

Nos. 1-14-0084, 1-14-0187
(Consolidated)

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

STATE BANK OF COUNTRYSIDE, an Illinois banking corporation,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
)	
Plaintiff-Appellant,	)	Nos. 12 L 10264,
	)	11 L 50876
v.	)	11 L 50877
)	
THOMAS V. BOOTH, an individual, and THOMAS M. BULOW, an individual,	)	Honorable
	)	Margaret Brennan,
	)	Robert Lopez-Cepero,
Defendants-Appellees.	)	Judges Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

ORDER

¶ 1 *Held:* In consolidated appeals, the appellate court: (1) affirmed the dismissal of plaintiff's complaint against defendants, based on the principles of *res judicata*; (2) affirmed the circuit court's denial of plaintiff's petition to vacate the prior judgment; and (3) denied defendants' request for sanctions.

¶ 2 In these consolidated appeals, plaintiff State Bank of Countryside (Countryside) appeals

from orders of the circuit court of Cook County dismissing its claims against defendants Thomas M. Bulow (Bulow) and Thomas V. Booth (Booth). Countryside alleged that Bulow and Booth breached their personal guaranties to Countryside, and they fraudulently transferred assets to hinder or preclude Countryside from collecting on the guaranties. Countryside also appeals a circuit court order denying Countryside's petition to vacate a judgment dismissing the breach of contract and fraudulent transfer claims under the principles of *res judicata*. On appeal, Countryside argues: (1) its breach of contract and fraudulent transfer claims should not have been dismissed under the principles of *res judicata*; (2) the circuit court erred in vacating a judgment by confession initially obtained by Countryside against Bulow and Booth; and (3) Countryside should have been permitted to amend the complaint to allege breach of contract and fraudulent transfer claims after the circuit court vacated the judgments by confession. For the following reasons, we affirm the judgments of circuit court.

¶ 3

BACKGROUND

¶ 4

11 L 50876 and 11 L 50877

¶ 5

On August 11, 2011, Countryside filed separate complaints for confession of judgment in the circuit court against Bulow and Booth, in case numbers 11 L 50876 and 11 L 50877, respectively. Countryside alleged Bulow and Booth were indebted to Countryside as evidenced by a January 17, 2008, promissory note for MTT Investments, LLC (MTT), signed by Bulow and Booth,¹ as well as commercial guaranties signed by Bulow and Booth. Pursuant to these documents, the amount of indebtedness of the note was \$2,368,000. Bulow was the guarantor of 20% of the indebtedness, while Booth was the guarantor of 72% of the indebtedness. After

¹ MTT Investments, LLC, owned property that was rented to an entity that operated a restaurant in Orland Park, Illinois. The promissory note in this case constituted a refinancing of obligations related to the property.

accounting for payments, interest, attorney fees, and costs, the total amount alleged to be due Countryside was \$2,303,343.09. Accordingly, Countryside alleged Bulow owed \$460,668.80, while Booth owed \$1,658,407.02.

¶ 6 On August 17, 2011, the circuit court entered judgments in the amount of \$2,303,343.09 in both cases. On September 1, 2011, Countryside issued a citation to discover assets to Morgan Stanley Smith Barney regarding Bulow, indicating \$460,668.80 was due. On the same date, Countryside issued a citation to discover assets to Suburban Bank regarding Booth, indicating \$1,658,407.02 was due. On November 16, 2011, Countryside issued a citation to discover assets to Rydex, SGI regarding Booth.²

¶ 7 On October 11, 2011, Bulow filed a motion to vacate the August 17, 2011, judgment against him. Bulow alleged he was never served with process before or after the entry of the judgment. Bulow also contended the judgment was void because the amount of the indebtedness could not be ascertained from the face of the documents. Bulow further maintained the judgment should be vacated because the fair market value of the underlying real estate was equal to the amount of the indebtedness. Additionally, Bulow asserted the amount of the indebtedness was contested. On November 11, 2011, Booth filed a substantially identical motion to vacate the judgment against him.

¶ 8 On March 13, 2012, Booth filed a motion to consolidate his case with Bulow's case, as both were based on the same note and substantially identical guaranties.³ On March 20, 2012, the circuit court granted the motion to consolidate the cases involving Bulow and Booth.

