

No. 1-16-0018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DENISE NOVAK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 14 L 008866
)	
WELLS FARGO BANK N.A., as Successor in Interest)	
to Fidelity Mortgage Company,)	Honorable
)	Margaret A. Brennan,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order granting the defendant's motion to dismiss with prejudice and without leave to amend is affirmed.

¶ 2 The plaintiff, Denise Novak, appeals from an order of the circuit court of Cook County dismissing her amended complaint against the defendant, Wells Fargo Bank, N.A., the successor in interest to Fidelity Mortgage Company (Fidelity), with prejudice and without leave to amend. For the following reasons, we affirm the circuit court's order.

¶ 3 The following facts are adduced from the pleadings and record on file.

¶ 4 On October 8, 2002, the plaintiff and her husband, David Novak, executed a note to Fidelity secured by a mortgage on property located at 950 Westmoor Road in Winnetka (subject property). In January 2004, the plaintiff was in default on the loan because she ceased paying the monthly installments. As a result, the defendant sought foreclosure of the subject property in April 2004. Sometime in 2006, the plaintiff entered into a forbearance agreement and, in 2008, the foreclosure action was dismissed for want of prosecution.

¶ 5 In April 2007, the plaintiff again defaulted. The defendant filed another foreclosure action in July 2010. This foreclosure action was still pending on August 25, 2014, when the plaintiff filed a two-count complaint against the defendant, alleging that it violated the "Residential Mortgage Loan Act"—count I—and the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2004))—count II.

¶ 6 On December 8, 2014, the defendant filed a combined motion to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). In the motion, the defendant moved for dismissal of the complaint pursuant to section 2-619 (735 ILCS 5/2-619 (West 2014)), alleging that the plaintiff's claims were barred by the three-year statute of limitations under the Consumer Fraud Act. The defendant also argued that the complaint should be dismissed pursuant to section 2-615 (735 ILCS 5/2-615 (West 2014)) because the plaintiff failed to allege a deceptive act and could not demonstrate actual damages. In so arguing, the defendant explained, *inter alia*, that complained-of conduct was justified pursuant to the mortgage's provisions regarding default and acceleration. As to actual damages, the defendant claimed that "all damages *** are attributable to [the plaintiff's] own admitted default, not [the defendant's] conduct."

¶ 7 On April 15, 2015, the circuit court granted the defendant's motion to dismiss under section 2-615, but gave the plaintiff leave to file an amended complaint as to count II only—the Consumer Fraud Act claim.

¶ 8 On May 29, 2015, the plaintiff filed an amended complaint adding a third count and a new party defendant, Ocwen Federal Bank FSB (Ocwen), the defendant's "agent." Count I re-alleged that the defendant violated the "Residential Mortgage Loan Act." In count II of the amended complaint, the plaintiff recounted the same facts from count II of the original complaint; however, instead of arguing that the defendant's conduct violated the Consumer Fraud Act, she asserted that the defendant's actions were "unconscionable and on information and belief violate[d] the Residential Mortgage Loan Act." Lastly, in count III, the plaintiff alleged that Ocwen "charged [her] an exorbitant amount of money for both an appraisal *** and for premiums for [an] insurance policy" on her property.

¶ 9 On June 24, 2015, the defendant filed a motion to dismiss the plaintiff's amended complaint. The defendant argued that the circuit court did not grant the plaintiff leave to re-plead count I or to add a new claim with an additional party as she did in count III; thus, those counts should be stricken. The defendant further alleged that, because the "Residential Mortgage Loan Act" does not exist, count II should be dismissed for failure to state a claim pursuant to section 2-615 of the Code.

¶ 10 On August 24, 2015, the plaintiff responded to the defendant's motion to dismiss the amended complaint. The plaintiff explained that she re-pleaded count I in order to preserve the issue for appellate review. She conceded that she should have sought leave to add an additional party—Ocwen—in count III and stated that "summons to issue such Motion will be presented at

the time of the hearing of this matter."¹ The plaintiff explained that count II was "an attempt to set forth a [c]omplaint for a violation of the practice of providing a person with a mortgage that they could not afford and then failing to properly service said mortgage." The plaintiff went on, "[h]owever[,] if the Court is of the opinion that said Count lacks sufficient details[;] then[,] leave is requested to amend said Count."

