FIRST DIVISION
September 28, 2018

No. 1-17-2656

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

JACQUELINE SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 16 L 5570
BRIAN CONNOLLY; VICTORIA A. VALENTINE;	)	
and FURTHERMORE, INC.,	)	The Honorable
	)	Jerry A. Esrig,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Griffin and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court dismissing plaintiff's third amended complaint with prejudice. Plaintiff abandoned her breach of fiduciary duty claim in her second amended complaint by failing to preserve that claim in her third amended complaint. Plaintiff failed to state a claim for intentional infliction of emotional distress where the conduct alleged was not extreme and outrageous. Plaintiff forfeited her argument on appeal that she stated a defamation claim because she failed to advance any coherent argument in support of reversal.

¶ 2 Plaintiff Jacqueline Smith, acting *pro se*, filed a third amended complaint against defendants Brian Connolly, Victoria A. Valentine, and Furthermore, Inc. asserting claims of defamation and intentional and negligent infliction of emotional distress The circuit court

dismissed plaintiff's complaint with prejudice for failing to state a claim. Plaintiff appeals. We affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff's appellate brief contains an inadequate statement of facts. An appellant is required to provide a statement of facts that "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). Here, plaintiff's one-and-a-half page statement of facts provides only a brief description of the procedural history of the case in the circuit court following the filing of her second amended complaint. Her statement of facts provides us with no explanation of the contents of any iteration of her complaint or the nature of her claims against defendants. Plaintiff's brief contains a section titled "Nature of the Case," which provides us with some detail regarding her claims, but there are two problems with this approach. First, the introductory paragraph in an appellate brief should be limited to stating "(i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." Ill. S. Ct. R. 341(h)(2). The introductory paragraph is not the place to set forth the background facts necessary to understand the case. Second, plaintiff's introductory paragraph contains only a few citations to the record on appeal, and thus does not satisfy the requirements of Rule 341(h)(6).

¶ 5 We have the authority to strike a statement of facts for failure to comply with Rule 341, and we have the authority to dismiss an appeal for failure to provide a complete statement of facts. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9. In this instance, we will not dismiss plaintiff's appeal, but we will disregard her statement of facts in its entirety.

Instead, we look to both the statement of facts set forth in defendants' brief and the record on appeal in order to understand the facts of this case.

¶ 6 Plaintiff initiated this action in June 2016 and was ultimately granted leave to file a second amended complaint. Plaintiff's second amended complaint alleged that plaintiff was a condominium unit owner at 111 East Chestnut, Chicago, Illinois, a past member of the 111 East Chestnut Condominium Association board (Association), and was a licensed real estate broker. Connolly was also a unit owner in the 111 East Chestnut condominium building and served as the Association director between April 2010 and October 2011. Connolly was the editor and publisher of the website www.111eastchestnut.org (website), and also served as the president of Furthermore, which had been involuntarily dissolved. Valentine was the secretary of Furthermore and resided with Connolly at 111 East Chestnut. In February 2014, Connolly and Furthermore took control of the website and began using it to harass, ridicule, and present false information about the members and directors of the Association.

¶ 7 Plaintiff's second amended complaint asserted claims for defamation based statements contained in articles dated April and June 2014 posted by defendants to the website (count I); breach of fiduciary duty against Connolly for making statements about past litigation involving plaintiff that were protected by a confidential settlement agreement reached during Connolly's time as a director of the Association (count II); and claims for intentional and negligent infliction of emotional distress based on allegations that in April 2014, Connolly posted an article to the website containing a racial slur directed at plaintiff, and that in June 2016, Connolly made an anonymous complaint to the Chicago Association of Realtors (CAR) regarding the validity of

plaintiff's real estate license (count III).[1] With respect to count III, plaintiff asserted that Connolly knew that plaintiff was taking care of her "severely ill, homebound mother," and that his actions caused plaintiff to suffer "digestive issues, panic attacks, extreme anxiety, embarrassment, and psychological distress."

¶ 8 Defendants moved to dismiss plaintiff's second amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). Defendants moved to dismiss plaintiff's defamation claim in count I pursuant to section 2-619(a)(5) of the Code (*id.* § 2-619(a)(5)), asserting that it was barred by the one-year statute of limitations applicable to defamation claims in section 13-201 of the Code (*id.* § 13-201). Defendants moved to dismiss the portion of plaintiff's negligent and intentional infliction of emotional distress claims in count III related to the April 2014 article pursuant to section 2-616(a)(5) of the Code, asserting that it was barred by the two-year statute of limitations in section 13-202 of the Code (*id.* § 13-202). Defendants also moved to dismiss counts I, II, and III for failure to state a claim pursuant to section 2-615 of the Code (*id.* § 2-615). Defendants' motion was fully briefed.

