SIXTH DIVISION
JULY 21, 2017

No. 1-15-3060

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MERDELIN JOHNSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
GENERAL BOARD OF PENSION AND HEALTH	)	No. 14 L 9647
BENEFITS OF THE UNITED METHODIST	)	
CHURCH, CHAD MOELLER, MARLENE IGEL,	)	
and CARLA ROZYCKI,	)	Honorable
	)	Eileen O'Neill Burke,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's amended complaint was properly dismissed and leave to file an amended complaint was properly denied.

¶ 2 Plaintiff Merdelin Johnson appeals from orders of the circuit court dismissing all ten counts of her amended complaint, denying her motion for leave to file a second amended complaint, and denying her motion to strike an exhibit submitted by the defendants. For the following reasons, we affirm the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 This appeal concerns claims by plaintiff against her former employer, the General Board of Pension and Health Benefits of the United Methodist Church (Board), as well as three of the Board's attorneys: (1) Marlene Igel; (2) Chad Moeller, and (3) Carla Rozycki.

¶ 5 Plaintiff was employed by the Board from June 1999 until her termination in March 2004. During her employment, she participated in the Board's defined contribution retirement benefit plan (plan). Following her termination, she made a number of withdrawals from her account with the plan, decreasing her account balance to less than $1,000.

¶ 6 In 2002 and again in 2004, plaintiff initiated federal court lawsuits against the Board, alleging employment discrimination and retaliation claims, which were consolidated (the federal court litigation). In September 2010, plaintiff initiated a separate lawsuit against the Board in the circuit court (the 2010 litigation), which was based on the Board's alleged recording of her personal telephone calls at work.

¶ 7 Rozycki represented the Board in negotiations with the plaintiff regarding a potential settlement to resolve both the federal court litigation and the 2010 litigation. In early 2011, Rozycki sent plaintiff a proposed settlement agreement under which the Board would pay plaintiff $300,000, and which also specified that the Board "will delete [recordings of] all telephone calls of [plaintiff] ***." Plaintiff rejected the $300,000 offer, and submitted a counter-offer. The parties did not reach a settlement.

¶ 8 In 2011, a jury in the federal litigation returned a verdict in favor of the Board. Discovery in the 2010 litigation continued into 2013. In May 2013, the plaintiff designated expert witnesses, including plaintiff's therapist, Naomi Bayer, and a psychologist, Dr. Richenel

Ellecom, to testify regarding plaintiff's "mental, emotional and physical harms" as a result of the alleged recording of her telephone calls. The Board issued subpoenas to both Bayer and Dr. Ellecom, which plaintiff now claims were unlawful. No documents were produced as a result of those subpoenas.

¶ 9 Plaintiff also identified her cardiologist, Dr. David Marmor, as a potential witness in the 2010 litigation. Plaintiff produced to the Board's attorneys copies of medical records from Dr. Marmor. After plaintiff issued a trial subpoena to Dr. Marmor, Dr. Marmor's attorney contacted Moeller to inquire about the nature of the case. Moeller subsequently forwarded to Dr. Marmor's attorney the records that were previously produced from plaintiff to the Board.

¶ 10 By letter dated June 26, 2013, the Board informed plaintiff that her retirement account balance would be distributed to her. The letter explained that because the value of her account was under $5,000 it was "subject to an automatic distribution." In July 2013, plaintiff responded in writing, returning her distribution check and requesting that the funds be "credited back" to her account. The Board denied the request.

¶ 11 In January 2014, the Board obtained a directed verdict in its favor in the 2010 litigation.

¶ 12 On September 16, 2014, plaintiff filed the complaint initiating this action. After the defendants filed motions to dismiss, plaintiff was granted leave to file an amended complaint.

