2016 IL App (1st) 141098-U

FIFTH DIVISION
June 10, 2016

No. 1-14-1098

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIDELITY NATIONAL TITLE INSURANCE COMPANY, Plaintiff-Appellee, v. HOME EQUITY TITLE SERVICES, INC., and HENRY KIELY, Defendants-Appellants.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 11 L 008747 Honorable Thomas R. Mulroy, Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.[*]
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

Held: The circuit court is affirmed where plaintiff's claims are not barred by *res judicata*, the prior proceeding did not satisfy plaintiff's claims, Henry Kiely's obligations were not discharged; defendants' liability was not limited to $10,000, and plaintiff's prove-up affidavits complied with Illinois Supreme Court Rule 191.

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[*] This case was recently reassigned to Justice Burke.

¶ 1 Defendants Home Equity Title Services, Inc. (Home Equity), and Henry Kiely (together, defendants) appeal from the circuit court's entry of judgment in favor of plaintiff, Fidelity National Title Insurance Company (Fidelity), and denial of defendants' motion to reconsider. Fidelity brought suit against Home Equity for breach of contract and against Kiely, the chief operating officer of Home Equity, for breach of a related personal guarantee. The parties filed cross-motions for summary judgment and the circuit court ruled in favor of Fidelity. On appeal, defendants argue that the trial court erred in denying their motion for summary judgment and erred in denying their motion to strike the prove-up affidavits submitted by plaintiff as noncompliant with Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013). We affirm.

¶ 2 I. BACKGROUND

¶ 3 On October 18, 2006, Fidelity and Home Equity executed an "issuing agency contract" (the agency agreement) in which Home Equity agreed to issue title insurance commitments and policies on behalf of Fidelity. Paragraph 8 of the agency agreement provided as follows:

> "LIABILITY OF AGENT: Agent [Home Equity] shall be liable to and agrees to indemnify and to save harmless Principal [Fidelity] for all attorneys' fees, court costs, administrative and other expenses and loss or aggregate of losses resulting from any one or more of the following:
>
> A. Errors or omissions in any commitment, policy, endorsement or other title insurance which were disclosed by the application, by the abstracting, examination or other work papers or which were known to Agent [Home Equity] or which, in the exercise of due diligence, should have been known to Agent [Home Equity]."

¶ 4 Additionally, attached to the agency agreement was a personal guarantee (the guarantee) signed by Kiely. Schedule D, which was attached to and incorporated by reference into the agency agreement, provided in relevant part:

> "each of the undersigned acknowledges that (s)he will personally benefit from said Agency Contract, and each of the undersigned jointly and severally does hereby personally and unconditionally undertake, guarantee, and assure the full, prompt and complete performance of all the terms, agreements, covenants, conditions and undertakings of Agent [Home Equity] as set forth in said Agency Contract."

¶ 5 In October 2006, JPMorgan Chase (Chase) sought to purchase from Fidelity a lender's policy of title insurance in the amount of $208,750 to insure the validity and priority of a refinancing mortgage sought by Rick A. and Laura G. Lowry for a parcel of property located at 536 South Avenue, in Aurora, Illinois (the property). As the insurance issuing agent for Fidelity, Home Equity performed a title search on the property in October 2006. The parties agree that the search revealed an unreleased mortgage on the property in favor of Valley Community Bank (Valley)[1] recorded on August 19, 2004 (the Valley mortgage). Home Equity issued a lender policy of title insurance to Chase dated November 30, 2006, for the property (the Chase policy), insuring the Chase mortgage as having a first lien interest in the property. However, the Chase policy failed to list the prior Valley mortgage as an exception from coverage and no release of the Valley mortgage was obtained. In March 2008, Fidelity and Home Equity executed a mutual termination of the agency agreement.

[1] The record reflects that Valley was subsequently closed and its assets were sold to First State Bank.

¶ 6 In December 2008, Valley filed a foreclosure action in Kane County, seeking to foreclose its mortgage on the property and alleging that its mortgage lien was superior to Chase's mortgage lien. Fidelity, pursuant to the Chase policy, was obligated to, and did, retain counsel to defend Chase in the Kane County litigation. Chase issued a document subpoena to Home Equity on April 15, 2010, which was served by certified mail on Kiely as the registered agent of Home Equity.

¶ 7 As part of the Kane County litigation, Chase filed a third party complaint on July 2, 2010, against Home Equity for breach of closing instructions (the foreclosure action and third party complaint will hereinafter be referred to as "the Kane County litigation"). Kiely, as registered agent of Home Equity, was served with the third party complaint. Home Equity never filed an appearance. Chase filed a motion for default judgment seeking an order of default against Home Equity based on its failure to appear and answer. The Kane County circuit court entered an order granting Chase's motion for a default judgment against Home Equity on October 19, 2010.

¶ 8 Chase and Valley's successor in interest, First State Bank, ultimately settled the lien priority dispute in the Kane County litigation. Fidelity, on behalf of Chase, paid First State Bank $60,000, in exchange for release of Valley's first position mortgage lien on the property and dismissal of the foreclosure action. On June 28, 2011, the circuit court in Kane County entered a stipulation and agreed order of dismissal in which it dismissed Valley's foreclosure action with prejudice pursuant to settlement. In addition, under the stipulation and agreed order, Chase voluntarily dismissed, without prejudice, its third party complaint against Home Equity.

¶ 9 Thereafter, Fidelity filed a two-count complaint against Home Equity and Kiely in Cook County circuit court on August 22, 2011. In count I, Fidelity alleged that Home Equity breached the agency agreement by issuing the Chase policy for the property without exception to Valley's

mortgage, which resulted in Fidelity expending $98,854.58, comprised of the $60,000 Fidelity paid to Valley as part of the mortgage lien settlement and $38,854.58 that Fidelity paid in attorney fees and costs in defending Chase in the Kane County litigation. In count II, Fidelity alleged that Kiely breached his guarantee obligations by failing to pay all amounts owed by Home Equity.

