

No. 1-15-2628

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).

ARIE ZWEIG SELF DECLARATION OF TRUST)	Appeal from the
DATED JUNE 28, 1990 and ARIE ZWEIG,)	Circuit Court of
Individually and as Trustee of the)	Cook County
ARIE ZWEIG SELF DECLARATION OF TRUST)	
DATED JUNE 28, 1990,)	
)	
Plaintiffs-Appellants,)	
)	No. 14 L 8665
v.)	
)	
THE BOZORGI LIMITED PARTNERSHIP,)	
NADER BOZORGI, M.D., MANDAN)	
GARAHATI, M.D. and GUITA BOZORGI GRIFFITHS,)	Honorable
)	Eileen O'Neill Burke,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court abused its discretion in dismissing the first amended complaint with prejudice and in denying plaintiffs' motion for leave to file a second amended complaint.

¶ 2 Plaintiffs filed this action against defendants for fraud, breach of contract and breach of fiduciary duty based on events arising from a failed investment partnership. After the trial court

ordered that arbitration be pursued against one defendant, Bedford Med LLC, plaintiffs filed a first amended complaint. Shortly thereafter, defendants filed a motion to dismiss the first amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 619 (West 2012)). Rather than responding to the motion, plaintiffs sought leave to file a second amended complaint that added a derivative count and asserted that the proposed second amended complaint corrected the alleged defects by including additional facts. The circuit court denied plaintiffs' motion for leave to file the second amended complaint and ordered plaintiffs to file a response to defendants' motion to dismiss the first amended complaint. After further briefing and hearing, the court dismissed the first amended complaint with prejudice. Plaintiffs appeal the denial of the motion for leave to file the second amended complaint and, in the alternative, argue the circuit court erred in dismissing the first amended complaint with prejudice. For the following reasons, we find the circuit court erred in dismissing the first amended complaint with prejudice and in denying plaintiffs' motion for leave to file a second amended complaint and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 On August 8, 2014, plaintiffs filed an action against defendants for fraud, breach of contract and breach of fiduciary duty, seeking rescission of several agreements (Joinder Agreement, Contribution Agreement, and Letter Agreement), the return of their \$2 million investment, attorney fees, punitive damages, indemnification or, alternatively, an award of monetary damages. After the circuit court dismissed a defendant, Bedford Med LLC, on the grounds that plaintiffs could only proceed against Bedford Med through arbitration, plaintiffs filed a 23-page five count first amended complaint on January 23, 2015 substantially restating the same fraud, breach of contract and breach of fiduciary duty claims and repleading one count

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against Bedford Med "solely to preserve [it] for appeal."

¶ 5 The gist of the first amended complaint is that Nader Bozorgi and Mandan Farahati made false and misleading statements and representations to Zweig that he relied upon to induce a \$2 million equity investment in a partnership involving an ambulatory surgical center referred to as Bedford Med. These representations included the following: Bedford Med had been appraised at \$21 million; that permanent financing had been secured; the Bozorgi defendants had invested over \$5 million in the project; the real estate venture was already leased or had leases that were about to be finalized for a large part of the building owned by the venture; Zweig's \$2 million investment would be used as equity in the venture and for working capital purposes; and Zweig would make annual profits of 15 to 20%. After investing \$2 million in the real estate venture, plaintiffs learned those statements were untrue: that only a construction loan had been secured and that it was near maturity and further critical financing was needed which could only be secured with a personal guaranty from Zweig; and, after the investment was made defendants did not use the investment to reduce debt or as working capital but instead improperly withdrew plaintiffs' \$2 million investment without their authority and used the money for their personal benefit and not for the benefit of the venture. Defendant Griffiths is the daughter of Nadar and Mandan and a co-manager of Bedford Med. Griffiths was alleged to have also fraudulently induced plaintiff's investment and loan guarantee and allegedly provided certain transactional documents and engaged in other conduct that was in breach of her fiduciary duties to Zweig and the members and managers of the LLC.

¶ 6 On February 19, 2015, defendants filed a motion to dismiss the first amended complaint in its entirety arguing: (1) the fraud and breach of fiduciary duty claims were insufficiently pled under section 2-615 of the Code; (2) defendants did not conceal their use and transfer of

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plaintiffs' \$2 million investment; (3) defendants are immune from liability under the Illinois Limited Liability Act; and (4) plaintiff Zweig lacked standing, individually, to bring any of the alleged claims.