¶ 13 The amended complaint, filed December 29, 2014, contained ten counts. Count I, for breach of contract, pleaded that the June 2013 distribution of plaintiff's retirement account balance violated the "agreement" under the plan "that her account balance would remain on account until she requested a lump sum distribution or partial distribution." Count I cited certain documents referring to the plan, which were attached as exhibits to the amended

complaint, although the actual provisions of the plan were not attached.[1] Counts II and III pleaded breach of fiduciary duty and negligence against the Board based upon the same distribution. Count IV alleged that the Board's statements regarding the distribution violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). 815 ILCS 510/2 (West 2014). Count V pleaded fraud by the Board based on the statement in its settlement offer that the Board would delete recordings of plaintiff's telephone calls. Plaintiff alleged the Board "knew it ha[d] already destroyed" the recordings, and that she relied on the statement to reject the $300,000 settlement offer. Counts VI and VII pleaded identical claims against the Board (count VI) and Moeller and Igel (count VII) for violating the Mental Health and Developmental Disability Confidentiality Act, 740 ILCS 110/1 *et seq*. (West 2014) (Confidentiality Act) by issuing subpoenas to Bayer and Dr. Ellecom without a court order or plaintiff's consent. Count VIII pleaded "publication of private facts" against the Board, Moeller, and Igel for transmitting her previously-produced medical records to Dr. Marmor's attorney. Count IX pleaded "civil conspiracy" against Moeller and Igel based on acts in their representation of the Board in the 2010 litigation, including allegedly false discovery responses and false statements to the court. Finally, Count X pleaded fraud against Rozycki, based on the same statement in the settlement offer that was the basis of count V against the Board.

¶ 14 On February 5, 2015, separate motions to dismiss were filed by the Board, Moeller and Igel, and Rozycki. Each of those motions was brought under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), and asserted separate arguments that

[1]Plaintiff's exhibits to the amended complaint included account statements showing her balances; a document entitled "SRBP: A Guide to Completing Your Application for Benefits"; and correspondence between plaintiff and the Board regarding the June 2013 distribution of her account.

plaintiff failed to plead a viable cause of action under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014), or that affirmative matter otherwise defeated her claims under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). The motions by the Board, Igel and Moeller were supported by affidavits from Igel and Moeller. Igel's affidavit attached certain provisions of the plan**.** On May 12, 2015, while the motions to dismiss were pending and unresolved, plaintiff moved for leave to file a second amended complaint.

¶ 15 On May 18, 2015, the trial court entered an order granting the motions to dismiss. The trial court indicated that dismissal of count X was "pursuant to 735 ILCS 5/2-619.1," cited both sections 2-615 and 2-619 of the Code in dismissing count IX, and otherwise indicated that the remaining counts were dismissed pursuant to section 2-619 of the Code. The same order denied plaintiff's request to amend her complaint.

¶ 16 On June 6, 2015, the plaintiff filed a motion to reconsider the May 18, 2015 order. On July 27, 2015, the Board, Moeller, and Igel filed a combined response to that motion which attached, as "Exhibit C," certain excerpts from the version of the plan effective January 1, 2014. Plaintiff subsequently filed a motion to strike Exhibit C, claiming it was improper to rely on a version of the plan after the June 2013 distribution, and requesting sanctions against defendants.

¶ 17 On September 17, 2015, plaintiff again filed a motion for leave to file a second amended complaint, to which she attached a "draft" second amended complaint.

¶ 18 On September 21, 2015, the trial court denied the motion to reconsider, as well as plaintiff's motion to strike and request for sanctions. On the same date, the trial court also struck plaintiff's motion to file a second amended complaint from the call.

¶ 19 Plaintiff filed a notice of appeal on October 19, 2015.

¶ 20 ANALYSIS

¶ 21 Plaintiff's appellate brief challenges the dismissal of her amended complaint, as well as the denial of her motion for leave to file a second amended complaint and the motion to strike. Before we may address the merits of her arguments, we are obligated to consider the issue of this court's jurisdiction and dismiss this appeal if jurisdiction is lacking. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011).

¶ 22 Although plaintiff filed a notice of appeal within 30 days of the September 21, 2015 order, defendants assert that we lack jurisdiction to review the May 18, 2015 order dismissing the amended complaint. Defendants recognize that an appeal within 30 days of the decision on a post judgment motion "directed against the judgment" preserves our jurisdiction to review the prior judgment. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015). However, defendants assert that plaintiff's June 2015 motion to reconsider was not a "motion directed against the [May 2015] judgment" but merely sought leave to file a second amended complaint. Defendants rely on *Brennan v. Travelers Home and Marine Ins. Co.*, 2016 IL App (1st) 152830, which held that a motion to reconsider a dismissal judgment that "d[oes] not present any reasons for relief other than permission to file an amended complaint" does not extend the time to file a notice of appeal from the dismissal. *Id.* ¶ 13.