¶ 10 The parties filed cross-motions for summary judgment. Fidelity asserted that defendants admitted the Chase policy contained errors and omissions in failing to list the unreleased Valley mortgage and that the errors and omissions were disclosed in Home Equity's abstracting, examination, and work papers in issuing the Chase policy and were known to Home Equity. Fidelity asserted that Home Equity agreed to indemnify Fidelity in paragraph 8 of the agency contract for any errors or omissions in any policy it issued.

¶ 11 In defendants' motion for summary judgment, defendants acknowledged that Home Equity's title search revealed the prior unreleased mortgage and it issued the Chase policy without exception to Valley's unreleased mortgage. However, defendants argued that Fidelity's complaint was barred by *res judicata*, collateral estoppel, and claim splitting; that Fidelity's claim has been satisfied and discharged in the Kane County settlement; that Kiely's guarantee was discharged due to insufficient notice of the Kane County litigation, lack of consideration, and termination of the agency agreement; and that defendants' liability was limited to $10,000.

¶ 12 The circuit court issued a written opinion on November 4, 2013, denying defendant's motion and granting Fidelity's motion for summary judgment, and continuing the matter for a prove-up hearing regarding damages. Defendants filed a motion to strike the prove-up affidavits tendered by Fidelity. On January 23, 2014, the circuit court denied defendants' motion to strike the affidavits and entered judgment for Fidelity and against defendants in the amount of

$86,433.66. The trial court also denied defendant's motion to reconsider on March 17, 2014. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Standard of Review

¶ 15 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2–1005(c) (West 2010). In determining whether a genuine issue of material fact exists, this court construes the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review a circuit court's decision on a motion for summary judgment *de novo. Id.* In filing cross-motions for summary judgment, the parties agree that no material questions of fact exist and only questions of law remain, so that the court may decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment does not obligate a circuit court to render summary judgment in favor of either party. *Id.* ¶ 28.

¶ 16 This case also involves interpretation of various contract provisions. Generally, "the construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law" and is therefore subject to *de novo* review. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005). "Contract construction and interpretation are generally well suited to disposition by summary judgment." *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). Additionally, whether a claim is barred by *res judicata* constitutes a question of law, which is also reviewed *de novo* on appeal. *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 218 (2011).

¶ 17 B. *Res Judicata*

¶ 18 On appeal, defendants reiterate the argument advanced in their motion for summary judgment that Fidelity's claims are barred by *res judicata* based on the Kane County litigation.

¶ 19 "Under the doctrine of *res judicata,* the judgment in the first suit is conclusive not only on the matters actually decided but also on all issues that could have been decided during that suit." *Bagnola v. SmithKline Beecham Clinical Laboratories,* 333 Ill. App. 3d 711, 717 (2002). "The doctrine of *res judicata* or estoppel by judgment applies when the following three criteria are satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Bagnola v. SmithKline Beecham Clinical Laboratories,* 333 Ill. App. 3d 711, 717 (2002) (quoting *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 302 (1998)). The party relying on *res judicata* bears the burden of establishing its applicability. *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.,* 189 Ill. App. 3d 638, 650 (1989).

¶ 20 i. Final Judgment on the Merits

¶ 21 Defendants argue that two orders from the Kane County litigation constitute final adjudications which bar Fidelity's current complaint: (1) the default judgment entered on October 19, 2010, regarding Chase's third party complaint against Home Equity, and (2) the June 28, 2011, stipulation and order to dismiss.

¶ 22 We first address the October 19, 2010, Kane County order. The order provided: "[i]t is hereby ordered that JPMorgan Chase Bank's motion for default judgment against Home Equity Title Services, Inc., is granted."

¶ 23 Our supreme court has stated that "default judgments are always *res judicata* on the ultimate claim or demand presented in the complaint." *Housing Authority for La Salle County v. YMCA of Ottawa,* 101 Ill. 2d 246, 254 (1984). However, "[t]he entry of a default does not

constitute a judgment; rather, it is an order precluding the defaulting party from making any further defenses regarding liability. It is simply 'an interlocutory order that in itself determines no rights or remedies.' " *Wilson v. TelOptic Cable Construction Company, Inc.*, 314 Ill. App. 3d 107, 111 (2000) (quoting 46 Am.Jur.2*d Judgments* § 266 (1994)).

> "The default judgment is the act that terminates the litigation and decides the dispute. 46 Am.Jur.2d *Judgments* § 266 (1994). It is final if it grants the plaintiff relief and either resolves the case entirely or is final as to one party or cause of action and is certified in accord with the requirements of Supreme Court Rule 304(a). [Citations.] Moreover, a default judgment comprises two factors: (1) a finding of the issues for the plaintiff; and (2) an assessment of damages." *Wilson*, 314 Ill. App. 3d at 111-12 (quoting *Trobiani v. Racienda*, 95 Ill. App. 2d 228, 234 (1968)).

¶ 24 "A judgment is final if it terminates the litigation on the merits of the case and determines the rights of the parties so that if affirmed the trial court has only to proceed with the execution of the judgment. [Citation.] A judgment is not final if the court retains jurisdiction for future determination of a substantial controversy." *Allabastro v. Wheaton National Bank*, 91 Ill. App. 3d 222, 224 (1980).