¶ 11 On October 9, 2015, in a written order and opinion, the circuit court dismissed the amended complaint with prejudice pursuant to section 2-615 of the Code. In so holding, the court found, *inter alia*, that, in count II, the plaintiff "seem[ed] to be relying on a non-existent statute and further fail[ed] to allege what sections of the Act were violated. *** [She] could not, under any set of facts, state a claim against the [defendant]."

¶ 12 The plaintiff filed a motion to reconsider, which the circuit court denied. She now appeals.

¶ 13 On appeal, the plaintiff does not challenge the portion of the circuit court's order granting the defendant's motion to dismiss. Her sole argument is that the court erred in denying her request to file a "first" amended complaint.²

¶ 14 We review a court's denial of leave to amend a complaint under the abuse-of-discretion standard. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 748-49 (2009). When deciding

¹ The record does not contain a motion to add an additional party. Because the defendant's motion to dismiss the amended complaint was set for a written ruling on October 9, 2015, and no transcripts of any proceedings are included in the record, we are unaware whether the plaintiff made any oral statements or requests concerning this issue.

² The plaintiff was, in fact, given leave to file a first amended complaint. The circuit court denied her leave to file a *second* amended complaint by dismissing the first amended complaint with prejudice.

whether to grant a motion to amend, the circuit court "must review the proposed amended pleading" (*In re Huron Consulting Group, Inc. S'holder Derivative Litig.*, 2012 IL App (1st) 103519, ¶ 68) and consider: "(1) whether the proposed amendment would cure defective pleadings; (2) whether other parties would sustain prejudice or surprise because of the proposed amendment; (3) the timeliness of the proposed amendment; and (4) whether there were earlier opportunities to amend" (*Wagner*, 391 Ill. App. 3d at 748 (citing *Loyola Acad. v. S & S Roof Maint., Inc.*, 146 Ill. 2d 263, 273 (1992))). Accordingly, in a motion for leave to amend, the plaintiff must provide an argument as to why the court should allow the amendment pursuant to these four factors and include a copy of the proposed amended pleading. *In re Huron*, 2012 IL App (1st) 103519, ¶ 68; *Loftus v. Mingo*, 158 Ill. App. 3d 733, 746 (1987) (a circuit "court cannot be said to have abused its discretion where a proposed amendment has not been submitted to the [circuit] court or made a part of the record.").

¶ 15 In this case, the plaintiff's response to the defendant's motion to dismiss her amended complaint, in relevant part, states: "if the Court is of the opinion that [count II] lacks sufficient details[;] then[,] leave is requested to amend said Count." This statement does not contain an argument addressing why leave to amend should be granted pursuant to the four *Loyola Academy* factors. The plaintiff also did not submit a proposed second amended complaint with this request. Absent a proposed amended complaint, we are unable to determine whether the amendment would cure the defective pleading. Thus, the first *Loyola Academy* factor is not satisfied. We also note that the plaintiff was given an opportunity to amend her complaint, but, as the circuit court correctly noted, she failed to add any additional facts to state a cause of action. The circuit court, therefore, did not abuse its discretion in denying the plaintiff leave to amend because, among other things, she never filed a proper motion. See *In re Huron*, 2012 IL

No. 1-16-0018

App (1st) 103519, ¶ 68 (holding that a proper motion to amend was not submitted where, in his response to the motion to dismiss, the plaintiff wrote, "[i]f the court is inclined to grant any portion of Defendants' Motions, Plaintiffs respectfully request 45 days leave to replead.").

¶ 16 Accordingly, the circuit court's order granting the defendant's motion to dismiss with prejudice and without leave to amend is affirmed.

¶ 17 Affirmed.