¶ 9 On August 17, 2017, the circuit court entered a handwritten order dismissing with prejudice plaintiff's defamation claims and emotional distress claims premised on the April and June 2014 articles in counts I and III, and further dismissed with prejudice the breach of fiduciary duty claim in count II. Plaintiff was granted leave to replead a defamation claim "stemming from the June 2016 'anonymous' complaint to [CAR]." Plaintiff filed a motion to reconsider the dismissal of counts II and III, which the circuit court denied. The circuit court also denied plaintiff's oral motion for a finding pursuant to Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

[1]The second amended complaint also asserted a claim against RSUI Group, LLC of "Aiding and Abetting via Breach of Duty and Bad Faith," but plaintiff does not raise any issue on appeal regarding that claim.

¶ 10 On October 6, 2017, plaintiff filed a third amended complaint. Count I asserted a claim for defamation against Connolly for making an anonymous complaint to CAR in June 2016 regarding plaintiff's real estate license. Plaintiff asserted that Connolly's statements were made "with intent to destroy [her] reputation, licensure, and ability to earn a living in her chosen profession." Plaintiff alleged that Valentine "is or should have been aware" of Connolly's actions. Count II of the third amended complaint asserted claims of intentional and negligent infliction of emotional distress based on Connolly's alleged anonymous complaint to CAR. Plaintiff alleged that Connolly was aware that plaintiff was taking care of her "severely ill, homebound mother, and was under immense stress and fatigue having to care for her sickly mother who could not walk." She alleged that the "heightened level of stress caused [her] uterus to start to bleed heavily" and that the bleeding lasted for two and half weeks, necessitating a blood transfusion due to a "dangerously low" blood level. She asserted injuries to her business reputation as well as losses of prospective business opportunity and returns on her business investments. She also asserted that Connolly's actions caused her to be more prone to "digestive issues, panic attacks, extreme anxiety, embarrassment, and psychological distress from the knowledge that her reputation is being impugned." She claimed that the "excess stress" caused by Connolly's conduct caused her to be hospitalized twice for "stress, fatigue and extreme anemia."

¶ 11 On October 13, 2017, the circuit court entered a handwritten order stating that defendants made an oral motion to dismiss plaintiff's third amended complaint for failure to state a claim. The circuit court ordered that oral argument was to be heard on October 26, 2017. The order further states "No briefing schedule requested or ordered." On October 26, 2017, the circuit court entered a handwritten order granting defendants' motion to dismiss the third amended complaint

with prejudice pursuant to section 2-615 of the Code. There is no transcript, bystander's report, or any other form of a report of the proceedings for either the October 13, 2017, or the October 26, 2017, hearings. Plaintiff filed a timely notice of appeal from the October 26, 2017, dismissal of her third amended complaint.

¶ 12 ANALYSIS

¶ 13 On appeal, plaintiff raises three arguments. First, she argues that the circuit court erred by dismissing her breach of fiduciary duty claim from the second amended complaint. Second, she argues that the third amended complaint stated a claim for intentional infliction of emotional distress. Finally, she argues that the third amended complaint stated a claim for defamation.

¶ 14 A motion to dismiss pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. We accept as true all well-pleaded facts in the complaint. *Id.* "The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Id.* Our review of a dismissal under section 2-615 of the Code is *de novo*. *Id.*

¶ 15 First, we must reject plaintiff's argument that count II of her second amended complaint stated a claim for breach of fiduciary duty against Connolly because plaintiff failed to preserve that claim for appellate review. It is well-settled "that a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983). " 'Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Id.* (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). In order to preserve a dismissed

claim for appellate review and avoid forfeiture, a party may either (1) stand on the dismissed counts, voluntarily dismiss any remaining claims, and appeal, (2) file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts, or (3) perfect an interlocutory appeal from the dismissal order prior to filing an amended pleading. *Rubin and Norris, LLC v. Panzarella*, 2016 IL App (1st) 141315, ¶ 30.

