FIRST DIVISION
June 8, 2015

No. 1-14-2856
2015 IL App (1st) 142856-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAJPAT R. MADAN, REKHA M. MADAN, and LRM MANAGEMENT, INC.,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Cook County.
v.	)	
BMO HARRIS BANK NATIONAL ASSOCIATION, f/k/a HARRIS, N.A.,	)	No. 13 L 14187
Defendant-Appellee.	)	The Honorable Patrick J. Sherlock, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

Held: Trial court properly dismissed two counts of plaintiffs' complaint pursuant to section 2-619 of the Code as barred by the Illinois Credit Agreement; and trial court properly dismissed one count of plaintiffs' amended complaint pursuant to section 2-615 of the Code for failure to state a claim for breach of fiduciary duty.

¶ 1 Plaintiffs Lajpat R. Madan, Rekha M. Madan, and LRM Management, Inc. (plaintiffs) appeal from the dismissal of all three counts of their complaint against defendant BMO Harris Bank National (BMO). Plaintiffs filed their original complaint alleging (1) a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2012)), (2) breach of fiduciary duty, and (3) breaches of contract and the duty of good faith and fair dealing. The trial court dismissed with prejudice, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), counts I and III of the complaint. The trial court dismissed, without prejudice, count II of the complaint. Plaintiffs filed an amended complaint which repled count II of the complaint for breach of fiduciary duty. The trial court dismissed the amended complaint with prejudice pursuant to sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2012). On appeal, plaintiffs contend that counts I and III were not barred by the Illinois Credit Agreement Act (Act) (815 ILCS 160/0.01, *et seq*. (West 2012)), and that count II sufficiently pled a claim of breach of fiduciary duty. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On December 17, 2013, plaintiffs filed their original complaint against BMO. It stated that Lajpat Madan and Rekha Madan were married and the beneficiaries of ATG Trust Company Trust No. L006-127 (Trust). LRM Management, Inc. (LRM) was a corporation organized and existing under the laws of the State of Illinois. Plaintiffs alleged that in the summer of 2006, they took steps to purchase a shopping center in Schaumburg, Illinois. They further alleged that it was the intention of the parties that in connection with financing the purchase of the shopping center, BMO would loan funds solely to Rekha. The closing on the shopping center took place on November 16, 2006, with the shopping center being acquired by the Trust.

¶ 4 Plaintiffs alleged that without informing them, BMO brought documents to the closing listing Lajpat as a borrower, and that Lajpat was induced to signing the documents which made him personally liable for the loan at issue. Plaintiffs contended that after the closing, Lajpat informed BMO that he had signed the documents in error. On January 16, 2007, he signed a "Change in Terms of Agreement" form as the agent of LRM, which was the property manager of the shopping center.

¶ 5 On September 20, 2012, Colony BMO Funding LLC (Colony), to which BMO allegedly assigned the loan documents, filed a complaint for foreclosure against plaintiffs seeking possession and ownership of the shopping center, and seeking in excess of $3 million from Lajpat, Rekha, and the Trust. At the time of the current lawsuit, and at the time plaintiffs filed this appeal, this foreclosure case was still pending.

¶ 6 Count I of plaintiffs' complaint was for consumer fraud. Plaintiffs alleged that as the result of BMO's alleged misconduct in inducing Lajpat to sign the loan documents, liability was alleged against him in the foreclosure case. Plaintiffs argued that the wrongful conduct of BMO constituted unfair and deceptive acts and practices in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2012)). Plaintiffs asserted that Lajpat was entitled to recover "damages to be proved at trial," attorney fees, punitive damages, costs of the suit incurred, and any other relief determined by the trial court.

¶ 7 Count II of plaintiffs' complaint alleged breach of fiduciary duty. Plaintiffs claimed that while the shopping center was managed by Lajpat, doing business as LRM, BMO exerted dominating control and managerial discretion over Lajpat, Rekha, and the Trust, which resulted in a fiduciary duty to Lajpat, Rekha, and the Trust. Plaintiffs alleged that the managerial discretion of BMO over the shopping center included "dictating what tenants could be accepted

in the shopping center, and when they might be accepted, and what rental amounts they could be charged." Plaintiffs asserted that as a direct and proximate result of the "usurpation" of managerial control, they were forced into rejecting tenants that would have provided revenue, and would have enabled the promissory note to be repaid at the initial maturity date.