¶ 7 On March 13, 2015, plaintiffs filed a motion seeking leave to file a 33-page second amended complaint asserting essentially the same claims for fraudulent inducement, breach of contract, breach of fiduciary duty and, for the first time, added one derivative count against defendant Guita Bozorgi Griffiths. Plaintiffs argued that, after reviewing defendants' pending motion to dismiss and having conducted further investigation, the interests of judicial economy would best be served by permitting them leave to file the second amended complaint. Plaintiffs asserted that the proposed second amended complaint alleged additional facts to further support the fraud and breach of fiduciary duty claims and the proposed pleading addresses the affirmative matters raised in defendants' motion to dismiss sufficiently to withstand dismissal.

¶ 8 Defendants opposed the filing of the second amended complaint arguing that plaintiff already had one opportunity to amend and should not be granted another. Defendants disputed certain factual allegations in the proposed second amended complaint explaining that those allegations "are issues for a different day." Defendants also argued that: plaintiff Zweig was attempting to portray himself as a "babe in the woods" misled by defendants' representations regarding the investment; plaintiffs' proposed amendment fails to address the other affirmative matter raised in their pending motion to dismiss; and the proposed second amended complaint improperly added Bedford Med as a defendant, in violation of a prior court order directing plaintiffs to proceed against Bedford Med through arbitration. In support of their motion to dismiss, defendants attached an operating agreement for Bedford Med that they argued evidenced affirmative matter that defeated plaintiffs' claims.

¶ 9 On April 13, 2015, the circuit court denied plaintiffs' motion for leave to file a second amended complaint on the basis that defendants' motion to dismiss the first amended complaint "purportedly includes some other affirmative matter" defeating plaintiffs' claims, the court "should err on the side of allowing a resolution on the merits rather than to impose procedural hurdles to litigation" and plaintiffs failed to show how their proposed second amended complaint would defeat defendants' pending motion to dismiss. The court ordered plaintiffs to respond to defendants' motion to dismiss the first amended complaint. After further briefing and hearing on the defendants' motion to dismiss, the circuit court found many of the fraud and breach of fiduciary counts were insufficiently pled and dismissed the first amended complaint with prejudice pursuant to section 2-619 of the Code. The circuit court found that plaintiffs' interpretation of the parties' operating agreement is "wholly inaccurate" and the allegations that defendants "lulled" plaintiffs into the investment and execution of the operating agreement and other transactional documents was without merit because plaintiffs could have "discovered the realities surrounding the investment." Plaintiffs timely filed this appeal arguing the trial court erred in denying them leave to file a second amended complaint and, in the alternative, the trial court erred in dismissing the first amended complaint with prejudice.

¶ 10 ANALYSIS

¶ 11 On appeal, plaintiffs first argue that the trial court erred in denying their motion for leave to file a second amended complaint.

¶ 12 Section 2-616(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(a) (West 2012)) provides that, at any time before final judgment, parties may be permitted to amend pleadings to include parties who ought to have been joined previously, to change the cause of action or to add new causes of action, on just and reasonable terms. 735 ILCS 5/2-616(a) (West

2012). Although the right to amend is not absolute or unlimited, generally, Illinois has a liberal policy towards granting a motion to amend a pleading. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 41. In fact, "[i]n Illinois, courts are encouraged to freely and liberally allow the amendment of pleadings" (*Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992)) to "permit parties to fully present their cases and to further the interests of justice" (*McDonald v. Lipov*, 2014 IL App (2d) 130401, ¶ 47).

¶ 13 A trial court is required to consider four factors when determining whether to allow an amended pleading: "(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). We will not reverse a trial court's decision to deny a motion to amend a complaint unless that decision constitutes an abuse of discretion. *Id.* at 273-74.