¶ 16 Here, the circuit court dismissed count II of the second amended complaint with prejudice and granted plaintiff leave to file a third amended complaint. Plaintiff did not file any motion with the circuit court indicating that she wished to stand on her second amended complaint and forego her opportunity to replead any of her claims under the first option. Plaintiff's motion to reconsider the dismissal of count II was denied, as was her motion for a finding pursuant to Rule 304(a). Therefore, plaintiff was unable to perfect an interlocutory appeal from the dismissal of the second amended complaint under the third option. Instead, plaintiff filed a two-count third amended complaint asserting claims of defamation and intentional and negligent infliction of emotional distress, which did not reallege, incorporate by reference, or refer to the dismissed breach of fiduciary duty claim set forth in the second amended complaint under the second option. Instead, the third amended complaint was complete in itself, and thus the breach of fiduciary duty claims in the second amended complaint were effectively abandoned and withdrawn (*Foxcroft*, 96 Ill. 2d at 153), and "our consideration of the trial court's dismissal of that claim is eliminated from this appeal" (*Rubin and Norris*, 2016 IL App (1st) 141315, ¶ 34). Therefore, we have no authority to review the breach of fiduciary duty claims that were alleged in the second amended complaint that were dismissed with prejudice by the circuit court.

¶ 17 Before addressing plaintiff's remaining contentions on appeal, we note that the third amended complaint failed to allege that either Valentine or Furthermore were responsible for any of the conduct alleged in the third amended complaint. Plaintiff merely alleged that Valentine "is or should have been aware" of Connolly's conduct, but plaintiff failed to plead any facts tending to show that either Valentine or Furthermore were legally responsible for Connolly's conduct, or that either Valentine or Furthermore participated in Connolly's conduct. Therefore, we find that the circuit court properly dismissed all of plaintiff's claims directed at Valentine and Furthermore in the third amended complaint.

¶ 18 Next, plaintiff argues that her third amended complaint stated a claim for intentional infliction of emotional distress[2] because she "showed a direct relationship to the actions of [Connolly] and a specific health crisis." She argues that the circuit court "made a mistake in deciding the facts."

¶ 19 Defendants, however, contend that plaintiff improperly pleaded the intentional infliction of emotional distress claim in her third amended complaint after the circuit court dismissed the intentional infliction of emotional distress in the second amended complaint with prejudice. We disagree. Plaintiff's intentional infliction of emotional distress claim in her second amended complaint asserted that Connolly was the person who made an anonymous complaint to CAR, and that he did so with the intention of "inflict[ing] severe emotional distress and/or *** knew that there was a high probability that [his] actions would cause severe emotional distress." The third amended complaint contains nearly identical allegations. By repleading an intentional infliction of emotional distress claim in her third amended complaint, plaintiff preserved the

[2]Plaintiff does not advance any argument in her appellate brief that her third amended complaint stated a claim for negligent infliction of emotional distress, and has therefore forfeited that claim. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

circuit court's dismissal of her claim in the second amended complaint for appellate review. See *Rubin and Norris*, 2016 IL App (1st) 141315, ¶ 30.

¶ 20 In order to state a claim for intentional infliction of emotional distress, "a plaintiff must allege that (1) the defendant engaged in conduct that was 'extreme and outrageous'; (2) the defendant intended to inflict severe emotional distress or knew that there was a 'high probability' that his conduct would cause the plaintiff to experience severe emotional distress; and (3) the defendant's 'conduct must in fact cause severe emotional distress.' " (Emphasis omitted.) *Schweihs v. Chase Home Finance, LLC*, 2015 IL App (1st) 140683, ¶ 27, *aff'd*, 2016 IL 120041 (quoting *McGrath v. Fahey*, 126 Ill. 2d 78, 86, 127 (1988)). "[T]he tort does not extend to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.' " *McGrath*, 126 Ill. 2d at 86 (quoting Restatement (Second) of Torts § 46, cmt. *d*, at 73 (1965)). "Rather, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community." *Schweihs*, 2015 IL App (1st) 140683, ¶ 27. Our supreme court has identified several factors to be considered when determining whether conduct rises to the level of extreme and outrageous, including whether the defendant was in some position that gives him authority over the plaintiff or the power to affect the plaintiff's interests (*McGrath*, 126 Ill. 2d at 86-87), or the defendant's awareness that the plaintiff is particularly susceptible to emotional distress (*Koelgas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992)). "The outrageousness of a defendant's conduct must be determined in view of all of the circumstances pled *** in a particular case." *Schweihs*, 2016 IL 120041, ¶ 52.

¶ 21 Plaintiff does not advance any argument on appeal as to how Connolly's conduct is extreme and outrageous under our case law. Even accepting all of plaintiff's allegations as true, we find that as a matter of law, plaintiff failed to plead sufficient facts from which a jury could

conclude that Connolly's conduct rose to the level of extreme and outrageous necessary to sustain a claim for intentional infliction of emotional distress. Plaintiff's third amended complaint alleged that "on or just before June 20, 2016, [Connolly] anonymously lodged a formal complaint with CAR concerning [plaintiff's] licensure as a real estate managing broker" and that she was given until the end of that business day "to provide proof to the contrary *** or her membership [as] a [r]ealtor would be suspended immediately." She alleged that she had to spend the remainder of her day providing documentation to CAR to resolve the matter, and the matter was resolved the next day after CAR verified with the State of Illinois that plaintiff's license was valid.