The order granting Chase's motion for an order of default against Home Equity in the Kane County litigation did not constitute a final judgment on the merits. It did not terminate the litigation and decide the dispute. *Wilson*, 314 Ill. App. 3d at 111-12. Chase filed the motion for "an order of default" against Home Equity pursuant to section 2-1301(d) of the Code of Civil Procedure (735 ILCS 5/2-1301(d) (West 2010)), based on Home Equity's failure to file an appearance or answer in response to Chase's third party complaint. Section 2-1301(d) provides

that a "[j]udgment by default may be entered for want of an appearance, or for failure to plead ***." 735 ILCS 5/2-1301(d) (West 2010). The October 19, 2010, order simply granted Chase's motion for an order of default against Home Equity. The order did not resolve the entire litigation, nor did it contain a Rule 304(a) finding. Significantly, the order did not address or determine the issue of damages. Home Equity could have moved to set aside the default, as section 2-1301(e) provides that the court "may in its discretion, before final order or judgment, set aside any default ***." 735 ILCS 5/2-1301(e) (West 2010). Turning next to the June 28, 2011, stipulation and order of dismissal, we similarly conclude that this did not constitute a final judgment on the merits. The order provided:

"STIPULATION AND ORDER TO DISMISS

All matters in dispute between First State Bank, Rick A. Lowry, Laura G. Lowry, and JPMorgan Chase Bank having been satisfactorily compromised and settled:

It is stipulated and agreed between said parties, by their respective attorneys, that First State Banks' Amended Complaint may be dismissed without cost to any party, all costs having been paid.

***

It is further stipulated and agreed that said dismissal shall be a bar to the bringing of any action based on or including the claims in the First Amended Complaint.

***

It is further stipulated by JPMorgan Chase Bank that it is voluntarily dismissing without prejudice its third party complaint against Home Equity Title Services, Inc., which has not appeared.

Wherefore, the parties request this court to enter an order dismissing this case with prejudice, with the Court retaining jurisdiction to enforce the parties' settlement.

***

ORDER

It is ordered: First State Bank's Amended Complaint is dismissed with prejudice. JPMorgan's Third Party Complaint against Home Equity Title Services is dismissed without prejudice and without costs. *** This court retains jurisdiction to enforce the parties' settlement agreement."

¶ 25 The foreclosure action in Kane County was resolved through a settlement by the parties; the June 28, 2011, stipulation and order to dismiss was entered to that effect. The settlement occurred between Chase and Valley's successor, First State Bank, wherein First State Bank was paid $60,000 in exchange for releasing its first position mortgage lien on the property and dismissing the foreclosure action.

¶ 26 This court has previously noted that

"there is a split of authority on the question of whether a dismissal with prejudice pursuant to a settlement agreement operates as a final judgment on the merits. See *Jackson v. Callan Publishing, Inc.*, 356 Ill. App. 3d 326, 340 (2005) (noting split of authority). However, we agree with the cases that find that the dismissal does not operate as a final judgment on the merits for

> purposes of *res judicata,* because 'an agreed order is not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties.' *Kandalepas v. Economou,* 269 Ill. App. 3d 245, 252 (1994)." *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011)

¶ 27 Accordingly, when the Kane court dismissed the foreclosure action between First State Bank and Chase with prejudice pursuant to a settlement agreement, the dismissal did not operate as a final judgment for our purposes in the present case as to Fidelity's complaint against Home Equity and Kiely. *Id.*

¶ 28 In addition, it is significant that the stipulation and order to dismiss specifically provided that Chase's third party complaint was voluntarily dismissed without prejudice. As such, the June 28, 2011, order did not constitute a final judgment as to Chase's third party claim. See *Domingo v. Guarino*, 402 Ill. App. 3d 690, 698 (2010) ("Because counts II and III were dismissed without prejudice, there was no final adjudication on the merits of those counts. Without a final adjudication on the merits, the trial court correctly determined that *** *res judicata* is not triggered.") Notably, our supreme court has stated that "the use of 'without prejudice' language is not sufficient to protect a plaintiff against the bar of *res judicata* when another part of plaintiff's case has reached final judgment in a previous action." *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 155 (2010). This rule is inapplicable here because it is not the case that "another part of plaintiff's case has reached final judgment in a previous action." *Id.* Chase is not attempting to pursue part of its claims in the current case and it never previously reached a final judgment. Further, Fidelity's claims were not part of any previous action. Accordingly, no final judgment was ever entered in the Kane County litigation which would operate to bar Fidelity's current proceedings.

¶ 29 ii. Identity of Causes of Action

¶ 30 Next, defendants contend that an identity of causes of action exists between the Kane County litigation and the present case because the Chase policy was the sole basis for Chase and Fidelity's involvement in the Kane County litigation and it is also the basis upon which Fidelity seeks to hold Home Equity and Kiely liable for the Kane County litigation expenses here.

¶ 31 To determine whether there is an identity of causes of action for purposes of *res judicata*, Illinois courts apply the "transactional test." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310-11 (1998); *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009). Under this test, separate claims are considered the same cause of action for purposes of *res judicata* if they arise from a common core of operative facts, even if they assert different theories of relief or there is no substantial overlap in evidence. *Goodman*, 408 Ill. App. 3d at 300; *River Park*, 184 Ill. 2d at 311. What constitutes a "transaction" is determined pragmatically: courts should weigh whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether treating them as one would conform to the parties' expectations. *River Park*, 184 Ill. 2d at 312.

¶ 32 We find no identity of causes of action here. Although related, the foreclosure action did not arise from the same common core of operative facts as Fidelity's claims in the present case. *Goodman*, 408 Ill. App. 3d at 300. The agency agreement, guarantee, and Chase policy were not related in time, space, origin, or motivation with regard to Valley's mortgage and foreclosure action. *River Park*, 184 Ill. 2d at 312. Valley's foreclosure action involved a separate and unrelated mortgage transaction, *i.e.*, its mortgage recorded on the property in 2004. It instituted the foreclosure on this mortgage in 2008. With regard to Fidelity's causes of action for breach of contract, the Chase policy and the agency agreement and guarantee were all created in 2006.

Although defendants argue that Fidelity hired counsel to defend Chase in Valley's foreclosure action and it paid the settlement amount and attorney fees, Fidelity did so in fulfillment of its contractual obligation to Chase under the Chase policy. Otherwise, Fidelity was not a defendant in the foreclosure action and had no interests involved in it. Similarly, Home Equity and Kiely were not defendants in the foreclosure action and had no interests involved in it or in the property subject to Valley's mortgage. At issue in Valley's foreclosure action was its own unfulfilled mortgage and the priority of its mortgage compared to Chase's mortgage. In contrast, Fidelity's causes of action alleged that Home Equity breached the agency agreement in issuing the Chase policy, and Kiely breached the guarantee in failing to fulfill all of Home Equity's obligations. Fidelity is not seeking to relitigate the issue of mortgage lien priority. It had no ascertainable damages until the prior Kane County litigation was resolved and resulted in a settlement amount and attorney fees. It is also not seeking to relitigate the amount of the settlement or the attorney fees.