¶ 14 Here, reviewing the pleadings in context, there is little or no substantive difference between the initial complaint and the first amended complaint because the first amended complaint was repled to align the parties and claims after one claim against one defendant was sent to arbitration. Defendants' argument that plaintiffs should be denied a further amendment because they had previously amended their complaint cannot be accepted. Plaintiffs are routinely given leave to amend an early filing especially where, in good faith, it is represented that perceived deficiencies can be corrected with an amendment. Here, the first substantive amendment attempted by plaintiff was contained in the proposed second amended complaint where plaintiff, arguably, alleged more specific factual allegations related to the previously pled fraud and breach of fiduciary duty claims and, for the first time, alleged a derivative claim.

Against this background, the trial court denied plaintiffs' motion for leave to file a second amended complaint finding that plaintiffs failed to show how the proposed amendment would defeat the pending motion to dismiss the first amended complaint.

¶ 15 In regards to the first factor considered when deciding whether to allow an amended pleading, we find plaintiffs should have been allowed an attempt to cure purported defects in the first amended complaint by filing the second amended complaint. Defendants moved to dismiss the first amended complaint by basically arguing a mix of legal and factual questions including pleading deficiencies, an immunity defense, blanket denial of making false or misleading statements and Zweig's lack of standing. The circuit court denied plaintiffs' motion to amend the complaint on the basis that plaintiffs failed to show how the proposed amendment would cure the pleading defects raised in defendants' pending motion to dismiss.

¶ 16 As a practical matter, in the early pleading stage, a plaintiff is routinely allowed to file an amended complaint, in lieu of responding to a motion to dismiss, where it is represented that the proposed amendment will correct purported defects identified by the defendant. This commonly utilized procedural device promotes judicial economy by eliminating the need to research, brief and file a response to the motion to dismiss. It also allows for the possible avoidance of the need to file a reply and the necessity of the court ruling on the matter. While it is possible that the proposed amendment may also be defective and cause another motion to dismiss, that possibility is not typically a sufficient basis for rejecting an early stage amendment to a complaint. Here, the proposed second amended complaint purported to include additional facts to support the asserted causes of action and an additional count was newly asserted that purportedly addressed the standing arguments raised by defendants in their motion to dismiss the first amended complaint. Thus, had the second amended complaint been allowed to be filed, the

parties and the court would have been in a better position to determine whether plaintiff sufficiently alleged at least one cause of action sufficient to warrant further proceedings.

Although we cannot prematurely issue an advisory opinion on the sufficiency of the proposed second amended complaint, our review of the amended pleading in light of liberal pleading standards leads us to conclude that the motion to file the proposed second amended complaint should have been allowed and thereafter considered.

¶ 17 We also note that several of the arguments raised by defendants in their motion to dismiss the first amended complaint (blanket denial of making false statements, plaintiff unreasonably relied on the representations made, defendants made certain disclosures that refute the claims of fraudulent inducement, the relationship between the parties could not create a dominant or fiduciary relationship) were referred to by the circuit court in denying plaintiffs' motion to file the second amended complaint. The bulk of these arguments involve factual issues which cannot be considered at this stage of the proceedings. *McCleary v. Wells Fargo Securities, L.L.C.*, 2015 IL App (1st) 141287, ¶ 23. At the pleading stage of the litigation, we are only concerned with whether the complaint is sufficiently pled or is defeated, as a matter of law, for reasons not involving questions of fact. See *id.* As such, we must liberally allow the amendment of pleadings so that litigants can fully present their causes of action to settle the controversy on its merits. *McDonald*, 2014 IL App (2d) 130401, ¶ 47; *Ryan v. Mobil Oil Corp.*, 157 Ill. App. 3d 1069, 1074-75 (1987). Thus, under the circumstances presented here, we find the first factor weighted in favor of allowing plaintiffs leave to file the proposed second amended complaint. See *Loyola Academy*, 146 Ill. 2d at 274-75.

¶ 18 The second factor, whether defendant will be prejudiced or surprised by the amendment, is the most important of the four factors "and substantial latitude to amend will be granted when

there is no prejudice or surprise to the nonmovant." *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (2004). "Prejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial." *Miller v. Pinnacle Door Co., Inc.*, 301 Ill. App. 3d 257, 261 (1988). There is no indication in the record that allowing the plaintiffs to file the second amended complaint would have prejudiced or surprised defendants.

