2015 IL App (1st) 133696-U

SIXTH DIVISION
Order filed: May 1, 2015

No. 1-13-3696

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

U.S. BANK NATIONAL ASSOCIATION, As Trustee, Successor-in-Interest to Bank Of America, NA as Successor by Merger to LaSalle Bank NA as Trustee for WAMU Mortgage Pass-Through Certificates Series 2007-HY07 Trust,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 09 CH 10076
RENATA PLACEK, KRZYSZTOF F. PLACEK, JPMORGAN CHASE BANK, NA, and UNKNOWN OWNERS AND NON-RECORD CLAIMANTS,	)	
Defendants-Appellees,	)	Honorable Michael F. Otto, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Justices Lampkin and Rochford concurred in the judgment and opinion.

ORDER

¶ 1 *Held*: The dismissal of count I of the plaintiff's amended complaint was affirmed as the plaintiff forfeited any issue regarding the propriety of the dismissal by failing to address the question in its appellate brief. The dismissal of count II of the plaintiff's amended complaint was reversed as the defendant's motion to dismiss failed under either section 2-615 or section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2012)). The cause was remanded for further proceedings.

¶ 2 The plaintiff, U.S. Bank National Association, as Trustee, Successor-in-Interest to Bank of America, NA, as Successor-by-Merger to LaSalle Bank NA, as Trustee for WAMU Mortgage Pass-Through Certificates Series 2007-HY07 Trust (hereinafter "U.S. Bank"), appeals from the circuit court order which dismissed its two-count amended complaint seeking, in count I, foreclosure of a mortgage dated May 1, 2007, and recorded as a lien on property at 7910 Davis Street in Morton Grove (the property) and seeking the imposition of an equitable lien and equitable subrogation in count II. For the following reasons, we affirm the dismissal of count I, reverse the dismissal of count II, and remand this matter to the circuit court for further proceedings.

¶ 3 On March 5, 2009, Bank of America filed a single-count complaint against the defendants, Renata Placek (hereinafter referred to as "Renata"), Krzystof F. Placek, JPMorgan Chase Bank, NA, and Unknown Owners and Non-Record Claimants, seeking to foreclose on a mortgage on the property dated May 1, 2007 (2007 Mortgage)[1], purportedly executed by Renata.

¶ 4 On April 3, 2009, Renata filed her *pro se* appearance and answer to the complaint. In her answer, Renata stated that she did not sign the documents connected to the 2007 Mortgage. She stated that she was in Poland at the time the 2007 Mortgage was allegedly executed by her.

¶ 5 Responding to Bank of America's discovery requests, Renata produced a copy of her passport which contained stamps supporting her claim that she entered Poland on April 24, 2007, and re-entered the United States on May 8, 2007.

[1] The 2007 Mortgage was originally executed in favor of Washington Mutual Bank. However, after JP Morgan Chase acquired Washington Mutual Bank, it assigned the mortgage to Bank of America.

¶ 6 On August 2, 2011, Bank of America sought leave to file an amended complaint, which the circuit court granted on August 18, 2011. In count I of the amended complaint, Bank of America again sought to foreclose upon the 2007 Mortgage. According to the amended complaint, no payment was ever made on the note secured by the 2007 Mortgage. In count II, which was pled in the alternative to count I, Bank of America sought the imposition of an equitable lien upon the property in the amount of $600,207.13 and that it "be subrogated to" the lien positions of Harris Bank and Washington Mutual Bank (WAMU). According to the amended complaint, the property was encumbered by two prior mortgages executed by Renata; namely: a mortgage in the amount of $340,000, which was recorded on December 9, 2003, executed in favor of WAMU (hereinafter referred to as the "WAMU Mortgage"), and a mortgage in the amount of $310,000, which was recorded on October 24, 2006, executed in favor of Harris Bank (hereinafter referred to as the "Harris Mortgage"). Bank of America alleged that from the proceeds of the 2007 Mortgage, Washington Mutual Bank paid $289,778.56 to WAMU and $310,428.57 to Harris to extinguish the WAMU and Harris Mortgages.