¶ 8 Count III of the complaint was for breaches of contract and the duty of good faith and fair dealing. Plaintiffs stated that Rekha and the Trust informed BMO in September and November of 2011 that they wanted the promissory note to be renewed and extended. Accordingly, no attempts were made with other institutions to refinance. Plaintiffs alleged that despite the communications about renewal, BMO failed to renew and extend the promissory note and thereby breached the agreements between the parties, as well as breached the implied duty of good faith and fair dealing that BMO owed to plaintiffs.

¶ 9 BMO filed a section 2-619.1 (735 ILCS 5/2-619.1 (West 2012)) motion to dismiss the complaint. BMO alleged, pursuant to section 2-619(a)(9) of the Code, which states that a complaint may be dismissed if it is barred by affirmative matter defeating the claim, that all three counts were barred by the Act. BMO asserted that the Act requires loan modifications of underlying credit agreements to be in writing and signed by both parties, and plaintiffs failed to provide any written evidence of any of the agreements alleged in their complaint.

¶ 10 BMO also argued that pursuant to section 2-615 of the Code, count II of plaintiffs' complaint should be dismissed with prejudice because they failed to allege facts that showed they had a fiduciary relationship with BMO, and failed to allege actual damages for the alleged breach.

¶ 11 A hearing was held on BMO's motion to dismiss on May 1, 2014. The trial court found that counts I and III should be dismissed with prejudice, as barred by the Act. The trial court

further found that count II should be dismissed without prejudice, as it failed to allege sufficient facts that would create a fiduciary duty. The trial court allowed plaintiffs time to replead count II.

¶ 12 On May 22, 2014, plaintiffs filed an amended complaint. In count II, plaintiffs argued that Lajpat had frequent communications with BMO employees who told Lajpat not to rent any portions of the shopping center at "cheap rents." Plaintiffs alleged that at least eight potential tenants would have provided additional income, but were rejected based on criteria established by BMO. Plaintiffs alleged that BMO asserted dominating control and managerial discretion over the shopping center by dictating what tenants could be accepted and when they might be accepted, and what rental amounts could be charged. Plaintiffs asserted that the wrongful conduct of BMO constituted a breach of its fiduciary duty, which resulted in damages to be proved at trial.

¶ 13 BMO filed a section 2-619.1 motion to dismiss the amended complaint. Pursuant to section 2-615 of the Code, BMO alleged that count II failed to plead sufficient facts to state a claim for breach of fiduciary duty by BMO. It argued that in order for a financial institution to be held to a fiduciary standard, the lending institution must be the alter ego of the customer, and plaintiffs did not allege facts establishing this. Pursuant to section 2-619(a)(9) of the Code, BMO contended that count II should also be dismissed because it violated the Act since plaintiffs relied on oral communications in an attempt to establish a fiduciary relationship.

¶ 14 On August 19, 2014, the trial court issued a written order dismissing count II of plaintiffs' complaint with prejudice. The trial court found that plaintiffs' allegation that BMO asserted dominion and control and managerial discretion over plaintiffs was a legal conclusion that must be fleshed out with facts sufficient to support a cause of action. The trial court noted that reading

the allegations most favorably to the plaintiffs, the best that they could possibly show was that BMO was "over-enthusiastic in monitoring the collateral." The court went on to state that "[n]ot a single fact is alleged showing that plaintiffs placed the high [] degree of trust and confidence in defendant that is necessary to establish a fiduciary relationship – or that plaintiffs placed any trust or confidence in [BMO] at all."

¶ 15 The trial court further stated that even if count II had stated a cause of action for breach of fiduciary duty, the Act would bar the claim, as it prohibits debtors from suing their lenders unless the suit is based on a written contract between the parties.

¶ 16 Plaintiffs now appeal the dismissal of counts I and III of their original complaint, as well as count II of their amended complaint.