¶ 23 We find that *Brennan* is distinguishable, as the motion to reconsider in that case contained *no* argument challenging the dismissal on the merits of the pleadings. *Id.* Although plaintiff's motion to reconsider in this case also requested leave to amend, it asserted arguments disputing the trial court's bases for dismissal of each count of the amended complaint. As a result, for purposes of Rule 303(a), the motion to reconsider was a motion directed against the

May 2015 dismissal order. Thus, we have jurisdiction to review the May 2015 dismissal order, as well as the September 2015 orders denying her motion to amend and motion to strike.[2]

¶ 24 We first review the dismissal of the amended complaint. Each of the defendants' motions to dismiss was brought under section 2-619.1 of the Code, 735 ILCS 5/2-619.1 (West 2014), which "permits combined motions pursuant to section 2-615 [and] section 2-619." *Reynolds v. Jimmy John's Enterprises*, *LLC*, 2013 IL App (4th) 120139, ¶ 20. "Combined motions pursuant to section 2-619.1 retain procedural distinctions between section 2-615 [and] 2-619 ***." *Id.*

¶ 25 "A section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54. If the alleged facts "are insufficient to state a cause of action upon which relief may be granted then dismissal pursuant to section 2-615 is appropriate." *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10.

¶ 26 On the other hand, "[a] motion to dismiss under section 2-619 admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim." (Internal quotation marks omitted.) *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶13. "We review a dismissal under either section 2-615 or section 2-619 *de novo*." *DiScola v. Ryan*, 2015 IL App (1st) 150007, ¶ 7. Further, we may affirm dismissal on any basis apparent from the record. *In re Detention of Duke*, 2013 IL App (1st) 121722, ¶ 11.

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[2]Although plaintiff's notice of appeal also sought reversal of the portion of the September 21, 2015 order denying her motion to reconsider the dismissal of the amended complaint, her initial appellate brief failed to raise any distinct argument on that point. Accordingly, that point is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 27 We proceed to review the dismissal of each count of the amended complaint. First, we address count I for breach of contract against the Board, which was premised on the June 2013 distribution of plaintiff's plan account without her approval.

¶ 28 The trial court agreed with the Board that certain provisions of the plan constituted affirmative matter defeating the breach of contract claim under section 2-619 of the Code. First, the trial court agreed that the breach of contract claim failed because section 8.2(a) of the plan provides for the automatic distribution of plan account balances under $5,000. The court further agreed that dismissal was independently warranted under section 10.11 of the plan because plaintiff "failed to file an administrative claim within one year of the alleged wrongful distribution."

¶ 29 On appeal, plaintiff first argues that the trial court erroneously relied on the version of the plan effective January 1, 2014, as it followed the June 2013 distribution of her account. However, that argument is forfeited as plaintiff never raised it in opposition to the motions to dismiss. *Sheth v. SAB Tool Supply Co.* 2013 IL App (1st) 110156, ¶ 59. Moreover, as plaintiff specifically relied on provisions from the same 2014 version of the plan in the trial court, she is estopped from now asserting that this version is inapplicable. See *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007).

¶ 30 Plaintiff otherwise argues that section 8.2(a) does not apply to her because she is "not a participant receiving cash installment[s] nor required minimum distribution." She claims section 8.2(a) is limited to " 'an account holder receiving Cash Installment[s].' " Plaintiff's interpretation of section 8.2(a) is without merit, as that provision expressly *excludes* recipients of cash installments from the automatic distribution of accounts under $5,000: "*Except in the case of* *** an Accountholder receiving Cash Installments, if a Distribution-Eligible Participant ***

has an Aggregate Account Balance at the time of distribution that does not exceed $5,000, then the entire amount *** will be distributed in a lump sum ***." (Emphasis added.) As plaintiff was *not* receiving cash installment payments, and her account balance was less than $5,000, the trial court correctly concluded that section 8.2(a) mandated the distribution of her account. We likewise reject plaintiff's claim that section 8.2(c)[3] of the plan applies, as that provision only concerns plan participants with "an Aggregate Account Balance that exceeds $5,000." As section 8.2(a) defeats the breach of contract claim, we need not analyze the trial court's additional basis for dismissal of count I.

