

2025 IL App (1st) 231536-U

No. 1-23-1536

Order filed March 31, 2025

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GABINA LOPEZ and EDUARDO HERNANDEZ,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiffs-Appellants,)	
)	
v.)	No. 22 CH 3079
)	
JORGE L. CASTRO and GABINA HERNANDEZ,)	Honorable
)	Sophia Hall
Defendants-Appellees.)	Judge, Presiding

JUSTICE MARTIN delivered the judgment of the court.
Justices Reyes and D.B. Walker concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred when it dismissed plaintiffs' specific performance claim, where the claim was not barred by the Statute of Frauds. The court did not err in dismissing plaintiffs' claim that defendants violated the Consumer Fraud and Deceptive Business Practices Act.

¶ 2 Plaintiffs Gabina Lopez and Eduardo Hernandez, husband and wife (plaintiffs), appeal an order of the circuit court dismissing their complaint alleging breach of an oral contract to purchase real property. The trial court dismissed the complaint pursuant to defendants Jorge L. Castro's and Gabina Hernandez's (defendants) section 2-619.1 (735 ILCS 5/2-619.1 (West 2022)) motion to

dismiss, finding the complaint was barred by the Statute of Frauds, 740 ILCS 80/2 (West 2022), and that it failed to state a claim for violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), 815 ILCS 505/1 *et seq.* (West 2022). We affirm the dismissal of the violation of the Consumer Fraud Act claim, and reverse and remand the portions of the order dismissing the claim for specific performance.¹

¶ 3

I. BACKGROUND

¶ 4

Plaintiffs filed an action against defendants seeking to enforce an alleged oral agreement to purchase real property. Plaintiffs claim that in January 2014, they discussed with defendants their desire to purchase the defendants' real property, located at 616 North Springfield Avenue in Chicago. According to plaintiffs, the terms of the sale provided for a purchase price of \$90,000. Plaintiff Hernandez secured a loan of \$15,000, which he tendered to defendants as a down payment. The plaintiffs were to make monthly payments of \$1000—\$900 in principal and \$100 in interest. Plaintiffs began living in the property in February 2014.

¶ 5

Two years later, in January 2016, plaintiffs allege the monthly payments increased to \$1200. The increase represented additional interest. By September 2021, plaintiffs claimed to have tendered the entire purchase price and subsequently asked defendants to convey title to the property, as agreed. Defendants refused, claiming that plaintiffs owed them an additional \$100,000.

¶ 6

Plaintiffs thereafter filed an action in circuit court seeking to enforce the oral purchase agreement. Plaintiffs contended they have fully performed by paying defendants the agreed upon purchase price, maintaining the interior and exterior of the dwelling, and paying for all utilities.

¹In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

After the resolution of various procedural issues and in lieu of an answer, defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2022)). Defendants argued that an oral agreement to purchase land is unenforceable and barred by the Statute of Frauds, 740 ILCS 80/2 (West 2022). They further argued that plaintiffs failed to state a claim for violation of the Consumer Fraud Act, 815 ILCS 505/1 *et seq.* (West 2022). Following a hearing, the trial court granted defendant's motion, dismissing the complaint without prejudice. Plaintiffs were granted leave to file an amended complaint.

¶ 7 Plaintiffs filed their amended complaint for specific performance on December 19, 2022. Therein, plaintiffs included a footnote indicating that although they had not specifically replied their consumer fraud allegation, they were incorporating it by reference into the amended complaint for purposes of appellate review. Defendants again moved for dismissal pursuant to section 2-619.1 of the Code, and on April 28, 2023, the trial court dismissed the amended complaint, again without prejudice. Six weeks later, plaintiffs were granted leave to file a second amended complaint. Plaintiffs eventually chose not to file and defendants petitioned the court to convert the earlier dismissal without prejudice into a dismissal with prejudice. On July 28, 2023, the trial court entered an order dismissing plaintiffs' claims with prejudice. This timely appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, plaintiffs challenge the trial court's rulings granting defendants' section 2-619.1 motion to dismiss (735 ILCS 5/2-619.1 (West 2022)). Specifically, plaintiffs argue that the trial court erred in determining that the (1) Statute of Frauds barred their claim of an enforceable oral

agreement, and (2) complaint failed to allege a cognizable claim for violation of the Consumer Fraud Act.