¶ 17 ANALYSIS

¶ 18 Plaintiffs contend that the trial court erred in dismissing counts I and III of its original complaint, as well as count II of its amended complaint. BMO responds that the trial court properly dismissed all three counts with prejudice.

¶ 19 Counts I and III

¶ 20 Count I of plaintiffs' original complaint alleged that BMO committed consumer fraud by listing Lajpat as a borrower. Plaintiffs alleged that BMO had agreed that it would only list Rekha as the borrower. Plaintiffs alleged that BMO committed fraud when it listed both plaintiffs as the borrowers at the time of closing. The trial court dismissed count I of plaintiffs' original complaint pursuant to section 2-619(a)(9) of the Code, finding that the claim was barred by the Act. 735 ILCS 5/2-619(a)(9) (West 2012).

¶ 21 Under section 2-619(a)(9) of the Code, a complaint may be dismissed where "the claim asserted * * * is barred by other affirmative matter avoiding the legal effect of or defeating the

claim." 735 ILCS 5/2-619(a)(9) (West 2012). 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." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). When ruling on a motion to dismiss, all pleadings and supporting documents must be interpreted in the light most favorable to the nonmoving party. *Johnson v. Chicago Transit Authority*, 366 Ill. App. 3d 867, 869 (2006). A court should grant a motion to dismiss where the plaintiff can prove no set of facts that would support his cause of action. *Id*. Our standard of review is *de novo*. *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 349 (2006).

¶ 22 The Act defines a "credit agreement" as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1 (1) (West 2012). Section 2 of the Act states as follows:

> "A debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 2012).

¶ 23 Illinois courts have relied on the broad language of the Act in determining whether a credit agreement was entered into by the parties. *First National Bank in Staunton v. McBride Chevrolet, Inc*., 267 Ill. App. 3d 367, 372 (1994). There is no limitation as to the type of actions by a debtor which are barred by the Act, so long as the action in any way related to a credit agreement. *McBride*, 267 Ill. App. 3d at 372. The court in *McAloon v. Northwest Bancorp, Inc.*,

274 Ill. App. 3d 758, 765 (1995), found that "enforcing the Act as written causes harsh results for bank customers in some circumstances, but the Act is very broadly worded and dictates such a result." Therefore, "all actions which depend for their existence upon an oral credit agreement are barred by the Act." *McBride*, 267 Ill. App. 3d at 372.

¶ 24 In *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, ¶ 25, Hubbard Street Lofts claimed that they had an agreement with Inland Bank that the interest rate for a loan would be calculated at 8.000%. The agreement, however, was not in writing. *Id.* Because Hubbard Street Lofts could not show in writing that they had an agreement with Inland Bank to apply the 8.000% interest, the count was barred by the Act. *Id*.

¶ 25 Similarly here, plaintiffs claim that they had an agreement with BMO that only Rekha would be the borrower on the loan. However, this agreement was not in writing, and not signed by both parties. See 815 ILCS 160/2 (West 2004) (debtor may only maintain an action related to a credit agreement if the agreement is in writing and signed by both parties). Accordingly, plaintiffs' reliance on this purportedly oral agreement as the basis for count I of their complaint is precisely the situation the Act prohibits. If an oral agreement is made between a bank customer and the bank, and the bank for some reasons chooses not to honor the agreement, "the customer has no recourse in the law." *McBride*, 267 Ill. App. 3d at 373. "There is no justifiable reliance on an oral credit agreement as a matter of law in Illinois." *Id*. Accordingly, we find that the trial court properly dismissed count I of the complaint, as it was barred by the Act.

¶ 26 We also find that the trial court properly dismissed count III of the complaint, which alleged breaches of contract and the duty of good faith and fair dealing, pursuant to section 2-619(a)(9) of the Code as barred by the Act. In count III of their complaint, plaintiffs alleged that Rekha and the Trust informed BMO in both September 2011 and November 2011 that they

wanted the promissory note to be renewed and extended. Plaintiffs alleged that because of these requests, and because of the favorable response they received from BMO, they did not seek refinancing from any other institutions. Plaintiffs alleged that BMO nevertheless failed to renew and extend the promissory notes, and thereby breached a contractual agreement between the parties, as well as breached the implied duty of good faith and fair dealing that BMO owed to plaintiffs. Plaintiffs do not dispute that the note provided that the lender "may" renew or extend the loan.