¶ 33 With respect to Chase's third party complaint in the Kane County litigation, we also conclude that there is no identity of causes of action. Chase alleged that, in closing the refinancing mortgage transaction between Chase and the Lowrys, Home Equity breached the closing instructions. As such, Chase's third party complaint did not arise from the same common core of operative facts as Fidelity's causes of action in the present case, which allege breach of the agency agreement and guarantee. Fidelity and Kiely were not parties to the closing instructions. The agency agreement and guarantee were not issued at the same time as the closing instructions. Moreover, the closing instructions originated from Chase to Home Equity, whereas the agency agreement and guarantee involved Fidelity, Home Equity, and Kiely. The agency agreement, guarantee, and the Chase policy did not have any bearing on the closing instructions

and were not necessary to prove Chase's breach of closing instructions claim against Home Equity.

¶ 34 As argued by Fidelity, while there is some overlap in the evidence here, the operative facts overall span different time periods, were for different purposes, involved different parties, and had different origins. Accordingly, because the facts underlying the instant claims and those in the Kane County litigation do not arise from the same core of operative facts, we find no identity of causes of action here. *River Park*, 184 Ill. 2d at 311.

¶ 35 iii. Privity

¶ 36 Turning to the third prong of *res judicata*, defendants assert that Chase, Fidelity, and Home Equity are parties in privity pursuant to the Chase policy.[2]

¶ 37 "In order to be bound by a prior judgment in an action where it was not a party, the party in the subsequent lawsuit must have been in privity with one of the parties in the prior lawsuit." *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 220 (2011). "[P]rivity exists between a party to the prior suit and a nonparty when the party to the prior suit 'adequately represent[ed] the same legal interests of the nonparty." *Id.* (quoting *Progressive*, 151 Ill. 2d at 296). "A nonparty may be bound pursuant to privity if his interests are so closely aligned to those of a party that the party is the virtual representative of the nonparty." (Internal quotation marks omitted.) *Oshana v. FCL Builders, Inc*., 2013 IL App (1st) 120851, ¶ 23 (quoting *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 513 (2010)). Whether privity exists depends on the circumstances of each case. *Oshana*, 2013 IL App (1st) 120851, ¶ 23.

[2] We note that, on appeal, Fidelity argues that defendants waived the issue of whether there was privity between Fidelity and Valley. However, defendants do not actually make this argument on appeal and therefore waiver is not at issue.

¶ 38 The relevant inquiry in this case is whether Fidelity's legal interests were adequately represented in the Kane County litigation. We conclude that they were not. Fidelity's legal interests in the case at bar include obtaining compensation from Home Equity and Kiely for the damages it incurred in paying for Chase's legal fees and the settlement amount to Valley. Fidelity's causes of action are based on Home Equity's breach of the agency agreement in issuing the Chase policy and Kiely's breach of the related personal guarantee. Chase had no interest in pursuing these interests on behalf of Fidelity. Chase's interest in the Kane County litigation included protecting its mortgage lien on the property from Valley's first priority mortgage lien and obtaining relief for Home Equity's alleged breach of the closing instructions. In addition, there certainly is no privity between Fidelity here and Home Equity in the Kane County litigation. Home Equity's interests as a third party defendant in the Kane County litigation included defending itself from Chase's allegations that it breached the closing instructions, which do not align with Fidelity's interests in this case, and, obviously, Home Equity is a defendant in Fidelity's current action.

¶ 39 Although defendants rely on the fact that under the Chase policy, Fidelity was obligated to pay the settlement amount between Chase and Valley and provide counsel for Chase, this did not give rise to privity between Fidelity and Chase or ensure that Fidelity's interests were represented or protected in the Kane County litigation. For example, the fact that an insurer hires counsel to represent an insured in the prior action does not transform the insurer into a "real party in interest." *Earl v. Thompson*, 128 Ill. App. 2d 32, 37 (1970) ("While it may be true that the attorney who represented defendants in the injury action had been retained by La Salle Casualty, it is a non sequitur to conclude, as plaintiff does, that La Salle Casualty was thus the 'real party in interest' in both suits.") See also *Mount Mansfield Insurance Group, Inc. v. American*

International Group, Inc., 372 Ill. App. 3d 388, 394-95 (2007) (rejecting the argument that "merely coordinating information with counsel in an effort to protect Mount Mansfield's interests would establish privity.")

¶ 40 Having found that there was no final judgment on the merits, no identity of causes of action, and no privity between the relevant parties, we conclude that Fidelity's causes of action in the current case are not barred by *res judicata*.

¶ 41 C. Claim Splitting

¶ 42 Related to its *res judicata* argument, defendants argue that Fidelity's action in this case is barred by Illinois' rule against claim splitting.

¶ 43 Under the doctrine of claim splitting, a plaintiff cannot "sue for part of a claim in one action and then sue for the remainder in another action. [Citation.] Instead, a plaintiff must assert all the grounds of recovery he or she may have against the defendant arising from a single cause of action in one lawsuit." *Green,* 401 Ill. App. 3d at 154-56. "In other words, a plaintiff 'who splits his claims by voluntarily dismissing and refiling part of an action *after a final judgment has been entered on another part of the case* subjects himself to a *res judicata* defense.' " (Emphasis added in original.) *Domingo,* 402 Ill. App. 3d at 698 (quoting *Hudson v. City of Chicago,* 228 Ill. 2d 462, 473 (2008)).