¶ 31 We next address the dismissal of the breach of fiduciary duty claim in count II, which was also premised on the June 2013 distribution. On appeal, plaintiff urges that the Board breached a fiduciary duty by automatically distributing her account balance.

¶ 32 "To recover for breach of a fiduciary duty, a plaintiff must prove that a fiduciary duty exists, that the fiduciary duty was breached, and that the breach proximately caused the injury of which the plaintiff complains. [Citation.]" *Crichton v. Golden Rule Ins. Co.*, 358 Ill. App. 3d 1137, 1149 (2005).

¶ 33 For the same reason that plaintiff cannot maintain the breach of contract claim**,** the June 2013 distribution cannot constitute a breach of fiduciary duty. That is, we agree with the Board that because it "complied with the terms of the Plan by distributing Plaintiff's sub-$5,000

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[3]Section 8.2(c), entitled "Distribution at Termination," states:

> "A Distribution-Eligible Participant *** who has an Aggregate Account Balance that exceeds $5,000 may elect to begin receiving the distribution of some or all of his or her Sponsor Account Balance *** as soon as administratively feasible thereafter *** or at a later date. Until he or she elects to begin receiving such distribution, he or she will be deemed to have elected to postpone receiving such distribution ***."

account balance, there is no wrongful act that could constitute a breach of fiduciary duty." As the distribution was independently mandated by section 8.2 of the plan, we affirm the dismissal of count II for the same reason as count I.

¶ 34 We next review the negligence claim in count III, which was also premised on the June 2013 account distribution. The trial court concluded that there was no breach of duty by the Board because it "operated in accordance with the mandatory disbursement of [plaintiff's] account."

¶ 35 To state a negligence claim, a complaint must allege "(1) the existence of a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) an injury proximately caused by that breach." *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶ 89. "An allegation of negligence based upon a contractual obligation, although sounding in tort rather than contract, is nonetheless defined by the contract. [Citations.]" *Eichengreen v. Rollins, Inc.*, 325 Ill. App. 3d 517, 525 (2001). "[T]he scope of duty is determined by the terms of the contract. [Citation.]" *Id.*

¶ 36 The plan provisions make clear that the Board was under no duty to obtain plaintiff's consent before distributing her account balance. To the contrary, section 8.2(a) mandated such distributions for accounts with balances below $5,000. We thus agree with the trial court that, as the June 2013 distribution was required by the plan, it could not constitute a breach of duty. We therefore affirm the dismissal of count III.

¶ 37 We next review count IV, which alleged that the Board violated the Consumer Fraud Act, 815 ILCS 505/1 *et seq*. (West 2014). The trial court concluded that the claim failed because plaintiff was not a "consumer" for purposes of the statute. On appeal, plaintiff urges that she stated an actionable claim under the Consumer Fraud Act because the Board "is a service

organization and that the letter sent to her regarding her pension distribution was false and intended to deceive" her.

¶ 38 Section 2 of the Consumer Fraud Act provides:

> "Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false premise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, *** in the conduct of any trade or commerce are hereby declared unlawful ***." 815 ILCS 505/2 (West 2014).

"In order to adequately plead a cause of action under the Consumer Fraud Act, a plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) the defendant's intent that the plaintiff rely on the deception; (3) that the deception occurred in the course of conduct involving trade or commerce; and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 24. Such claims "must satisfy the 'consumer nexus test,' " under which the alleged conduct must "involve[] trade practices addressed to the market generally or otherwise implicate[] consumer protection concerns." (Internal quotation marks omitted.) *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 159 (1998).

¶ 39 Our review of count IV leads us to conclude that plaintiff failed to allege deception involving trade or commerce, as the Board's alleged statements regarding the distribution of her plan account do not implicate the advertising or sale of goods and services to consumers. We thus affirm the dismissal of count IV.

¶ 40 We turn to the trial court's dismissal of the fraud claim against the Board (count V), which was premised on the statement in the settlement offer that the Board would delete recordings of plaintiff's telephone calls, which had already been destroyed. Plaintiff allegedly relied on the statement when she rejected the settlement offer.