¶ 27 As in the case of count I, plaintiffs are alleging that BMO and plaintiffs entered into an agreement, related to the original credit agreement, that was not in writing, nor signed by both parties. As discussed above, if an agreement is made between a bank customer and the bank, that is not written and signed by both parties, and the bank for some reasons chooses not to honor the agreement, "the customer has no recourse in the law." *McBride*, 267 Ill. App. 3d at 373. "There is no justifiable reliance on an oral credit agreement as a matter of law in Illinois." *Id*. Accordingly, we find that the Act barred plaintiffs' claim for breach of contract.

¶ 28 Plaintiffs claim for breach of implied faith and fair dealing is also barred by the Act for the same reasons. As a matter of law in Illinois, a duty of good faith and fair dealing is implied in every contract. *Saunders v. Michigan Avenue National Bank*, 278 Ill. App. 3d 307, 315 (1996). The duty requires a party vested with contractual discretion to exercise that discretion reasonable and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. *Teachers Insurance & Annuity Ass'n of America v. LaSalle National Bank*, 295 Ill. App. 3d 61, 73 (1998). However, it is undisputed that the written credit agreement did not require BMO to renew the loan. Nonetheless, plaintiffs argue that the foreclosure claim against them resulted in part from BMO's refusal to renew the loan after allegedly promising to

renew it. Because the alleged breach of a duty of good faith and fair dealing shows that it is based on the purported agreement to renew the loan, we find that this claim is barred as the purported agreement to renew the loan was not in writing, and not signed by both parties. *Id*. at 73-74. Accordingly, plaintiffs' claims for breach of contract and breach of the implied duty of good faith and fair dealing were properly dismissed pursuant to section 2-619(a)(9) of the Code.

¶ 29 Count II

¶ 30 Plaintiffs next contend that count II of their amended complaint, alleging breach of fiduciary duty, should not have been dismissed. The trial court dismissed this count pursuant to section 2-615 of the Code for failing to sufficiently allege a cause of action. 735 ILCS 5/2-615 (West 2012). A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether the complaint states a cause of action upon which relief can be granted. *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1037 (1998). The issue is one of law, and our review of a dismissal pursuant to section 2-615 is *de novo*. *Id*. In considering a section 2-615 motion, all well-pled facts in the complaint must be taken as true with all reasonable inferences drawn in favor of the pleader. *Id*. A complaint fails to state a cause of action if it does not contain factual allegations in support of each element of the claim that the plaintiff must prove in order to sustain a judgment. *Id*. Furthermore, a complaint may not rest on mere unsupported factual conclusions. *Id*.

¶ 31 In order to state a claim for breach of fiduciary duty, it must be alleged that a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused the injury of which the plaintiff complains. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 313 (2002). A fiduciary duty may arise as a matter of law from the existence of a particular relationship, such as an attorney-client or principal-agent relationship. *Id*. "A fiduciary

relationship and the attendant duties may also arise as the result of special circumstances of the parties' relationship, where one party places trust in another so that the latter gains superiority and influence over the former." *Id*. (citing *Ransom v. A.B. Dick Co*., 289 Ill. App. 3d 663, 672 (1997)). "When the relationship between the parties is not one that gives rise to a fiduciary relationship as a matter of law, the party asserting the existence of the relationship has the burden of establishing such by clear and convincing evidence." *Id*. The relevant factors in determining whether a fiduciary relationship exists include: the degree of kinship between the parties; the disparity in age, health, mental condition and education and business experience between the parties; and the extent to which the 'servient' party entrusted the handling of its business affairs to the 'dominant' party and placed trust and confidence in it. *Ransom*, 289 Ill. App. 3d at 673.

