FOURTH DIVISION
March 24, 2016

1-14-3610

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NORTHSIDE COMMUNITY BANK, an Illinois State Chartered Bank, Plaintiff-Appellee, v. HEUNG K. BAEK and HYUN K. BAEK-LEE, Defendants-Appellants,	)	Appeal from the Circuit Court of Cook County. No. 14 L 50452
HEUNG K. BAEK, Individually and as manager of Clark and Leland Condominium, LLC, an Illinois Limited Liability Corporation, HYUN K. BAEK-LEE, CLARK AND LELAND CONDOMINIUM, LLC, and SOO CORPORATION d/b/a Blue Ocean Contemporary Sushi, Plaintiffs-Appellants, v. NORTHSIDE COMMUNITY BANK, an Illinois Chartered Bank, WILLIAM KIVIT, Individually and as Vice-President for Northside Community Bank, Defendants-Appellees.	)	No. 12 L 7369 Honorable Sanjay Tailor, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment striking affirmative defenses and counterclaims to complaint to enforce personal guaranty of defaulted bank loan with prejudice is affirmed, and the judgment granting summary judgment in favor of the lender is affirmed; the guarantors of the loan lacked standing to bring their original affirmative defenses and counterclaims, their proposed amended claims are barred by *res judicata*, and the lender is entitled to summary judgment on the complaint to enforce the personal guaranty of the loan by reason of the loan's maturation and the borrower's failure to satisfy the indebtedness through foreclosure. The judgment dismissing a separate complaint against the lender with prejudice is affirmed as barred by *res judicata* arising from the foreclosure proceeding and a related eviction proceeding.

¶ 2 This is an appeal from orders entered in two cases consolidated in the trial court. Mr. Heung K. Baek and Mrs. Hyun K. Baek-Lee (the guarantors) appeal from an order granting summary judgment in favor of plaintiff NorthSide Community Bank (NorthSide) on its complaint to enforce a commercial guaranty of loan (guaranty complaint). Mr. Heung K. Baek and Mrs. Hyun K. Baek-Lee, and two entities Mr. Baek controls (collectively, "the Baeks"), also appeal from orders dismissing their complaint against NorthSide (the 2012 complaint) and denying them leave to file an amended complaint.[1] In May 2013 the circuit court of Cook County entered orders (1) striking and dismissing the guarantors' affirmative defenses and counterclaims to the guaranty complaint with prejudice, and (2) dismissing the 2012 complaint. In September 2014 the trial court denied the guarantors' and the Baeks' motions to reconsider and entered summary judgment in favor of NorthSide on the guaranty complaint.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

[1] We will refer to the defendants in case number 14 L 50452 as "the guarantors" and we will refer to the plaintiffs in case number 12 L 7369 (the "2012 complaint") at "the Baeks."

¶ 5 In July 2006 NorthSide Community Bank (NorthSide or "the bank") entered into a construction loan agreement evidenced by a promissory note with Clark & Leland Condominium, LLC (Clark & Leland). Clark & Leland was to use the loan to build a four-story mixed use building in Chicago (hereinafter, "the subject property"). NorthSide alleges the guarantors, entered into a commercial guaranty of the loan guaranteeing all of Clark & Leland's indebtedness to the bank. Mr. Baek signed the guaranty in July 2006, at the same time the bank and Clark & Leland entered the loan agreement and promissory note. A guarantee bearing the signature of Mrs. Baek-Lee is attached to the guarantors' motion to vacate a confession of judgment that was entered against them on their personal guaranties. That pleading alleges Mrs. Baek-Lee did not execute her guaranty until approximately January 2008 and is supported by her affidavit, but she later refuted that statement. Mr. Baek is the sole member of Clark & Leland and on appeal admits Baek-Lee has a miniscule ownership interest. In October 2010 NorthSide sent Clark & Leland and Mr. Baek a letter notifying them the loan was in default for enumerated reasons unrelated to maturation of the loan. The loan matured shortly thereafter in December 2010 at which time the balance of the principal and interest became due.

¶ 6 In July 2011 NorthSide filed its first amended complaint for breach of commercial guaranty against Baek (Count I) and Baek-Lee (Count II) (hereinafter, "the guaranty complaint"). NorthSide also commenced eviction proceedings against Soo Corporation (Soo). Baek owned Soo Corporation, which was a commercial tenant in the subject property. The guarantors filed affirmative defenses and counterclaims to the guaranty complaint. NorthSide moved to strike and dismiss the affirmative defenses and counterclaims. The Baeks filed a separate complaint against NorthSide and Mr. Kivit, NorthSide's employee (hereinafter "the 2012 complaint") alleging breaches by NorthSide and Kivit which adversely affected Clark & Leland. NorthSide and Kivit moved to dismiss the 2012 complaint on grounds of lack of

standing, *res judicata*, and collateral estoppel. Subsequently, the Baeks moved to amend the 2012 complaint.