¶ 44 Defendants' argument relies on its assertion that Chase and Fidelity are in privity based on the Chase policy. However, as stated, *supra,* we have already rejected this argument. Moreover, we conclude that the doctrine of claim splitting does not apply here. The plaintiffs are different in the Kane County litigation and here. Chase filed the third party complaint against Home Equity for breach of closing instructions in the Kane County litigation. In the present case, Fidelity filed its complaint for breach of the agency agreement and guarantee against Home Equity and Kiely. Fidelity was not a plaintiff or a party in the prior action in Kane County, and

Chase is not a plaintiff in the instant case. Thus, Chase did not raise some of its claims in the Kane County litigation or voluntarily dismiss some of its claims, only to then pursue the remainder in the case at bar. Moreover, Chase could not have pursued Fidelity's claims in the Kane County litigation as it would have lacked standing to do so. Similarly, Fidelity did not pursue *any* claims in the Kane County litigation and it was not a party to the litigation. Accordingly, claim splitting does not apply here, where different plaintiffs are filing separate actions based on distinct grounds.

¶ 45 Moreover, even assuming that there was privity between Chase and Fidelity, we would still conclude that Fidelity's claims are not prohibited by claim splitting. The June 28, 2011, order dismissed Chase's third party complaint voluntarily and without prejudice, which "signals the trial court's intent to allow a plaintiff to refile an action." *Domingo*, 402 Ill. App. 3d at 698 (citing *DeLuna v. Treister*, 185 Ill. 2d 565, 576 (1999)). As previously discussed, neither the voluntary dismissal without prejudice of Chase's third party complaint nor the order of default constituted an adjudication on the merits. Accordingly, "[w]ithout a final adjudication on the merits," claim-splitting concerns were not present here, and therefore "*res judicata* is not triggered." *Id.*

¶ 46 D. Collateral Estoppel

¶ 47 We note that in their opening brief, defendants briefly assert that the doctrine of collateral estoppel or "estoppel by verdict" applies here. Fidelity asserts that this argument has been waived because defendants failed to fully address this issue below and on appeal. Although defendants did raise collateral estoppel in the trial court, defendants merely refer in their opening brief on appeal to the doctrine of collateral estoppel, but their citations to law and their analysis

thereafter refers only to *res judicata*. It is not until their reply brief that defendants respond to Fidelity's argument and address collateral estoppel.

¶ 48 We find that this issue has been forfeited. When a party fails to adequately develop an argument on appeal with proper citation to authority and legal reasoning, it is forfeited for appellate review. *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 54 (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)); *Lake County Grading Co. v. Village of Antioch*, 2014 IL 115805, ¶¶ 35–36). In addition, " '[p]oints not argued [in the opening brief] are waived and shall not be raised in the reply brief ***.' " *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶ 56 (citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). "Issues not presented to or considered by the trial court are waived [forfeited] on appeal [citation], and appellate contentions which are not supported by legal reasoning, citation to authority and citation to the pertinent pages of record are waived [forfeited] on appeal and shall not be raised in a reply brief or a petition for rehearing." *Board of Managers of Eleventh Street Loftominium Association v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 188 (2007).

¶ 49 Even if we were to find that defendants had not forfeited this issue, we would nevertheless conclude that collateral estoppel does not apply. "Collateral estoppel has a more limited preclusive effect" than the estoppel by judgment form of *res judicata*. *Bagnola v. SmithKline Beecham Clinical Laboratories*, 333 Ill. App. 3d 711, 717 (2002). It is applied where "the issue decided in the prior adjudication is identical with the issue in the current action, there was a final judgment on the merits in the prior adjudication and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." *Id*. The earlier judgment " 'operates as an estoppel only as to the point or question *actually litigated* and determined and not as to other matters which might have been litigated and determined.' "

(Emphasis in original.) *Housing Authority for La Salle City*, 101 Ill. 2d at 252 (1984) (quoting *Charles E. Harding Co. v. Harding*, 352 Ill. 417, 427 (1933)).

¶ 50 As previously discussed in our *res judicata* analysis, neither the order of default entered as to Chase's third party complaint or the stipulation and order to dismiss entered as part of the foreclosure settlement constituted final judgments on the merits with respect to the instant case. As we also previously held, Chase and Fidelity were not in privity. Further, the Kane County litigation clearly did not involve identical issues to the present case. As discussed, Chase's third party complaint alleged that Home Equity breached the closing instructions, and Valley's foreclosure action involved the priority of mortgage liens. In contrast, Fidelity's complaint alleged breach of the agency agreement by Home Equity and breach of the guarantee by Kiely. Thus, the issues were not identical and the same question was not actually litigated in both cases. *Bagnola*, 333 Ill. App. 3d at 717.

¶ 51 E. Fidelity's Causes of Action Have Not Been Satisfied of Record

¶ 52 Next, defendants contend that both counts of Fidelity's complaint were satisfied in the Kane County litigation. In support, defendants cite case law regarding *res judicata* and the principle that a guarantor's liability is limited by and is no greater than that of the principal debtor.

¶ 53 As the circuit court correctly determined, and as stated previously, no final judgment on the merits was ever entered against Home Equity or Kiely in the Kane County litigation. The foreclosure action, which did not involve Home Equity or Kiely, was settled and dismissed with prejudice. It merely resolved the issue of releasing Valley's mortgage. Chase's breach of closing instructions action against Home Equity was dismissed without prejudice. Neither of these orders determined Home Equity's and Kiely's liability in the present case with respect to Fidelity's

claims regarding breach of the agency agreement and guarantee. It is evident that Fidelity's payment of $60,000 on behalf of Chase in settlement of the mortgage lien priority dispute with Valley did not somehow "satisfy" Fidelity's own claims against Home Equity and Kiely in the present case. Indeed, not only were Fidelity's claims not satisfied by the Kane County litigation, it was Fidelity's payment of the $60,000 and the associated attorney fees which gave rise to the damages incurred by Fidelity related to its claims in the present case. We therefore reject defendants' argument that Fidelity's claims against Home Equity and Kiely were satisfied in the Kane County litigation.