¶ 9 On April 26, 2012, the circuit court entered an order granting defendants' motions to vacate the judgments by confession. Although the order does not set forth the basis for the

² The record indicates that Rydex, SGI holds mutual fund assets.

³ The motion was amended on March 19, 2012, but raised substantially similar points.

decision, the parties' appellate briefs state that the circuit court ruled the judgment was void for lack of jurisdiction. On April 30, 2012, the circuit court entered an order granting the defendants' emergency motion to quash and dismiss the citations to discover assets issued in this matter.⁴

¶ 10 On May 7, 2012, Countryside filed a notice of appeal in this court, seeking review of the circuit court's order of April 26, 2012, which vacated the judgments by confession previously entered in case numbers 11 L 50876 and 11 L 50877. This court docketed the appeal under number 12-1376. On May 9, 2012, Countryside filed an emergency motion in the circuit court to stay the order of April 26, 2012, pending appeal, pursuant to Illinois Supreme Court Rule 305 (eff. July 1, 2004). On May 16, 2012, the circuit court entered an order granting Countryside's emergency motion to stay the order of April 26, 2012, stating "the sole controversy contained in the pleadings was disposed of by the order of April 26, 2012[,] and the matter is appealable as of that date." On May 16, 2012, Countryside filed an amended notice of appeal to this court.⁵

¶ 11 On August 17, 2012, Countryside filed a motion to voluntarily dismiss appeal number 12-1376. On August 23, 2012, this court entered an order voluntarily dismissing the appeal.

¶ 12 12 L 5734 / 12 L 10264

¶ 13 On May 25, 2012, while appeal number 12-1376 was pending, Countryside filed a verified complaint in the circuit court against Bulow and Booth, docketed as case number 12 L 5734. Countryside alleged that Bulow and Booth breached their respective guaranties with Countryside and fraudulently transferred assets (previously held pursuant to the citations to discover assets in case numbers 11 L 50876 and 11 L 50877) to hinder, delay or defraud

⁴ The copy of the emergency motion included in the record on appeal is not date-stamped.

⁵ Countryside also had filed an amended notice of appeal on May 15, 2012, which was substantively identical to the original May 7 notice, but adding contact information for Countryside's counsel.

Countryside in collecting on the indebtedness.⁶

¶ 14 On July 13, 2012, Bulow and Booth filed a joint motion to dismiss case number 12 L 5734 pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). In a supporting memorandum filed on October 29, 2012, Bulow and Booth argued that the verified complaint: (1) lacked verification; (2) was barred by the principles of *res judicata* and the rule against claim splitting; and (3) could not state a claim for fraudulent transfer.

¶ 15 On July 23, 2012, the circuit court, having determined the matter should be placed on an appropriate law division stay calendar, entered an order placing the matter on the law division's appellate stay calendar. On August 23, 2012, the appellate court granted Countryside's motion to voluntarily dismiss appeal number 12-1376. Countryside, on August 30, 2012, filed a motion to remove the case from the appellate stay calendar. On September 11, 2012, the circuit court entered an order removing the case from the appellate stay calendar and directing that case number 12 L 5734 be administratively renumbered 12 L 10264.⁷

¶ 16 On November 20, 2012, Countryside filed its response to the motion to dismiss, asserting: (1) the motion was improperly labeled; (2) a copy of the verification was tendered to

⁶ The complaint also alleged that on September 22, 2011, Countryside filed a complaint for mortgage foreclosure in case number 11 CH 33151, including a breach of contract claim against MTT on the January 17, 2008, promissory note. Countryside attached a judgment of foreclosure and sale entered on February 10, 2012, in 11 CH 33151, in which MTT was a defendant. The record on appeal indicates that on December 1, 2011, MTT moved to have summary judgment entered against itself in the foreclosure proceedings. Subsequently, MTT and another defendant objected to the sale (the date-stamp is illegible), asserting that: (1) Countryside "credit bid" \$1,500,000 at the June 8, 2012, sheriff's sale, even though both Countryside and MTT possessed appraisals indicating the property was worth \$2,200,000; (2) Countryside had "so mismanaged its business that the FDIC was forced to take aggressive action with Countryside in March of 2012"; (3) Countryside wrongfully sued Bulow and Booth on the guaranties before attempting to foreclose; and (4) Countryside unreasonably rejected a third-party offer to purchase the property "that would have basically made Countryside whole." On October 2, 2012, the circuit court entered an order confirming the judicial sale and finding MTT responsible for a deficiency of \$871,791.48.