¶ 22 We find our supreme court's decision in *McGrath* to be instructive. There, the plaintiff and his business colleague decided to sell an apartment building. *McGrath*, 126 Ill. 2d at 82. The defendants, including a bank and its officers, sought to defraud the plaintiff, and as part of the scheme, refused to release plaintiff's funds that were on deposit with the bank that had no connection to plaintiff's business in order to coerce the plaintiff into assigning to the defendants his interest in certain mortgages. *Id.* at 82-85. The defendants knew that the plaintiff was susceptible to heart problems and that the defendants' actions were making him anxious, and the plaintiff eventually suffered a heart attack while attempting to obtain his money, which defendants continued to obstruct. *Id.* at 83-85. One of the defendants then repeatedly called the plaintiff while he was recuperating from open heart surgery, ostensibly to continue pressuring him. *Id.* at 85. The plaintiff filed a complaint alleging intentional infliction of emotional distress and the circuit court dismissed his complaint.

¶ 23 We reversed the circuit court's judgment, and the supreme court affirmed our judgment. The court found that the plaintiff stated a claim for intentional infliction of emotional distress

because the plaintiff's complaint alleged facts tending to show that the defendants engaged in a pattern of extortion and coercion with knowledge that the plaintiff was susceptible to heart disease and continued to harass the plaintiff after he suffered a heart attack. *Id.* at 90-92. The court found that a jury could reasonably conclude that the defendants' conduct was outrageous given the economic power wielded by the defendants over the plaintiff, the defendants' lack of legal justification for their actions, and their knowledge that the plaintiff was susceptible to emotional distress. *Id.* at 92-93.

¶ 24 Here, the conduct alleged is certainly undignified, but does not exceed all bounds of decency. Connolly did not have any authority over plaintiff and was in no greater position than any other member of the public to affect plaintiff's interests. Plaintiff claims that Connolly was aware of the amount of stress she was under due to having to care for her mother, but the conduct alleged—making a false report to CAR regarding plaintiff's real estate license—did not relate to the source of plaintiff's stress. In other words, while Connolly may have known that plaintiff was under stress, he simply injected an unrelated stressful event into plaintiff's life. Furthermore, the complaint is devoid of any factual allegations that Connolly knew or should have known that plaintiff was susceptible to any psychological or physical health problems brought on by stress, or that plaintiff was particularly susceptible to stress related to her job. We also note that plaintiff's complaint is devoid of any factual allegations as to the contents of the anonymous complaint, and thus the record on appeal does not demonstrate that the anonymous complaint contained any particular actionable accusations or aspersions made against plaintiff.[3] In sum, the

[3]In her reply brief, plaintiff alludes to the "nature" of the anonymous complaint for the first time and without citation to any materials contained in the record. Furthermore, she alleges in her reply that she learned in July 2018 that a complaint was filed in 2016 with the Illinois Department of Financial and Professional Regulation, which she asserts is "simply one subpoena way [*sic*] for discovery." These assertions were not set forth in her opening brief and are not supported by citations to the record. We

conduct alleged in the third amended complaint is tasteless, but does not rise to the level of extreme and outrageous conduct. The circuit court therefore properly dismissed plaintiff's intentional infliction of emotional distress claim in the third amended complaint with prejudice.

¶ 25 Finally, plaintiff contends that her third amended complaint stated a claim for defamation. Her argument on this point consists of a single sentence:

> "The support for the lack of good faith of the statements could have been present during discovery, or if the matters had been raised by the [d]efendants in any of their motions to dismiss, the full detail of the email directed to a third party, which Connolly/Furthermore included on the [website] as if it was written directed to them, was used by the judge to dismiss the [d]efamation claim."

¶ 26 We cannot discern how this assertion by plaintiff demonstrates the sufficiency of plaintiff's defamation claim in her third amended complaint. Plaintiff's failure to advance any coherent argument in support of reversal of the circuit court's judgment results in forfeiture (Ill. S. Ct. R. 341(h)(7)), and we therefore affirm the circuit court's judgment dismissing plaintiff's defamation claim in her third amended complaint with prejudice.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.

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cannot consider facts advanced for the first time on appeal that are outside of the record, as those facts were not presented in the circuit court.