¶ 54 F. Kiely's Obligations Under the Guarantee Have Not Been Discharged

¶ 55 Defendants advance two different theories on appeal in arguing that Kiely's obligations under the guarantee have been discharged. First, defendants assert that Fidelity's actions in the Kane County litigation and the lack of notice regarding the litigation discharged Kiely's obligations under the guarantee. Defendants argue that Fidelity conducted the Kane County litigation without Home Equity's or Kiely's knowledge or participation until Kiely, as registered agent of Home Equity, was informed of it on April 21, 2010, when Chase served it with a subpoena. Defendants contend that the "path of litigation was essentially concluded" at that point and defendants did not have the opportunity to defend or limit their liability. Defendants argue that Fidelity never obtained their consent to the settlement or the dismissal and that Fidelity should have made a demand upon Home Equity under the Chase policy.

¶ 56 In examining the agency agreement and guarantee, we construe them according to the principles governing contract interpretation. *JPMorgan Chase Bank, N.A. v. E.-W. Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 33. We give effect to the clear and unambiguous terms as written, and construe a guarantee "strictly in favor of the guarantor, but only where some doubt

has arisen as to the meaning of the guaranty language." *Id.* The primary objective is to give effect to the intent of the parties at the time they entered into the agreement, based on the language set forth in the contract. *Monroe Dearborn Limited Partnership v. Board of Education*, 271 Ill. App. 3d 457, 462 (1995).

¶ 57 "A guarantor will be discharged *pro tanto* of his obligation where, without the consent of the guarantor, the creditor takes any action to vary the terms of the principal obligation, to increase the guarantor's risk or to deprive the guarantor of the opportunity to protect himself." *JPMorgan Chase Bank, N.A. v. E.-W. Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 33. On the other hand, "[t]he rule discharging a guarantor upon a material alteration in the underlying obligation has no application where the guarantor has knowledge of and impliedly consents to such change." *Alton Banking & Trust Co. v. Sweeney*, 135 Ill. App. 3d 96, 103 (1985).

¶ 58 The circuit court determined, and defendants do not dispute, that Kiely and Home Equity were apprised of the Kane County action on approximately April 21, 2010, when Kiely, as agent of Home Equity, was served with a subpoena. Chase filed its third party complaint on July 2, 2010. The court also determined that Kiely and his attorney were in contact with Chase's counsel between August 24, 2010, and June 27, 2011, to discuss the litigation and Home Equity's possible contribution toward a settlement. Based on these facts, the circuit court found no basis for discharging Kiely's obligations under the guarantee as no judgment was entered against defendants, Home Equity elected not to appear or defend itself, and the third party complaint was dismissed without prejudice.

¶ 59 On appeal, defendants have offered nothing to substantiate their assertion that they were informed of the Kane County litigation after "the die was cast and the path of litigation was essentially concluded." We agree with the trial court that Home Equity and Kiely were informed

early enough in the litigation to protect their interests, had they chosen to do so. Notably, even after being informed of the litigation via the subpoena and being sued as a third party defendant, Home Equity elected not to answer Chase's third party complaint, leading Chase to seek an order of default against it. And, in any event, the third party complaint was eventually dismissed without prejudice. The stipulation and order to dismiss was not entered until June 28, 2011, which was more than one year after Kiely and Home Equity learned of the proceedings, and almost one year after Chase filed its complaint against Home Equity. Additionally, defendants do not dispute that Kiely was involved in discussions with Chase's counsel about the Kane County litigation starting nearly one year before the stipulation and order of dismissal was entered pursuant to the settlement. Moreover, defendants fail to establish that either Home Equity or Kiely were entitled to some form of notice or demand with respect to Valley's foreclosure action, given that they were not parties to it.

¶ 60 In addition, defendants have failed to show how Fidelity's actions varied the terms of Kiely's obligations under the guaranty such that they increased his risk or otherwise deprived him of an opportunity to protect himself. *JPMorgan Chase Bank,* 2014 IL App (1st) 121111, ¶ 33. As Fidelity points out on appeal, the agency agreement and guarantee did not require Fidelity to obtain Home Equity's or Kiely's consent to any settlement or relieve them of liability in the event of a settlement. In providing counsel to Chase in the Kane County litigation and paying $60,000 to release Valley's first priority mortgage lien on the property, Fidelity's actions benefited Chase and protected Chase's mortgage on the property; they did not alter the terms or increase the risks undertaken in the agency agreement or guarantee. If anything, Kiely's exposure was likely limited by the $60,000 settlement, considering that the error in the Chase policy issued by Home Equity led to Valley's mortgage lien having priority over Chase's $208,750

mortgage lien. Accordingly, there is no basis upon which to discharge Kiely of his obligation as guarantor. *Id.*

¶ 61 Defendants also assert that Kiely was discharged from any obligations under the guarantee due to the mutual termination of the agency agreement by Home Equity and Fidelity. Defendants assert the termination materially altered the risks Kiely undertook in the guarantee.

¶ 62 "It is fundamental that a guarantor is not liable for anything that was not agreed to, and, if the creditor and debtor-principal have entered into an agreement materially different from that contemplated by the instrument of guaranty, the guarantor shall be released." *Alton Banking & Trust Co. v. Sweeney*, 135 Ill. App. 3d 96, 101-02 (1985). Barring a material change in the business dealings between a debtor-principal and creditor-guarantee and a corresponding increase in risk to the guarantor, however, "the obligation of the guarantor is not discharged." *Id.*

¶ 63 Here, the breach of the agency agreement occurred on November 30, 2006, when Home Equity issued the Chase policy containing errors and omissions. Fidelity and Home Equity executed the mutual termination of the agency agreement approximately one and a half years later, on March 27, 2008, with the termination effective on May 31, 2008. The trial court found that the termination would discharge any obligations which were still executory on both sides, but that "any right based on prior breach or performance survives," citing the Uniform Commercial Code-Sales. See 810 ILCS 5/2-106(3) (West 2008). The circuit court held that Kiely's liability as guarantor for the 2006 breach survived the 2008 mutual termination.