⁷ The record does not specify the reason for the administrative action.

defense counsel; (3) the voluntary dismissal of appeal number 12-1376 rendered *res judicata* inapplicable; and (4) Countryside can establish the elements of a fraudulent transfer. On December 21, 2012, Bulow and Booth filed a joint reply in support of their motion to dismiss, contending: (1) the motion was properly brought pursuant to section 2-619 of the Code; (2) the circuit court specifically entered an order in 11 L 50876 and 11 L 50877 that the judgment was appealable; (3) Countryside appealed the prior judgment pursuant to Supreme Court Rule 303 (eff. Jun. 4, 2008); and (4) Countryside's fraudulent transfer claim was also barred by the principles of *res judicata*.

¶ 17 On March 1, 2013, the circuit court granted the motion to dismiss, "based on the court's finding of claim splitting." On March 26, 2013, Countryside filed a motion to reconsider the dismissal. The circuit court, on April 8, 2013, entered an order denying the motion to reconsider.

¶ 18 On May 8, 2013, Countryside filed a notice of appeal in this court seeking a review of the circuit court's March 1 and April 8, 2013, orders. The matter was docketed by this court under appeal number 13-1531. On August 23, 2013, Countryside filed a motion in this court to voluntarily dismiss appeal number 13-1531. This court, on September 6, 2013, entered an order granting the motion to dismiss the appeal.

¶ 19 11 L 50876 and 11 L 50877 Revisited

¶ 20 After the circuit court denied the motion to reconsider in case number 12 L 5734 / 12 L 10264, but prior to Countryside filing the notice of appeal in appeal number 13-1531, Countryside, on April 19, 2013, sought leave to file an amended complaint in 11 L 50876 and 11 L 50877. Countryside argued the dismissal of appeal number 12-1376 allowed the case to proceed as though no appeal had been taken. The circuit court granted Countryside leave to file an amended complaint on April 30, 2013.

¶ 21 Countryside filed its amended complaint in 11 L 50876 and 11 L 50877 on May 2, 2013. The amended complaint contained allegations substantively identical to Countryside's complaint in case number 12 L 5734, alleging that Bulow and Booth breached their respective guaranties with Countryside and fraudulently transferred assets.

¶ 22 On June 28, 2013, Bulow and Booth filed a joint motion to dismiss the amended complaint pursuant to section 2-619 of the Code and for sanctions against Countryside pursuant to Supreme Court Rule 137 (eff. Jan. 4, 2013). Bulow and Booth argued the amended complaint should be dismissed under the principles of *res judicata*, and also because there was another action pending between the same parties for the same action. Bulow and Booth additionally asserted that the filing of repetitive and duplicative lawsuits was designed to harass them and should result in sanctions against Countryside.

¶ 23 On August 21, 2013, the circuit court entered an order staying any decision on the motion to dismiss with sanctions pending a decision from this court in appeal number 13-1531. On September 11, 2013, Countryside filed a motion to vacate the circuit court stay, given that Countryside had voluntarily dismissed appeal number 13-1531. On September 23, 2013, the circuit court entered an order setting defendants' motion to dismiss for a hearing. On January 9, 2014, the circuit court entered an order: (1) granting the motion to dismiss the amended complaint; (2) denying Countryside's leave to file a second amended complaint; and (3) denying the defendants' motion for sanctions. On January 17, 2014, Countryside filed a notice of appeal to this court seeking review of the dismissal of its amended complaint, which this court docketed as appeal number 14-0187.

¶ 24 12 L 5734 / 12 L 10264 Revisited

¶ 25 On November 20, 2013, while the motion to dismiss the amended complaint in 11 L

50876 and 11 L 50877 was pending, Countryside filed a motion to vacate the judgment in 12 L 5734 / 12 L 10264 entered on March 1, 2013, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). Countryside noted that after the circuit court dismissed the complaint in 12 L 5734 / 12 L 10264, the appellate court issued an opinion in *Turczak v. First American Bank*, 2013 IL App (1st) 121964. Countryside argued that the circuit court would not have dismissed its complaint if the court had access to the *Turczak* decision.