¶ 7 On September 12, 2011, Renata filed an answer to the amended complaint in which she denied that she was "in any way connected" to the 2007 Mortgage. She claimed that the 2007 Mortgage was "fraudulently executed" and that Bank of America was not entitled to any relief as it had an "adequate remedy" to recover funds from the individuals who participated in the fraud or the title insurer.

¶ 8 On May 2, 2012, Bank of America moved for partial summary judgment, arguing that it was entitled to judgment on the equitable lien claim asserted in count II of its amended complaint and praying for the entry of an order granting it a "first and paramount lien" on the property in

the amount of $600,207.13, the sum paid to extinguish the Harris and WAMU Mortgages upon the closing of the 2007 Mortgage.

¶ 9 On August 3, 2012, Bank of America filed a motion for substitution of plaintiff, asserting that U.S. Bank had succeeded to its interest in the 2007 Mortgage. The circuit court granted the motion on the same day, allowing U.S. Bank to substitute as plaintiff.

¶ 10 On January 22, 2013, the circuit court denied the motion for partial summary judgment, stating in a subsequent order that there was no foundation for the records relied upon to establish the alleged pay-off amounts for the pre-existing loans.

¶ 11 On February 13, 2013, Renata filed a *pro se* motion labeled as "Defendant's Motion to Dismiss Plaintiff's Complaint in its Entirety." The motion did not specify under which section of the Code of Civil Procedure (Code) (735 ILCS 5/2-101 *et seq.* (West 2012)) that it was brought. That motion asserted, *inter alia,* that Renata did not sign the 2007 Mortgage, and raised a number of factual arguments addressing the plaintiff's right to recover, such as: unclean hands, lack of any contact between herself and the plaintiff or its predecessors in interest, and the absence of privity. Attached to the motion was a certified copy of Renata's passport and a letter from Tamara Kaiden, a forensic document examiner, dated October 12, 2012, stating that she compared samples of Renata's signature to the signatures on the mortgage documents and that the signatures on the 2007 Mortgage documents "most probabl[y]" did not match Renata's signature.

¶ 12 U.S. Bank responded to Renata's motion, asserting that the motion did not identify the section of the Code under which dismissal was sought and requesting that the motion be denied on that ground. As to count II, U.S. Bank argued that, in the event that the 2007 Mortgage is invalid, it is entitled to the relief sought in count II by reason of the extinguishment of Renata's

liability under the WAMU Mortgage and the Harris Mortgage with the proceeds of the 2007 Mortgage. Responding to the grounds asserted in Renata's motion other than her assertion that she did not sign the 2007 Mortgage, U.S. Bank argued that there had been no showing that it, or its predecessor-in-interest, had been guilty of fraud, bad faith or negligence in the 2007 Mortgage transaction.

¶ 13 On July 22, 2013, the circuit court entered an order dismissing both counts of the amended complaint. In that order, the circuit court stated that it construed Renata's motion as having been brought under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)) as she was raising affirmative matter as the basis for the dismissal. Regarding count I, the circuit court noted that U.S. Bank did not dispute or offer any evidence which might contradict Renata's assertion that she never signed the 2007 Mortgage documents. U.S. Bank also did not challenge the admissibility of the passport or the letter from Kaiden that Renata submitted to support her motion. Regarding count II, the circuit court, relying on *Uptown National Bank of Chicago v. Stramer*, 218 Ill. App. 3d 905 (1991), stated that dismissal was proper because there was "clearly no express agreement between the parties" and because there was no allegation of fraudulent conduct by Renata which created a debt, duty or obligation to U.S. Bank.

¶ 14 U.S. Bank filed a motion to reconsider the circuit court's July 22, 2013, dismissal of count II of its complaint. On October 23, 2013, the circuit court denied that motion, and this appeal followed.