¶ 10

A. Failure to File Timely Record

¶ 11

We first consider defendants' renewed request to dismiss this appeal based on plaintiffs' failure to timely file a record on appeal and their failure to timely request an extension of time to file the record late. Illinois Supreme Court Rule 326 (eff. July 1, 2017) requires that the record on appeal be filed in the reviewing court within 63 days after the filing of the notice of appeal. Rule 326 further allows that extensions of time for filing may be granted on motion made before the expiration of the original time or within 35 days thereafter. Defendants rely on Illinois Supreme Rule 323(e) (eff. July 1, 2017) to support their argument. This rule provides that the court may extend the time for filing the report of proceedings beyond its due date, if a party moves for such prior to the expiration of the records due date or within 35 days thereafter. Ill. S. Ct. R. 323(e). Defendants further assert that this court lacks the discretion to do anything other than either dismiss this appeal or summarily affirm the trial court's findings, since the plaintiffs waited over 200 days beyond the due date to file the record on appeal. We disagree.

¶ 12

We acknowledge that plaintiffs failed to timely file the record on appeal. We further acknowledge that plaintiffs failed to file the appropriate motion seeking an extension to file the record late. We, however, do not read the rule as a restriction upon this Court's ability to hear an appeal on its merits. Instead, the rules act as an aid to the court in managing its docket. Clearly in the exercise of our discretion, we could dispose of this appeal without reaching its merits. And, in some circumstances, this is indeed appropriate. But we are not bound to do so and here we choose not to. We rely in part on *Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trust 2005-FF8 v. Roongseang*, 2019 IL App (1st) 180948. In *Deutsche*, this court

found that “[f]ailure to timely file the record or a motion for extension of time to do so does not affect the appellate court’s jurisdiction over an appeal.” *Id.* ¶ 19. Moreover, the court held that it “has the discretion to determine whether an appeal should be dismissed for failure to timely file the record, even where no extension for filing was requested.” *Id.* Accordingly, while the appeal could be disposed of by way of dismissal, the court was not bound to do so. But see *Hall v. Turney*, 56 Ill. App. 3d 644, 650 (1977) (finding that Ill. S. Ct. R. 323(e) has the force of law and is binding upon both the court and the litigants). We follow *Deutsche* in choosing not to exercise our discretion to dismiss this appeal but instead deciding it on its merits.

¶ 13 Defendants also request we dismiss this appeal for want of prosecution. We note that this case was initially dismissed for want of prosecution on March 11, 2024. However, upon a motion to reinstate, the dismissal order was vacated and the appeal was reinstated on April 19, 2024. Thereafter, plaintiffs filed their record on appeal on May 24, 2024, in compliance with the court’s April 19, 2024 order. Accordingly, we decline to dismiss this appeal for want of prosecution.

¶ 14 As a final word on this issue, we note that defendants failed to timely file their response brief, as provided by Illinois Supreme Court Rule 343(a) (eff. July 1, 2008). Despite the granting of four unmet filing extensions and a different panel of this court issuing an order taking this case solely on the plaintiffs’ brief, we nonetheless chose to exercise our discretion—to the defendants’ benefit—when we allowed defendants to file their brief six months late.

¶ 15 B. Merits

¶ 16 The defendants’ motion to dismiss was brought pursuant to section 2-619.1 of the Code, which allows a party to file a motion combining both a section 2-615 and a section 2-619 motion to dismiss. See 735 ILCS 5/2-619.1 (West 2022); *GPB Stockholder Group, LLC v. Partnership Capital Growth Investors III, L.P.*, 2023 IL App (1st) 211351-B, ¶ 14.

¶ 17 A motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint and asserts that it fails to establish a cause of action upon which relief could be granted. *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 25. “Since Illinois is a fact-pleading jurisdiction, plaintiff’s complaint must allege facts, not mere conclusions, that establish a viable cause of action.” *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 35. The critical question in reviewing a section 2-615 motion is “whether the allegations of the complaint, taken as true and construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted.” *Berry v. City of Chicago*, 2020 IL 124999, ¶ 25. Dismissal is proper only if it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recover. *Dent*, 2022 IL 126795, ¶ 25.

¶ 18 A motion to dismiss a complaint brought pursuant to section 2-619 of the Code “admits the legal sufficiency of the complaint, along with all well-pleaded facts and inferences drawn therefrom, but asserts an affirmative matter that avoids or defeats the claim.” *Sorce v. Armstrong*, 399 Ill. App. 3d 1097, 1098 (2010). Relevant here, section 2-619(a)(7) of the Code authorizes a circuit court to dismiss a complaint on the grounds “that the claim asserted is unenforceable under the provisions of the Statute of Frauds.” 735 ILCS 5/2-619(a)(7) (West 2022). “An appeal from a section 2-619 dismissal is similar to an appeal following a grant of summary judgment.” *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). Dismissal is appropriate only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *American Family Mutual Insurance Company v. Krop*, 2018 IL 122556, ¶ 13. Our review of a dismissal pursuant to either section 2-615 or 2-619 is *de novo*. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

¶ 19

1. Statute of Frauds

¶ 20

Plaintiffs first contend that the trial court erred in its determination that the Statute of Frauds barred their claim of an enforceable oral agreement for the purchase of real property. Plaintiffs maintain that specific performance in this instance is proper where plaintiffs have no adequate remedy at law.