¶ 26 On December 2, 2013, Bulow and Booth filed a joint motion to dismiss Countryside's petition pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). Bulow and Booth argued the petition must be dismissed because Countryside failed to: (1) cite any legal authority addressing section 2-1401 petitions; (2) attach an affidavit in support of its petition; (3) allege Countryside was diligent; and (4) establish a meritorious claim.

¶ 27 On December 9, 2013, the circuit court entered an order denying Countryside's section 2-1401 petition and denying the motion to dismiss the petition. On January 6, 2014, Countryside filed a notice of appeal to this court seeking review of the dismissal of its petition, which this court docketed as appeal number 14-0084. This court consolidated the cases for appeal.

¶ 28 ANALYSIS

¶ 29 On appeal, Countryside argues: (1) its breach of contract and fraudulent transfer claims should not have been dismissed under the principles of *res judicata*; (2) the circuit court erred in vacating a judgment by confession initially obtained by Countryside against Bulow and Booth; and (3) Countryside should have been permitted to proceed on an amended complaint alleging breach of contract and fraudulent transfer claims after the circuit court vacated the judgment by confession. Defendants not only disagree on the merits, but also argue that this court lacks jurisdiction to consider whether the circuit court erred in vacating the judgment by confession

because Countryside voluntarily dismissed its appeal of the order vacating the judgment by confession. Indeed, defendants assert that this court lacks jurisdiction to review not only the circuit court's orders of April 26 and May 16, 2012, but also the circuit court's orders of March 1 and April 8, 2013. Countryside replies that, in order to fairly consider the consolidated appeals, this court must necessarily review all of the issues it has raised because the cases and orders entered therein are inextricably interconnected. Accordingly, we first turn to address the jurisdictional issues raised by defendants.

¶ 30 Jurisdiction

¶ 31 Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). The filing of a notice of appeal is "the jurisdictional step which initiates appellate review." (Internal quotation marks omitted.) *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011) (quoting *People v. Smith*, 228 Ill. 2d 95, 104 (2008)). "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *Pappas*, 242 Ill. 2d at 176. In addition, our supreme court "has found notices of appeal to confer jurisdiction even if the order was not expressly mentioned in the notice of appeal, if that order was a step in the procedural progression leading to the judgment which was specified in the notice of appeal." (Internal quotation marks omitted.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23 (citing *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 435 (1979)).

¶ 32 These consolidated appeals are based on two notices of appeal filed by Countryside. The first notice of appeal was filed on January 6, 2014, regarding case number 12 L 10264 (formerly 12 L 5734). The first notice of appeal specifically requests a review of the circuit court order of

December 9, 2013, denying Countryside's section 2-1401 petition. The question, therefore, is whether the March 1 and April 8, 2013, judgments were a necessary step in the procedural progression leading to the December 9, 2013, order. It is firmly established that "[t]he filing of a section 2-1401 petition is considered a new proceeding, not a continuation of the old one."

Sarkissian v. Chicago Board of Education, 201 Ill. 2d 95, 102 (2002) (citing 735 ILCS 5/2-1401(b) (West 2000)). It is true that section 2-1401(f) codifies the common law rule allowing litigants to attack a void judgment at any time. *OneWest Bank, FSB v. Topor*, 2013 IL App (1st) 120010, ¶ 13 (citing *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 379 (2005)). An appeal of the denial of a petition to vacate brought pursuant to section 2-1401(a), however, does not confer jurisdiction on this court to review the underlying judgment. See, e.g., *JPMorgan Chase, N.A. v. Ontiveros*, 2015 IL App (2d) 140145, ¶¶ 16-17 (comparing untimely appeal from underlying judgment with timely appeal from denial of section 2-1401 petition).

¶ 33 Countryside's section 2-1401 petition did not attack the March 1 and April 8, 2013, judgments as void. Rather, Countryside argued that the circuit court would not have dismissed its complaint if the court had access to the *Turczak* decision, which addresses the application of the principles of *res judicata*. Accordingly, Countryside's first notice of appeal, specifying review of the denial of the section 2-1401 petition, does not confer jurisdiction on this court to review the March 1 and April 8, 2013, judgments in appeal number 14-0084. See *JPMorgan Chase, N.A.*, 2015 IL App (2d) 140145, ¶¶ 16-17.