¶ 41 On appeal, plaintiff acknowledges that her fraud claim is based on a statement of future conduct, but maintains it is actionable under the recognized exception for statements that are alleged to be the scheme employed to accomplish the fraud. See *Chatham Surgicore, Ltd. v. Health Care Service Corp.*, 356 Ill. App. 3d 795, 804 (2005). She also claims the Board knew or should have known that the statement at issue "would induce [plaintiff] to negotiate a higher settlement or seek further relief in Court" and that she adequately pleaded her reasonable reliance.

¶ 42 "In order to state a cause of action for fraud, the plaintiff must establish: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance." *Barille v. Sears Roebuck and Co.*, 289 Ill. App. 3d 171, 176 (1997). "[A] promise to perform an act in the future made by one who intends not to perform is not actionable fraud, unless the false promise of future performance is part of a scheme or device to defraud another of her property." *Chatham Surgicore*, 356 Ill. App. 3d at 804.

¶ 43 Reviewing the allegations of count V *de novo*, we conclude that it was premised upon a statement of future conduct, and that plaintiff did not allege a scheme to defraud plaintiff of her property. See *id.* Count V was thus non-actionable on its face, and thus we affirm its dismissal.

¶ 44 We next review the identical claims against the Board (count VI) and Moeller and Igel (count VII) for violation of the Confidentiality Act (740 ILCS 110/1 *et seq.*(West 2014)). Both counts were premised on the issuance of subpoenas to plaintiff's therapist, Bayer, and Dr. Ellecom, whom plaintiff had identified as potential witnesses in the 2010 litigation.

¶ 45 The trial court stated several grounds for dismissal of these counts, including the undisputed fact that no documents were produced as a result of the subpoenas. On appeal, plaintiff contends that a cause of action under the Confidentiality Act arises if subpoenas are improperly issued, even if they do not lead to actual disclosure of protected information.

¶ 46 The Confidentiality Act provides that records kept by physicians and therapists in the course of providing mental health services "shall be confidential and shall not be disclosed except as provided in this Act." 740 ILCS 110/2, 110/3(a) (West 2014). The statute specifies that litigants may not "serve a subpoena seeking to obtain access to records or communications under [the Confidentiality Act] unless the subpoena is accompanied by a written order issued by a judge or by the written consent *** of the person whose records are being sought ***." 740 ILCS 110/10(d) (West 2014). Section 15 of the Confidentiality Act provides that "[a]ny person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief." 740 ILCS 110/15 (West 2014).

¶ 47 We conclude that counts VI and VII do not allege that plaintiff is an "aggrieved" party who can maintain an action under section 15 of the statute. *Id.* Plaintiff alleges only that subpoenas were *issued* to Bayer and Dr. Ellecom in violation of section 10(d) of the Confidentiality Act; she fails to allege any actual disclosure of protected records, or other resulting damages. As she has not pleaded she was "aggrieved" by any violation of the statute,

she cannot maintain a cause of action under section 15 of the Confidentiality Act. 740 ILCS 110/15 (West 2014). We thus affirm the dismissal of these counts.

¶ 48 We next address the dismissal of count VIII, which asserted a claim for "publication of private facts" against Moeller, Igel and the Board, based on the disclosure of medical records from plaintiff's cardiologist, Dr. Marmor, which were previously produced by plaintiff to the Board in the 2010 litigation. Plaintiff asserts that the records were wrongfully transmitted by the Board's counsel to a third party, Dr. Marmor's attorney. The trial court dismissed count VIII upon concluding that plaintiff failed to allege that these records "were disclosed to the public at large."

¶ 49 In order to recover in an action for public disclosure of private facts, "a plaintiff must establish (1) that a defendant gave publicity to a private fact, (2) that such a fact would be highly offensive to a reasonable person, and (3) that such a fact was not of legitimate public concern. [Citation.] The publicity element in an action for public disclosure of private facts has been generally defined as communication of a private fact 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.' " *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739-40 (2000).

