), and *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009), as support for their noneconomic damages claim. In *Roche*, the court allowed the plaintiff to recover $750 for noneconomic damages for "aggravation and inconvenience" under the Consumer Fraud Act only when they were part of a total award that included actual economic damages. *Roche*, 235 Ill. App. 3d at 84-85. The court in *Morris* reiterated this holding when it noted that, "[a]ctual damages must be calculable and 'measured by the plaintiff's loss.' " *Morris*, 392 Ill. App. 3d at 402 (quoting *Chicago v. Michigan Beach Housing Cooperative*, 297 Ill. App. 3d 317, 326 (1998)). "The failure to allege specific, actual damages precludes a claim brought under the Consumer Fraud Act." *Id.*

¶ 32 Here, based on our foregoing finding, unlike the plaintiff in *Roche*, the Mars have not adequately pled actual economic damages, thus they are unable to recover noneconomic damages under the Consumer Fraud Act.

¶ 33 Affirmative Defense of Unclean Hands

¶ 34 Finally, we turn to the Mars proposed amended affirmative defense of unclean hands. The defense of unclean hands is intended to prevent a party from taking advantage of its own wrong and can only apply where a party's conduct rises to the level of fraud or bad faith. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 60 (2009). In order to adequately plead such an affirmative defense, a defendant is required to allege: (1) misconduct by the plaintiff that amounts to fraud or bad faith, (2) made toward the defendant, and (3) related to the subject matter of the litigation. *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3d 674, 680 (1988).

¶ 35 The Mars argue that they adequately pled the affirmative defense of unclean hands by alleging that BANA's wrongdoing was so notorious that "it led to the National Mortgage Servicing Settlement with the United States Department of Justice and 49 of the 50 States' Attorneys General." The Mars attached declaration of former BANA employees who admitted to improperly denying mortgage modification applications during the time period at issue here.

¶ 36 BNYM responds that the Mars failed to satisfy the heightened pleading requirements for fraud. Specifically, BNYM argues that the Mars did not allege that BNYM knowingly made a false statement upon which the Mars relied and induced them to act, resulting in damages.

¶ 37 After reviewing the Mars' proposed amended affirmative defense, we agree with BNYM. It is well-settled that, "the doctrine [of unclean hands] is unavailable where the act giving rise to the defense does not directly involve the transaction which is the subject of the litigation."

Gambino, 398 Ill. App. 3d at 60. Here, the Mars point to declarations by BANA employees regarding general conduct that occurred near the time period at issue. Additionally, in their proposed affirmative defense, the Mars point to litigation, *i.e.* the National Mortgage Servicing Settlement, as evidence of BANA's conduct including fraud or bad faith. However, the Mars never allege that such conduct directly involved the transaction that is at issue in this case, which is fatal to their proposed alleged defense. Merely pointing to general conduct by BANA near the time of the Mars' entering into the second loan modification agreement does not satisfy the heightened pleading standard required for the defense of unclean hands. Thus, the trial court did not abuse its discretion in denying the Mars leave to amend.

¶ 38 As previously stated, "[t]he plaintiff must meet all four *Loyola Academy* factors, and if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, courts of review will often not proceed with further analysis." (Internal quotation marks omitted.) *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 7. Here, the Mars have failed to convince this court that their proposed amended pleadings would cure the defects, thus we need not examine the remaining *Loyola Academy* factors. We, therefore, agree with the trial court's decision to deny the Mars' leave to file their proposed amended pleadings, and find that the trial court did not abuse its discretion in reaching such a conclusion.

¶ 39 CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the trial court that denied the Mars' motion for leave to amend their counterclaim, affirmative defense, and third-party complaint.

¶ 41 Affirmed.