¶ 21

The Statute of Frauds provides, in salient part:

“No action shall be brought to charge any person upon any contract for the sale of land *** for a longer term than one year, unless such contract, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party.” 740 ILCS 80/2 (West 2022).

¶ 22

While the Statute of Frauds clearly provides that an oral contract for the sale of land is unenforceable, Plaintiffs argue that their claim is not barred because the doctrine of complete performance applies. “In Illinois, oral contracts are not considered void [citation], although they may be unenforceable if they are subject to a Statute of Frauds provision.” *Meyer v. Logue*, 100 Ill. App. 3d 1039, 1043 (1981). However, where one party completely performs under an oral contract, there is an exception to the Statute of Frauds’ writing requirement. *Berkowitz v. Urso*, 2014 IL App (1st) 121662, ¶ 44. “ ‘The rationale of the full performance doctrine is that when one party, in reasonable reliance on the contract, performs all of its obligations, it would be unfair to allow the other party to accept the benefits under the contract but to avoid its reciprocal obligations by asserting the Statute of Frauds.’ ” *Noesges v. Servicemaster Co.*, 233 Ill. App. 3d 158 (1992). Additionally, the equitable doctrine of “partial performance” can also remove an oral contract to

convey land from the operation of the Statute of Frauds. *Anderson v. Kohler*, 397 Ill. App. 3d 773 (2009); *Leekha v. Wentcher*, 224 Ill. App. 3d 342 (1991).

¶ 23 “The test for specific performance of an oral contract is as follows:

¶ 24 ‘Before a court may exercise that discretion in favor of granting the remedy in the case of an oral contract which would normally be unenforceable under the Statute of Frauds, the court must find that the terms of the contract are clear, definite, and unequivocal [citations], that the contract has been at least partially performed by the party seeking the remedy [citations] and that the acts allegedly done in performance are positively attributable exclusively to the contract [citations].’ ” *Id.* at 349-50 (quoting *Intini v. Marino*, 112 Ill.App.3d 252, 256 (1983)).

¶ 25 Illinois courts have long acknowledged that performance of an alleged oral contract for the purchase of real estate entitles cases to be exempted from the Statute of Frauds. See *e.g.*, *Blunt v. Tomlin*, 27 Ill. 93 (1862) (finding that “[w]here a purchaser, under a verbal contract for the sale of land, takes possession by consent of the vendor, and makes valuable improvements, and within the time agreed upon for payment, tenders the purchase money, the case is taken out of the statute of frauds and the purchaser is entitled to specific performance of the oral agreement”); *Barret v. Geisinger*, 148 Ill. 98 (1893) (recognizing that proven partial performance of an oral agreement for the sale of land is sufficient, in equity, to take a case out of the operation of the Statute of Frauds). More recently, our courts have acknowledged a binding contract and granted specific performance of an oral contract where a purchaser made a down payment and five monthly payments towards the purchase price of a property, took possession of the property and made improvements to it (*Heitz v. Circle Four Realty Co.*, 191 Ill. App. 3d 727 (1989)); where a purchaser paid full consideration for the property and took possession (*Thomas v. Moore*, 55 Ill.

App. 3d 907 (1977)); and where one party fully performed the oral agreement, despite the oral contract violating the Statute of Frauds (*Lund v. E.D. Etnyre & Co.*, 103 Ill. App. 2d 158 (1968)).

¶ 26 In the instant case, plaintiffs claim that there was an oral contract to purchase defendants' real estate. Plaintiffs allege they completely fulfilled their obligations under the agreement because (1) the terms of their oral contract were clear and definite, (2) they paid the full consideration of \$90,000, and (3) they took possession of the real estate. Further, they highlight that their actions—particularly making a \$15,000 down payment, paying all utilities, and making improvements to the property—are attributable exclusively to the oral contract.

¶ 27 Defendants counter that *Fowley v. Braden*, 4 Ill. 2d 355 (1954) is the “controlling” authority and held that cases of complete performance only apply where there is a “promise to devise property in return for staying with the person and caring for them until death.” *Id.* at 362. We find *Fowley* distinguishable. Defendants interpret the holding in *Fowley* as stringently prohibiting an oral contract for the sale of real estate *regardless* of whether a plaintiff has performed. This is not the holding of our supreme court in *Fowley*. Rather, the court in *Fowley* denied specific performance of an oral agreement to convey an interest in leases in exchange for the plaintiff's services because the plaintiff's services could be estimated and were compensable in an action at law. *Id.* Such is not the case here.