¶ 34 Countryside's second notice of appeal was filed on January 17, 2014, regarding case numbers 11 L 50876 and 11 L 50877. The second notice of appeal specified review of the circuit court's January 9, 2014, judgment dismissing Countryside's amended complaint and denying leave to file a second amended complaint. "Generally, once an amended pleading is

filed, allegations contained in the prior pleading and objections to the trial court's ruling on that pleading are deemed waived, as it 'ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn. [Citation.]' " *Funes v. B & B Equipment, Inc.*, 282 Ill. App. 3d 272, 274 (1996) (quoting *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 61 (1992)). Although prior pleadings may remain part of the record in some cases, even after the filing of an amendment thereto, such pleadings are deemed abandoned when " 'the substance, theory, or format of the original complaint [has] been abandoned.' " *Funes*, 282 Ill. App. 3d at 275 (quoting *Arnold v. Chicago Ridge*, 181 Ill. App. 3d 778, 782 (1989)).

¶ 35 Countryside's amended complaint in 11 L 50876 and 11 L 50877 alleged breach of contract and fraudulent transfer. The substance, theory and format of the amended complaint differ from those of the original complaints for judgment by confession. Countryside thus abandoned its original complaints seeking judgments by confession in 11 L 50876 and 11 L 50877. Accordingly, the April 26 and May 16, 2012, orders were not necessary steps in the procedural progression leading to the judgments appealed from in appeal number 14-0187 and we lack jurisdiction to review those orders.

¶ 36 With the scope of our review thus determined, we turn to address the merits of each appeal, beginning with the initial litigation in 11 L 50876 and 11 L 50877.

¶ 37 No. 14-0187

¶ 38 In this appeal, Countryside argues the circuit court erred in dismissing its amended complaint (in 11 L 50876 and 11 L 50877) pursuant to section 2-619 of the Code. "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). In a section 2-619 motion to dismiss, the moving party "admits the legal sufficiency of the

complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Id.* The affirmative matter asserted against the defendant avoids the legal effect of or defeats the plaintiff's claim. *Id.* The court views the pleadings and any supporting documentary evidence "in the light most favorable to the nonmoving party." *Id.* at 368 (quoting *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997)). This court reviews *de novo* a dismissal pursuant to section 2-619. *Van Meter v. Darien Park District*, 207 Ill. 2d at 368. *De novo* consideration means we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). Moreover, "[a] dismissal order may be affirmed 'if it is justified in the law for any reason or ground appearing in the record regardless of whether the particular reasons given by the trial court, or its specific findings, are correct or sound.'" *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 923 (2008) (quoting *Natural Gas Pipeline Co. of America v. Phillips Petroleum Co.*, 163 Ill. App. 3d 136, 142 (1987)).

¶ 39 Bulow and Booth maintain the amended complaint was properly dismissed under the principles of *res judicata*. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996)). "*Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided." *Id.* "Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Id.*

¶ 40 Countryside maintains there was no final judgment on the merits to support the January 9, 2014, dismissal of its amended complaint in 11 L 50876 and 11 L 50877. Illinois Supreme

Court Rule 273 states that "an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan. 1, 1967). "Where a dismissal order does not specify that it is 'without prejudice' and does not grant the plaintiff leave to file an amended complaint, the judgment is a final adjudication on the merits under Supreme Court Rule 273." *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*, 361 Ill. App. 3d 362, 373 (2005).

¶ 41 In this case, Countryside's verified complaint in 12 L 5734—substantially identical to the complaint dismissed in 11 L 50876 and 11 L 50877—was dismissed on March 1, 2013, pursuant to section 2-619 of the Code, "based on the court's finding of claim splitting." The March 1, 2013, dismissal was thus a final adjudication on the merits. Indeed, Countryside appealed from that final judgment, but this court granted Countryside's motion to voluntarily dismiss appeal number 13-1531 on September 6, 2013, prior to the January 9, 2014, dismissal at issue in this appeal.