¶ 64 Although we disagree that the Uniform Commercial Code is applicable here as the contracts at issue did not involve the sale of goods (see 810 ILCS 5/2-102 (West 2008)), the court's holding nevertheless comports with the terms of the parties' agreements. Defendants do not dispute that the agency agreement contained a termination clause in paragraph 9. In section A

of paragraph 9, it provided for thirty days written notice for termination or, in the case of a material breach, for immediate termination. Additionally, paragraph 9(B) provided that, in the event of termination, "the obligations to make any payments including without limitation the Agent's liability for loss under Paragraph 8 herein, to provide notification as to claims and to provide access to records and files shall continue beyond the date of termination." As noted, paragraph 8(B) provided that Home Equity

> "shall be liable to and agrees to indemnify and to save harmless Principal [Fidelity] for all attorneys' fees, court costs, administrative and other expenses and loss or aggregate of losses resulting from *** Errors or omissions in any commitment, policy, endorsement or other title insurance which were disclosed by the application, by the abstracting, examination or other work papers or which were known to Agent [Home Equity] or which, in the exercise of due diligence, should have been known to Agent [Home Equity]."

¶ 65 Thus, paragraphs 9(B) and 8(B) made clear that, in the event the agency agreement was terminated, Home Equity would still be liable to Fidelity for losses which fall within the parameters of paragraph 8. Here, this includes Home Equity's issuing of the Chase policy without exception for Valley's prior mortgage lien.

¶ 66 In signing the guarantee, Kiely was aware of and beholden to the terms set forth in paragraph 9, which included the fact that Home Equity's liability for losses under paragraph 8 would continue after termination of the agency agreement. As such, he cannot claim that he is unexpectedly being held to different terms than to which he initially agreed. The fact that the mutual termination ended the continuing business relationship between Fidelity and Home Equity did not increase the risks Kiely undertook in signing the personal guarantee as it relates to

the claims in this case. Although Kiely did not agree to the mutual termination, nothing in the agency agreement or the guarantee required that Kiely consent to it.

¶ 67 G. Fidelity's Recovery is Not Limited to $10,000

¶ 68 In their next claim, defendants argue that the maximum amount for which Home Equity is liable under the terms of the agency agreement is $10,000. Defendants rely on paragraph G of Schedule A of the agency agreement:

> "G. General Liability of Agent: Subject to the provisions of Paragraph 8, Agent shall be liable for the first $10,000.00 of any Loss sustained or incurred by Principal as a result of the issuance of the Title Assurances by Agent."

¶ 69 The circuit court determined that, under the plain language of the agency agreement, the $10,000 limitation was, in turn, limited by paragraph 8. The circuit court also found that defendants admitted there were errors or omissions in the Chase policy which had been disclosed during Home Equity's abstracting examination and work papers and were known to Home Equity. As such, the circuit court held that paragraph 8 applied and defendants were liable for the $60,000 that Fidelity paid to Valley and for the attorney fees paid by Fidelity for Chase's defense.

¶ 70 We agree with the circuit court's interpretation of paragraphs 8 and G. According to the plain language of the agency agreement, the $10,000 limitation contained in paragraph G is constrained by paragraph 8. Paragraph G specifically provides that it is "[s]ubject to the provisions of Paragraph 8 ***." As stated, paragraph 8 specifies that Home Equity "shall be liable to and agrees to indemnify and to save harmless [Fidelity] for all attorneys' fees, *** and loss or aggregate loss resulting from *** [e]rrors or omissions in any commitment, policy, endorsement or other title assurance which were disclosed *** by the abstracting, examination or

other work papers or which were known to [Home Equity] ***." Defendants admitted that the Chase policy contained errors or omissions with regard to the prior unreleased mortgage, which was disclosed during Home Equity's in abstracting and work papers. As such, paragraph 8 applies and defendants are liable to Fidelity for the $60,000 paid as part of settlement with Valley Bank and the attorney fees.

¶ 71 H. Defendants' Motion to Strike the Affidavits

¶ 72 In their final contention on appeal, defendants argue that the circuit court erred in denying their motion to strike Fidelity's prove-up affidavits for failure to comply with Illinois Supreme Court Rule 191. Following the circuit court's order granting summary judgment for Fidelity and denying defendants' motion for summary judgment, the court set the matter for a prove-up hearing regarding damages and attorney fees. Fidelity submitted affidavits from Jonathan Gass and J. Michael Williams dated December 16, 2013, on the subject of damages and attorney fees. Defendants filed a motion to strike the affidavits for failure to comply with Rule 191, but the circuit court denied defendants' motion and entered judgment for Fidelity against defendants in the amount of $86,433.66.

¶ 73 "[W]hen the trial court rules on a motion to strike a Rule 191 affidavit in conjunction with a summary judgment motion, we review *de novo* the trial court's ruling on the motion to strike." *Jackson v. Graham*, 323 Ill. App. 3d 766, 774 (2001).

¶ 74 Rule 191 requires that affidavits submitted in support of a motion for summary judgment:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible

> in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 75 "Accordingly, a Rule 191(a) affidavit must not contain mere conclusions and must include the facts upon which the affiant relied." *US Bank, N. A. v. Avdic*, 2014 IL App (1st) 12175910, ¶ 22. " '[W]hen only portions of an affidavit are improper under Rule 191(a), a trial court should only strike the improper portions of the affidavit.' " *Id.* (quoting *Roe v. Jewish Children's Bureau of Chicago,* 339 Ill. App. 3d 119, 128 (2003). The plain language of Rule 191 "clearly requires that [supporting documents] be attached to the affidavit." *Robidoux v. Oliphant,* 201 Ill. 2d 324, 339 (2002).

¶ 76 Defendants argue that Gass's and Williams' affidavits failed to attach sworn or certified copies of all papers upon which the affiants relied, the records did not meet the best evidence or business records standard, the affidavits were conclusory as to attorney fees, Gass's affidavit identified an incorrect billed amount, and Williams' affidavit did not identify any amount billed to Fidelity and did not identify one attorney referenced in an invoice.