¶ 19 In this case, the proposed second amended complaint purported to allege additional particularized facts related to the same subject of the lawsuit: the alleged fraudulently induced investment and misappropriation of the investment proceeds. In addition, the motion for leave to file the second amended complaint was filed a mere two months after the first amended complaint was filed. Typically, there is no prejudice to the defendants where there is still time for discovery and time to prepare a defense. *Banks v. United Insurance Co. of America*, 28 Ill. App. 3d 60 (1975) (to substantiate prejudice resulting from a request to amend the pleadings, the complaining party must rely on something more than mere inconvenience occasioned by delay). Here, the claim was recently filed and defendants were essentially dealing with the same claim that was originally filed. Defendants contend that if plaintiffs had been granted leave to file the second amended complaint, defendants would have been prejudiced by spending additional funds to brief a motion to dismiss the second amended complaint, after they had already spent "thousands of dollars" in seeking dismissal of the prior complaints. This is a speculative argument because, absent the filing of the second amended complaint, it cannot be said that defendant would have moved to dismiss it or that it was fatally defective. Also, at this early stage of the proceedings, the cost of litigation is not a relevant factor in determining whether a defendant would be prejudiced by allowing a plaintiff to file an amended complaint. See *id.* For

these reasons, adhering to liberal pleading standards that focus on giving a party the reasonable opportunity to assert a claim without being held to arbitrary time constraints or number of attempts to plead a cause of action, we find the second factor also weighed in favor of allowing plaintiffs leave to file the proposed second amended complaint. See *Loyola Academy*, 146 Ill. 2d at 275.

¶ 20 In regards to the third factor, the motion to file the second amended complaint was timely. Defendants filed their motion to dismiss the first amended complaint on February 19, 2015. Plaintiffs filed their motion for leave to amend on March 13, 2015, clearly within a reasonable period after the motion to dismiss. We find the plaintiffs' motion for leave to file the second amended complaint was timely and weighed in favor of allowing plaintiffs leave to file the second amended complaint. See *Loyola Academy*, 146 Ill. 2d at 275.

¶ 21 Lastly, with regards to the fourth factor, whether plaintiff had previous opportunities to amend, we find this factor also weighed in plaintiffs' favor. After one count was referred to arbitration, plaintiffs were granted leave and timely filed a first amended complaint. We again note that the first amended complaint essentially was repleaded to properly align the parties and claims and to preserve for appeal purposes the count that was sent to arbitration. Thereafter, plaintiffs promptly moved for leave to file their second amended complaint after the motion to dismiss was filed. Plaintiffs advised the court that after consideration of the issues raised in the motion to dismiss the first amended complaint, they performed further investigation and prepared a second amended complaint that, arguably, was sufficient to defeat the motion. Because the circuit court did not allow the proposed second amended complaint to be filed, we cannot properly review the sufficiency of any individual count or the complaint in its entirety. We leave this responsibility to the discretion of the circuit court on remand. In any event,

because the requests to amend were timely and reasonable, we find this factor weighs in favor of permitting plaintiffs leave to amend the first amended complaint by filing the proposed second amended complaint. See *Loyola Academy*, 146 Ill. 2d at 276.

¶ 22 In summary, the gist of plaintiffs' claims is that there were fraudulent misrepresentations made and relied on, along with alleged breach of fiduciary duties, that resulted in the loss of a \$2 million investment that certain defendants later misappropriated for their personal benefit. After defendants moved to dismiss these claims based on pleading defects and affirmative defenses, the circuit court ultimately dismissed the entire complaint for pleading deficiencies relying, however, in part on legal arguments advanced by the defendants that involve questions of fact that are for the fact finder to decide after trial and not for the court to decide under section 2-615. Plaintiffs are entitled to amend their complaint to meet the minimum pleading requirements necessary to require an answer and ultimate resolution through summary judgment proceedings or by trial after full discovery. We conclude that the trial court was in error when it denied plaintiffs' motion for leave to file a second amended complaint. Therefore, we vacate the dismissal of the first amended complaint with prejudice, and remand the cause for further proceedings.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we reverse the judgment of the circuit court dismissing the first amended complaint with prejudice and the denial of plaintiffs' motion for leave to file their second amended complaint. We remand for further proceedings consistent with this order. We express no opinion on the merits of any claim or defense that have been asserted or that may be asserted.

¶ 25 Reversed in part and vacated in part; cause remanded.