¶ 15 Prior to addressing the issues raised by U.S. Bank in urging the reversal of the dismissal of count II of its amended complaint, we address a number of preliminary issues. First, as noted earlier, the plaintiff did not challenge the sufficiency of the evidentiary material submitted by Renata in support of her motion to dismiss. Consequently, any issues pertaining to the

sufficiency of that evidentiary material is forfeited and, because the plaintiff did not submit counterevidentiary material, we must take Renata's evidentiary material as true. *Mutschler Kitchens of Chicago, Inc. v. Wineman*, 95 Ill. App. 3d 728, 734 (1981).

¶ 16 Second, U.S. Bank's brief before this court contains no argument as to the propriety of the dismissal of count I of the amended complaint. Accordingly, any arguments pertaining to the propriety of the dismissal of that count have been forfeited. Ill. S. Ct. Rule 341(h) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) (stating that the failure to argue a point in the appellant's opening brief results in forfeiture of the issue).

¶ 17 Third, U.S. Bank's brief does not comply with Rule 341(h) as it does not contain an adequate statement of facts necessary to resolve the issues on appeal. Further, the facts which are included in the statement of facts do not contain proper citations to the record. See Ill. S. Ct. Rule 341(h)(6) (statement of facts "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"). Our supreme court's rules "are not aspirational" and "are not suggestions," but rather, "[t]hey have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995).

¶ 18 U.S. Bank raises two arguments on appeal: (1) that the circuit court erred when it considered Renata's motion to dismiss after she had filed an answer to the amended complaint; and (2) the circuit court erred when it dismissed count II of the complaint on the basis that the absence of any fraud on the part of Renata prohibited imposition of an equitable lien.

¶ 19 We find that U.S. Bank has forfeited its first argument. U.S. Bank failed to argue before the circuit court in either its response to Renata's motion to dismiss or in its motion for reconsideration of the order dismissing the amended complaint that Renata's motion to dismiss

was untimely as she had already filed an answer to the amended complaint. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal").

¶ 20 Forfeiture aside, and acknowledging that Renata's motion was procedurally improper, U.S. Bank has failed to establish how it was prejudiced by the court's consideration of the motion, and the record discloses no such evidence. Rather, the record demonstrates that the parties participated in discovery on the issues raised in the motion to dismiss and had fully briefed the motion and appeared at hearings before the circuit court on the matter. Under these circumstances, we are unable to find that U.S. Bank was prejudiced by the circuit court's consideration of Renata's motion to dismiss after she had answered the amended complaint. See *Stewart v. County of Cook*, 192 Ill. App. 3d 848, 858 (1989).

¶ 21 Finally, we find it impossible to address the legal issue raised by U.S. Bank in urging reversal of the circuit court's dismissal of count II of the amended complaint; namely: that the absence of any fraud on the part of Renata prohibited the imposition of an equitable lien on the property and equitable subrogation. We are unable to reach the issue as a result of the procedural context in which the dismissal of count II was entered.

¶ 22 As noted earlier, Renata answered count II of the amended complaint and subsequently filed her motion to dismiss which failed to state under which section of the Code that it was brought. However, in a reply in support of her motion to dismiss which was filed on May 16, 2013, Renata wrote: "As speculated by plaintiff, Defendant [Renata] relies here on Section 2-615 of the Illinois Code of Civil Procedure." Nevertheless, the order granting Renata's motion to dismiss provides that: "the Court believes it clear from context that Ms. Placek is moving to dismiss under section 2-619." For the reasons which follow, we believe that the dismissal of

count II of the amended complaint in response to Renata's motion was in error under either section of the Code.

¶ 23 A motion to dismiss brought pursuant to section 2-615 of the Code challenges only the legal sufficiency of the complaint, raising the question of whether the complaint states a cause of action. The only matters to be considered in ruling on such a motion are the allegations in the complaint itself which must be taken as true for purposes of the motion. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion does not raise affirmative factual defenses, but asserts only defects appearing on the face of the complaint. *Id.* The statute provides that a section 2-615 motion "shall point out specifically the defects complained of." 735 ILCS 5/2-615(a) (West 2012).