¶ 28 Admitting all well-pleaded facts and inferences drawn therefrom, as we must, we find that plaintiffs sufficiently alleged complete performance so as to take the purported oral contract for the purchase of real estate out of the Statute of Frauds. Accordingly, we reverse the circuit court's dismissal of plaintiffs' specific performance claim.

¶ 29

2. Consumer Fraud Act

¶ 30

Plaintiffs next argue that the court erred in dismissing their Consumer Fraud Act claim, as it states sufficient facts upon which relief can be granted. Defendants claim that plaintiffs' complaint is merely a breach of contract claim and allege that plaintiffs failed to set forth with necessary specificity how the Consumer Fraud Act applied to the alleged oral transaction for purchase of real estate.

¶ 31

"The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers *** against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002). To prevail on a claim under the Consumer Fraud Act, a plaintiff must demonstrate " '(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception.' " *Pack v. Maslikiewicz*, 2019 IL App (1st) 182447, ¶ 113 (quoting *Avery v. State Farm Mut. Auto. Ins. Co.*, 262 Ill. 2d 100, 190-91 (2005)).

¶ 32

In determining whether an act is unfair, the court considers whether the practice (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; and (3) causes substantial injury to consumers. *Robinson*, 201 Ill. 2d at 417-18 (citing *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972) (noting courts shall consider Federal Trade Commission's interpretation of section 5(a) of the Federal Trade Commission Act)). Under the Consumer Fraud Act, "a statement is deceptive if it creates a likelihood of deception or has the capacity to deceive." *Wright v. Walmart, Inc.* 688 F. Supp. 3d 794, 806 (S.D. Ill. 2023). A "complaint must state with particularity and specificity the deceptive manner of defendant's acts

or practices, and the failure to make such averments requires the dismissal of the complaint.”
Robinson, 201 Ill. 2d at 419.

¶ 33 Plaintiffs here have failed to adequately assert why their alleged oral agreement to purchase the residential property falls under the Consumer Fraud Act. Plaintiffs alleged² that defendants engaged in deception when they made a “false promise” to sell plaintiffs the residence when defendants had “no intention of ever conveying title to the Plaintiffs.” Further, they aver defendants engaged in an unfair practice when they (1) told plaintiffs that they could keep the residence if they paid an additional sum of approximately \$100,000, and (2) informed plaintiffs they would evict them if they failed to pay the additional sum. Plaintiffs contend that these deceptive and unfair acts “occurred in the course of conduct involving trade or commerce because the defendants are, on information and belief, engaged in the business of selling real estate.”

¶ 34 Illinois courts have held that the Consumer Fraud Act does not apply to the individual sale of a single-family residence between private parties. See, *e.g. Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154 (1986) (declining to extend the scope of the Consumer Fraud Act to individual sellers of single-family dwellings); *Anderson v. Stowell*, 183 Ill. App. 3d 862 (1989); *Carrera v. Smith*, 305 Ill. App. 3d 1079 (1999). Nonetheless, a different panel of the appellate court has held that the Consumer Fraud Act *may* apply when the seller is in the business of building and selling houses. *Kleczek v. Jorgensen*, 328 Ill. App. 3d 1012, 1019-20 (2002). Clearly then, there may be a situation in which the purchase of a residence may be covered under the Consumer Fraud Act.

¶ 35 However, plaintiffs here merely rely on conclusory assertions to support their deception and unfairness claims that defendants’ actions fall under the Consumer Fraud Act. Plaintiffs’

²This claim was incorporated by reference into plaintiffs’ amended complaint.

complaint did not implicate consumer protection concerns as pled and could not prevail where their allegations that defendants were engaged in trade or commerce are conclusory and speculative. See *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452 (1995) (holding that conclusory allegations that general contractor had no intention of paying subcontractor for work were insufficient to transform a breach of contract claim into cause of action under the Consumer Fraud Act). See also *Addison v. Distinctive Homes, Ltd.*, 359 Ill. App. 3d 997 (2005) (holding that plaintiffs' conclusory allegation that defendants had abandoned plans to build adjacent golf course before inducing purchasers to buy their homes was insufficient to state a cause of action for consumer fraud). Accordingly, we conclude that the circuit court correctly dismissed this claim, where plaintiffs failed to plead with specificity that defendants' alleged deception and unfair practices occurred in the course of conduct involving trade or commerce, as intended under the Consumer Fraud Act.

¶ 36

III. CONCLUSION

¶ 37

Based on the foregoing reasons, the judgment of the circuit court is affirmed in part and reversed in part. We remand the case to the circuit court for further proceedings on the specific performance claim.

¶ 38

Affirmed in part, reversed in part, and remanded.