¶ 77 In Gass's affidavit, Gass averred that he was familiar with Fidelity's business records through the performance of his work, the records were kept in the ordinary course of business, he personally examined the records relating to this case, and he has personal and document knowledge of the facts in his affidavit as he was associate claims counsel for Fidelity. Gass averred that he monitored Valley's foreclosure action and that Fidelity retained Cohon Raizes & Regal LLP's (Cohon) as counsel to defend Chase. Gass averred that Cohon's billing statements were attached to his affidavit as exhibit 1 and had also been attached to Fidelity's motion for summary judgment as "Group Exhibit G," and that these records showed the amount of

$36,303.66 as having been paid to Cohon. He averred that Fidelity utilizes an electronic billing system and true and correct copies of Fidelity's electronic records showing billing statements and proofs of payment through this system were attached as "Group Exhibit 2" and had also been attached to Fidelity's motion for summary judgment as "Group Exhibit G." Gass also averred that out of this sum paid by Fidelity between October 22, 2009, and July 27, 2011, Fidelity was not seeking attorney fees and costs in the amount of $4,870 "as marked by the letter X on Group Exhibit 2, and is only seeking the balance of the attorneys' fees in the amount of $31,433.66. Fidelity is also not seeking attorneys' fees incurred after 7-27-11, and not including same as part of Group Exhibit 2."[3] Gass averred that the referenced and attached documents were true copies made in the ordinary course of business at or near the time of the act or payment by persons with knowledge. Further, Gass averred that under the Chase policy, Fidelity paid First State Bank $60,000 to secure release of the Valley mortgage, and that true and correct copies of the assignment of mortgage, settlement agreement, settlement check, and release of mortgage were attached to his affidavit as "Group Exhibit 3" and had also been attached to Fidelity's motion for summary judgment as "Group Exhibit H."

¶ 78 In Williams' affidavit, he averred that he is a partner of Cohon, he has personal knowledge of the facts set forth in his declaration, and he and Elizabeth Greene were the attorneys who worked on the foreclosure case. He averred that Cohon's billing invoices relating to defending Chase in the foreclosure action were attached as "Group Exhibit 1" and showed the services performed, the attorney who performed them, the date of the services, and the reimbursable expenses incurred by Cohon. Williams averred that he was in charge of Chase's defense and was familiar with the services rendered, and he was also the billing attorney

[3] We note that the trial court's January 23, 2014, order also provided that the court "being fully advised in the premises, as the court reducing plaintiff's request of attorney fees by $5,000 ***."

responsible for reviewing, approving, and submitting the invoices, which were submitted and paid electronically.

¶ 79 Defendants argue that Fidelity failed to attach sworn or certified copies of all papers upon which the affiants rely, but defendants fail to specify which documents are missing. Fidelity contends that defendants failed to include in the record all of the exhibits referenced in and attached to its prove-up affidavits. In defendants' motion to strike the affidavits, defendants attached Gass's and Williams' affidavits as exhibits to its motion, in addition to "exhibit D," which is a list containing corresponding dates, invoice numbers, and amounts and is labeled "Summary" and "Group Exhibit 1 & 2." The total amount listed is $37,291.22. Defendants also attached "Exhibit E," which appears to be an invoice from Cohon dated January 11, 2010, listing a balance due of $1,174.50, and showing that the attorneys Greene and Caroline K. Kwak worked on the case. Despite several references in the prove-up affidavits to exhibits containing billing invoices and proofs of payment, no other exhibits or documents are attached to defendants' motion. Based on the statements in the affidavits of Gass and Williams, it appears that all of the documents Gass and Williams relied on were in fact attached, even if they were not attached to defendants' motion or otherwise contained in the record on appeal. As Fidelity notes, a review of Kiely's counteraffidavit also suggests that he did in fact receive and review the documents referenced as exhibits in the Fidelity affidavits, *i.e.*, the attached invoices regarding attorney fees. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984) (any doubts raised by an incomplete record must be resolved against the appellant).

¶ 80 In addition, having reviewed the affidavits of Gass and Williams, we find that they are clearly based on the personal knowledge of the affiants, they adequately set forth with particularity the facts supporting Fidelity's damages related to the payment of attorney fees, and

they did not consist of mere conclusions. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013); *US Bank*, 2014 IL App (1st) 12175910, ¶ 22. Both Gass and Williams averred that they had personal knowledge regarding the invoicing and payment of Cohon's attorney fees. They both swore in their affidavits that the attached documents were "true and correct," *i.e.*, "they were what they purported to be." *US Bank*, 2014 IL App (1st) 12175910, ¶ 22. Further, they signed the affidavits and "swore 'under penalties as provided by law pursuant to section 1–109 of the Code of Civil Procedure" that the statements in the affidavits were true and correct. *Id.*

¶ 81 With regard to defendants' assertion that Williams' affidavit did not identify Kwak, we note that Williams' affidavit indicated that he was in charge of Cohon's representation of Chase and he was familiar with all the work performed on the case and the associated billing. Defendants' bare assertion that Williams' affidavit should be stricken because it did not identify Kwak must fail. Other than arguing that Kwak is not identified, defendants do not assert that Kwak did not actually work on the case or that the invoice listed a fictitious name. " '[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.' " *US Bank*, 2014 IL App (1st) 12175910, ¶ 31 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)).

¶ 82 Lastly, although defendants contend that the affidavits "did not address the fact that the records referred to did not meet the standards of best evidence or business records," defendants fail to further elaborate on this argument or cite to relevant authority regarding the admission of business records. They have therefore forfeited appellate review of this argument. *Young*, 2015 IL App (1st) 131887, ¶ 54 (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)).

¶ 83 III. CONCLUSION

¶ 84 Based on the foregoing analysis, we affirm the trial court's orders denying defendants' motion for summary judgment, granting Fidelity's motion for summary judgment, entering judgment for Fidelity in the amount of $86,433.66, and denying defendants' motion to strike the affidavits.

¶ 85 Affirmed.