¶ 24 In comparison, a section 2-619 motion admits the legal sufficiency of the complaint but asserts affirmative matter that defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). For purposes of a section 2-619 motion, affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Dewan v. Ford Motor Co.*, 363 Ill. App. 3d 365, 368 (2005). "[A]ffirmative matter encompasses any defense other than a negation of the essential elements of the plaintiff's cause of action." *Id.* When the affirmative matter relied upon in support of a section 2-619 motion does not appear on the face of the complaint, the motion must be supported by affidavit. *Illinois Graphics Co.*, 159 Ill. 2d at 485; 735 ILCS 5/2-619(a) (West 2012). For purposes of ruling on such a motion, all well-pled facts in the complaint must be taken as true. *Goldberg v. Rush University Medical Center*, 371 Ill. App. 3d 597, 601 (2007).

¶ 25 Our review of dismissals under both section 2-615 and section 2-619 of the Code is *de novo. Kean,* 235 Ill. 2d at 361.

¶ 26 We first analyze Renata's motion to dismiss as it relates to count II of the amended complaint to ascertain whether it can form the basis of relief under section 2-615 of the Code. An examination of the motion discloses that there are no allegations contained therein pointing out where count II of the amended complaint is insufficient in law. Rather, the motion, relying upon evidentiary material, asserts that Renata did not execute the 2007 Mortgage, and also contains several fact-based arguments unsupported by affidavit as to why the plaintiff has no right to recover. Stated otherwise, Renata's motion did not challenge the legal sufficiency of the amended complaint or address the issue of whether either count of the amended complaint states a cause of action. Clearly, Renata's motion to dismiss is not a section 2-615 motion, and we cannot review it as such.

¶ 27 For its part, the circuit court construed Renata's motion as having been brought under section 2-619 of the Code. However, the circuit court's justification for the dismissal of count II addresses the sufficiency of the allegations supporting the plaintiff's claim for the imposition of an equitable lien and subrogation. In dismissing count II, the court reasoned that: "plaintiff has never suggested that Ms. Placek was a participant in the fraud or indeed anything but a victim thereof." Whether count II of the amended complaint required allegations that Renata participated in a fraud to state a claim for the imposition of an equitable lien and equitable subrogation go to the question of whether the count states a cause of action; the proper subject of a section 2-615 motion, not a section 2-619 motion which by its very nature admits the legal sufficiency of the complaint. Additionally, the evidentiary material submitted by Renata in support of her motion to dismiss, while relevant to the claim for foreclosure of the 2007

Mortgage as pled in count I of the amended complaint, is of little relevance to the claim for the imposition of an equitable lien and equitable subrogation pled in count II. There is no evidentiary material attached to Renata's motion or contained within the record going to the issue of her participation, if any, in the activity leading up to the execution of the 2007 Mortgage documents other than evidentiary material supporting her assertion that she did not execute the 2007 Mortgage. Renata's participation, or lack thereof, in the events leading up to the execution of the 2007 Mortgage document is certainly not apparent from the face of Count II of the amended complaint. As a consequence, any determination of whether she was or was not "a participant in the fraud" would have to have been supported by affidavit to even arguably be the basis of relief under section 2-619 of the Code. We conclude, therefore, that Renata's motion to dismiss cannot support a dismissal of count II of the amended complaint pursuant to section 2-619 of the Code.

¶ 28 Unless and until the sufficiency of the allegations in count II to state a cause of action is challenged in a procedurally proper context, we are not called upon to analyze the issue of whether the plaintiff in an action for the imposition of an equitable lien under the circumstances in this case must allege fraud on the part of the defendant. We are under no duty to search the record to determine the real questions at issue or to decide questions which have not been framed in a procedurally proper context. See *Morey v. Kinetic Services, Inc.*, 133 Ill. App. 3d 1002, 1004-05 (1985).

¶ 29 In summary, we conclude that a dismissal of count II of the amended complaint pursuant to Renata's motion to dismiss was error whether predicated on the provisions of section 2-615 or section 2-619 of the Code.

¶ 30 Based upon the foregoing analysis, we affirm the circuit court’s dismissal of count I of the amended complaint, reverse the circuit court's dismissal of count II of the amended complaint, and remand the matter for further proceedings.

¶ 31 Affirmed in part, reversed in part and remanded.