¶ 50 Our analysis is informed by the fact that, in this case, the alleged wrongful disclosure involve medical records previously produced by the plaintiff in litigation. This court has recognized that "the right to privacy does not protect disclosure of a person's medical records absolutely. Rather the right to privacy acts as a bar only to 'unreasonable invasions of privacy' where 'reasonableness is a function of relevance." *El-Amin v. Dempsey*, 329 Ill. App 3d 800, 805 (2002) (quoting *Kunkel v. Walton*, 179 Ill. 2d 519, 538 (1997). For example, "Plaintiff

cannot initiate litigation in which his physical condition is a critical consideration, then use the [patient-physician] privilege to shield truth-seeking about that condition." *Maxwell v. Hobart Corp.*, 216 Ill. App. 3d 108, 113 ("plaintiff placed his physiological and biological condition at the time of the accident into issue and made discoverable all information relating to that condition"); *El-Amin*, 329 Ill. App. 3d 800 (2002) (mother's wrongful death action on behalf of infant son waived physician-patient privilege with respect to prenatal care records).

¶ 51 Applying these principles to the facts of this case, we cannot say that the alleged disclosure was an unreasonable invasion of privacy giving rise to a tort claim. As detailed in Moeller's uncontroverted affidavit, plaintiff identified Dr. Marmor as a witness in the 2010 litigation and produced to the Board the same medical records from Dr. Marmor that are the basis for count VIII. Further, the records were transmitted to Dr. Marmor's personal attorney only after Dr. Marmor was subpoenaed by plaintiff. After placing these records in issue and identifying Dr. Marmor as a potential witness, plaintiff could not complain about their disclosure to Dr. Marmor's attorney in connection with the same litigation. As we affirm dismissal on this basis, we need not discuss whether plaintiff pleaded the publicity element of the tort claim.

¶ 52 We next review the dismissal of the conspiracy count (count IX). The trial court dismissed the claim under section 2-615 of the Code because plaintiff "fail[ed] to allege the existence of an agreement" between Moeller and Igel.

¶ 53 "The elements of a civil conspiracy are (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act. [Citations.]" *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d

912, 923 (2007). The complaint must "allege the necessary and important element of the existence of an agreement." *Id.* at 924.

¶ 54 Nowhere does count IX allege any agreement between Moeller and Igel. The count simply alleges various dishonest acts by the Board's attorneys during the 2010 litigation. However, the mere "characterization of combination of acts as a conspiracy" is insufficient to state a cause of action. *Id.* at 923-24. As plaintiff failed to plead a viable conspiracy claim, we affirm the dismissal of count IX.

¶ 55 As for count X, the fraud claim against Rozycki, this claim was based on the same statement of future conduct in the settlement agreement that was the basis for the fraud count against the Board (count V). Under the same reasoning discussed with respect to count V, plaintiff does not state an actionable fraud claim in count X. For the foregoing reasons, we affirm the dismissal of all ten counts of the amended complaint.

¶ 56 We now turn to the denial of plaintiff's leave to amend. "[A] court should not find that the denial of a motion to amend is prejudicial unless there has been a manifest abuse of discretion. [Citation.]" *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 17. To determine whether there has been an abuse of discretion we consider: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise *** (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). "Where it is apparent, even after amendment, that no cause of action can be stated, leave to amend should be denied." *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 57 Plaintiff's appellate brief offers no explanation as to how the proposed second amended complaint addresses any of the defects identified by the trial court, and our review of that filing reveals that it suffers the same flaws of the amended complaint discussed herein. Accordingly, we have no reason to find that the trial court abused its discretion in denying plaintiff's motion to amend.

¶ 58 Finally, we note plaintiff's argument that the court erred in denying her motion to strike "Exhibit C" from the brief filed by the Board, Igel, and Moeller in opposition to plaintiff's motion to reconsider the dismissal of her amended complaint, and her related request for sanctions.[4] However, as we have independently concluded that the dismissal of the amended complaint was warranted, we need not separately analyze these claims of error.

¶ 59 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 60 Affirmed.

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[4] Plaintiff also claims the trial court should have struck the affidavit from Moeller submitted with Moeller and Igel's reply in support of their motion to dismiss. However, her motion to strike in the trial court was limited to "Exhibit C" and thus the contention was not preserved for our review. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 59.