¶ 32 In count II of plaintiffs' amended complaint, plaintiffs alleged that Lajpat had frequent communications with BMO employees who told Lajpat not to rent any portions of the shopping center at "cheap rents." Plaintiffs alleged that at least eight potential tenants would have provided additional income, but were rejected based on criteria established by BMO. Plaintiffs further alleged that BMO asserting "dominating control" and "managerial discretion" over the shopping center by dictating what tenants could be accepted and when, and what rental amounts could be charged, resulted in a fiduciary relationship. There were no affidavits or exhibits submitted in connection with this count.

¶ 33 The trial court held, and we agree, that the facts alleged, when viewed in a light most favorable to plaintiffs, do not support a claim for breach of fiduciary duty. As the trial court noted, a fiduciary relationship does not exist between a debtor and a creditor as a matter of law. *Santa Claus Industries, Inc. v. First National Bank*, 216 Ill. App. 3d 231, 238 (1991). Accordingly, plaintiffs had the burden of establishing a fiduciary relationship based on the

degree of kinship between the parties; disparity in age, health, mental condition and education and business experience between the parties; and the extent to which the servient party entrusted the handling of its business affairs to the dominant party and placed trust and confidence in it. *Ransom*, 289 Ill. App. 3d at 673. While plaintiffs alleged that BMO asserted "dominating control" and "managerial discretion" over the shopping center by dictating which tenants could be accepted and what rental amounts could be charged, there is no indication that plaintiffs placed a high level of trust or confidence in BMO. Plaintiffs did not allege facts that would indicate BMO owed them a fiduciary duty. A complaint may not rest on mere unsupported factual conclusions. See *Grund*, 298 Ill. App. 3d at 1037. Moreover, the facts that plaintiffs allege to support the conclusion that BMO and plaintiffs were in a fiduciary relationship are the same facts that plaintiffs use to prove breach: that BMO dictated which tenants could be accepted and what rental amounts could be charged. Accordingly, we find that it was appropriate to dismiss plaintiffs' claim of breach of fiduciary duty pursuant to section 2-615 of the Code.

¶ 34 We are not persuaded by plaintiffs' reliance on a United States Bankruptcy Court case from the Central District of Illinois, *In re Heartland Chemicals, Inc*., 136 B.R. 503, 517 (C.D. 1992), which states that "[a]n exception to the general rule that a lending institution is under no fiduciary obligation to its borrower or to other creditors exists when the lending institution exerts dominion and control over its customers," and that a lending institution is held to a fiduciary standard "only when it usurps the customer's ability to make business decisions," as this case has no precedential value on this court. See *People v. Spahr*, 56 Ill. App. 3d 434, 438 (1978) (Illinois supreme court decisions are binding on all Illinois courts, but decisions of Federal courts

other than United States Supreme Court decisions concerning questions of Federal statutory and constitutional law are not binding on Illinois courts).

¶ 35 Even if *Heartland* were to apply to this case, we would nevertheless find that plaintiffs' allegations regarding fiduciary duty were inadequate. In *Heartland*, no fiduciary duty was found where the bank did not own any stock of the customer, did not place any of its employees as a director or officer of the customer, did not dictate which bills to pay, and did not run the day-to-day management. *Heartland*, 136 B.R. at 517. Similarly here, plaintiffs did not allege that BMO owned stock in their company, or dictated which bills to pay, or put its employees in superior positions, or even that BMO ran the day-to-day management of the shopping center. See also *Santa Claus Industries*, 216 Ill. App. 3d at 238-39 (customer failed to state a claim for breach of fiduciary duty despite argument that bank owned 20% of the customer's stock and directed the customer in its major business decisions). Here, the only facts relied on by plaintiffs to suggest BMO had "dominating control" and "managerial discretion" were that BMO advised plaintiffs on tenants and rent prices. These allegations do not sufficiently allege the existence of a fiduciary duty on the part of BMO, and we find that this count was properly dismissed pursuant to section 2-615 of the Code.

¶ 36 Having so found, we need not address whether the trial court properly dismissed this count in the alternative pursuant to section 2-619(a)(9) of the Code as barred by the Act. See *McNeil v. Carter*, 318 Ill. App. 3d 939, 944 (2001) (where this court affirms a dismissal, it need not address the viability of alternative grounds on which the trial court may have relied).

¶ 37 CONCLUSION

¶ 38 For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County.

¶ 39 Affirmed.