¶ 42 Countryside's primary argument that there was no final judgment in this case is directed to the circuit court's April 26, 2012, order granting defendants' motions to vacate the original judgments by confession. Countryside observes that defendants successfully relied upon *Grundy County National Bank v. Westfall*, 49 Ill. 2d 498, 500 (1971), and its progeny to argue the circuit court was without jurisdiction to enter the judgments by confession and the judgments were therefore void. Countryside thus argues that a judgment which is null and void for lack of jurisdiction may not be used as the basis for application of the doctrine of *res judicata*. See, e.g., *Township of Jubilee v. State*, 2011 IL 111447, ¶ 30. But see *Woerter v. Halperin*, 340 Ill. App. 406, 411 (1950) (order vacating a judgment by confession that was void and did not open the judgment for further proceedings was a final and appealable order).

¶ 43 Countryside's argument overlooks that the status of the April 26, 2012, order does not affect the finality of the March 1, 2013, dismissal. The question of whether the March 1, 2013, dismissal was erroneous is not to be considered by this court in determining whether that dismissal operates as a *res judicata* bar to the instant suit. *Patzner v. Baise*, 144 Ill. App. 3d 42, 44 (1986); *Bronstein v. Kalheim*, 126 Ill. App. 3d 643, 647 (1984). Countryside's related assertion that the rule against claim splitting was inapplicable in this case is similarly defeated by *Patzner* and *Bronstein*. Accordingly, the requirement of a final judgment is met, permitting application of the doctrine of *res judicata* in this appeal.

¶ 44 Countryside further asserts that *res judicata* cannot be applicable to the counts alleging fraudulent transfer of assets, contending they could not have been raised when Countryside sought judgments by confession. Initially, we observe that Countryside devoted a single paragraph to this point, lacking any citation to legal authority, thereby resulting in forfeiture of the argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived"); *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36 (a party's failure to support a point with relevant authority results in forfeiture). Moreover, the argument, similar to Countryside's primary argument, overlooks that the fraudulent transfer claims were previously raised and dismissed on March 1, 2013.

¶ 45 Lastly, Countryside argues the circuit court should have granted its motion to reconsider, which cited *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶ 31, and argued the decision clarified the principles enunciated by our supreme court in *Hudson*. In *BankFinancial*, the appellate court found *Hudson* and its progeny inapplicable where: (1) the dismissal of one count of the complaint filed in prior litigation was not an involuntary dismissal based on an infirmity in plaintiff's case, but a voluntary dismissal based on section 2-1009 of the Code (*id.* ¶

27); and (2) the subsequent order dismissing the remaining counts of the complaint in the prior litigation was a dismissal for want of prosecution, which did not become final until the one-year right to refile expired (*id.* ¶¶ 29-30). In this case, Countryside's claims of breach of contract and fraudulent transfer were involuntarily dismissed pursuant to section 2-619 of the Code.

Accordingly, *BankFinancial* is not persuasive authority in this appeal.

¶ 46 In sum, Countryside had the opportunity to challenge the order vacating the judgments by confession. Countryside might have won or lost appeal number 12-1376, or obtained a ruling from this court that this court lacked jurisdiction because the order appealed from was not a final and appealable order. Instead, Countryside chose to voluntarily dismiss appeal number 12-1376. Countryside also could have challenged the finality of the order vacating the judgments by confession in appeal number 13-1531. In appealing the March 1, 2013, involuntary dismissal of its complaint in 12 L 5734 /12 L 10264, Countryside could have argued the principles of *res judicata* and the related rule against claim splitting were inapplicable because the order vacating the judgments by confession was not a final judgment. Instead, Countryside chose to voluntarily dismiss appeal number 13-1531, leaving the March 1, 2013, involuntary dismissal standing as a final judgment. Thus, when Countryside filed an amended complaint in 11 L 50876 and 11 L 50877 that was substantively identical to the complaint dismissed in 12 L 5734 /12 L 10264, the circuit court did not err in dismissing that amended complaint pursuant to section 2-619 of the Code under the principles of *res judicata*.

¶ 47

No. 14-0084

¶ 48 In this appeal, Countryside contends the circuit court erred in denying Countryside's section 2-1401 petition. As previously noted, Countryside's section 2-1401 petition sought to vacate the judgment the circuit court entered on March 1, 2013, dismissing Countryside's breach

of contract and fraudulent transfer claims against defendants, "based on the court's finding of claim splitting."

"Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401(a) (West 2002). While the remedy in the statute does have its roots in common law equity, the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition. [Citations.] Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. 735 ILCS 5/2-1401(b) (West 2002). The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2002)." *In re Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 52 (quoting *People v. Vincent*, 226 Ill.2d 1, 7-8 (2007)).

"To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 52 (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "When a trial court dismisses a section 2-1401 petition, or enters judgment on the pleadings of said petition without holding an evidentiary hearing, the standard of review to be applied is *de novo*." *Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 53 (citing *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 9).

¶ 49 Countryside's section 2-1401 petition was based entirely on *Turczak*, in which this court

rejected the argument that a final judgment obtained on a promissory note barred a foreclosure suit under the principles of *res judicata*. *Turczak*, 2013 IL App (1st) 121964, ¶¶ 21-36. The *Turczak* decision, however, merely applied the well-settled law that foreclosure suits are *quasi in rem* proceedings, and thus "apply a legally distinct remedy" from *in personam* proceedings on a promissory note. *Id.* ¶ 33.

¶ 50 In this case, defendants did not assert the foreclosure proceedings in case number 11 CH 33151 as the basis for claiming *res judicata* or the related rule against claim splitting. Rather, the initial complaints for confession of judgment, as well as the subsequent complaints alleging breach of contract and fraudulent transfer, all arose out of the guaranties signed by defendants. *Turczak* is thus distinguishable from this case. Moreover, Countryside failed to allege due diligence in presenting this argument to the circuit court in the original action or in filing the section 2-1401 petition. *Turczak* was decided after the March 1, 2013, judgment, but merely applied already settled law. *Id.* There is no reason that Countryside could not have presented the same legal argument before March 1, 2013, or during the months between the dismissal and the filing of the section 2-1401 petition. Accordingly, we conclude the circuit court did not err in denying Countryside's section 2-1401 petition.

¶ 51 Sanctions

¶ 52 Lastly, defendants request that this court impose sanctions on Countryside pursuant to Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994), which provides:

"If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

or the manner of prosecuting or defending the appeal or other action is for such purpose, an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. An appeal or other action will be deemed to have been taken or prosecuted for an improper purpose where the primary purpose of the appeal or other action is to delay, harass, or cause needless expense." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

This court applies an objective standard to determine whether an appeal is frivolous, *i.e.*, whether the appeal would not have been brought in good faith by a reasonable, prudent attorney.

Parkway Bank & Trust Co. v. Korzen, 2013 IL App (1st) 130380, ¶ 87. Nevertheless, the imposition of Rule 375 sanctions is left entirely to the discretion of the reviewing court. *Id.* (citing *Kheirkhavash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011)).

¶ 53 Defendants contend that appeal number 14-0084 was frivolous, asserting that Countryside's brief failed to cite any authority related to section 2-1401 of the Code. Countryside's brief, however, did cite and discuss *Turczak*, which was the basis of the section 2-1401 petition. Although *Turczak* is distinguishable from this case, there is no indication that Countryside's analogy was not a good-faith argument for an extension of the law. Defendants also assert there was no good faith basis to reverse the denial of the section 2-1401 petition because it was essentially a second motion to reconsider. A section 2-1401 petition, however, necessarily seeks to vacate or reopen a final judgment.

¶ 54 Defendants also contend that appeal number 14-0187 was frivolous, arguing the appeal

had no chance of success where the circuit court had previously dismissed an identically-worded complaint with prejudice. Countryside's verified complaint in 12 L 10264 (formerly 12 L 5734), however, was dismissed based on the circuit court's finding regarding claim splitting.

Accordingly, Countryside filed the substantially identical amended complaint in 11 L 50876 and 11 L 50877, on the theory that the April 26, 2012, order vacating the judgments by confession was not a final judgment. The parties' appellate briefs address the finality of the April 26, 2012, order at some length. Given these circumstances, we conclude the amended complaint was not filed in bad faith and the appeal from the dismissal of the amended complaint was thus not filed in bad faith. Accordingly, in the exercise of our discretion, we decline to impose sanctions on Countryside in these consolidated appeals.

¶ 55

CONCLUSION

¶ 56 For all of the aforementioned reasons, the judgment of the circuit court is affirmed in appeal numbers 14-0087 and 14-0187.

¶ 57 Affirmed.