¶ 7 The circuit court of Cook County consolidated proceedings on the guaranty complaint and the 2012 complaint. In May 2013, the trial court granted NorthSide and Kivit's motion to dismiss the 2012 complaint. The court granted the motion to dismiss Counts I through VII of the 2012 complaint with prejudice. The court dismissed Counts VIII through XI without prejudice with leave to replead within 28 days. The Baeks did not file an amended "2012 complaint" within 28 days of the court's order. Also in May 2013, the court granted NorthSide's motion to strike and dismiss the guarantors' affirmative defenses and counterclaims to the guaranty complaint with prejudice. In August 2013 NorthSide filed a motion for summary judgment on the guaranty complaint.

¶ 8 Baek-Lee filed for bankruptcy and the trial court stayed proceedings pending the outcome. When the bankruptcy was dismissed, the guarantors and the Baeks filed motions to reconsider the trial court's May 2013 orders (1) striking and dismissing the guarantors' affirmative defenses and counterclaims to the guaranty complaint with prejudice, and (2) dismissing the 2012 complaint.

¶ 9 In September 2014 the trial court denied the guarantors' and the Baeks' motions to reconsider and entered summary judgment in favor of NorthSide on the guaranty complaint.

¶ 10 This appeal followed.

¶ 11 ANALYSIS

¶ 12 Appeal is taken from the following orders:

1. the May 30, 2013 order (1) dismissing the guarantors' affirmative defenses with prejudice, (2) dismissing the guarantors' counterclaims with prejudice, (3) dismissing Counts I though VII of the Baeks' complaint with prejudice, and (4) dismissing Counts

VIII through XI of the Baeks' complaint with leave to replead on or before June 27, 2013.

2. the September 11, 2014 order (1) denying the guarantors' motion to reconsider and file amended affirmative defenses and counterclaims, (2) denying the Baeks's motion to reconsider and to file an amended complaint, and (3) granting NorthSide's motion for summary judgment on the guaranty complaint.

3. the October 30, 2014 order (1) denying the guarantors' motion to vacate the summary judgment order and (2) denying the Baeks' motion for leave to file their amended complaint *instanter* pursuant to Illinois Supreme Court Rule 183.

¶ 13 I. Dismissal of the Guarantors' Affirmative Defenses and Counterclaims to the Guaranty Complaint

¶ 14 The guarantors argue their original affirmative defenses "alleged sufficient foundational facts to support the essence of their affirmative defenses—breach of contract, breach of fiduciary duty and fraud." Thus, the guarantors argue, the following affirmative defenses should not have been dismissed with prejudice (as numbered in the original filing): (26) unclean hands, (30) "lender is the cause of the acts and damages complained," (35) *in pari delicto*, (38) failure to perform, (43) anticipatory repudiation, and (53) unconscionable contract. The guarantors raised counterclaims based, in part, on the same facts alleged in support of their affirmative defenses. However, on appeal, the guarantors only argue that one counterclaim states a cause of action. In Count IV of their counterclaims the guarantors alleged NorthSide breached its fiduciary duty to Clark & Leland by engaging in self-dealing and refusing to maintain open books and to responsibly maintain the operating account.

¶ 15 NorthSide argues the guarantors lack standing as to their affirmative defenses and counterclaims, and that they are all barred by *res judicata* and collateral estoppel. The

guarantors have waived consideration of the dismissal of the other affirmative defenses and counterclaims (with the exception of the allegations in Count IV). "[P]ursuant to Illinois Supreme Court Rule 341(h)(7), points not argued in an opening brief on appeal are waived and shall not be raised in the reply brief. [Citation.]" *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 30 (citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). See also *Fink v. Banks*, 2013 IL App (1st) 122177, ¶ 14 ("By failing to present any argument regarding dismissal of his fiduciary duty claim, plaintiff waived that issue."). We next consider whether the guarantors have standing to raise the affirmative defenses and counterclaims.

¶ 16 "[S]tanding in Illinois requires only some injury in fact to a legally cognizable interest." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). "Standing is a doctrine that requires a plaintiff to have some real interest in his or her cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy." *In re Estate of Zivin*, 2015 IL App (1st) 150606, ¶ 14. "We consider *de novo* whether the section 2-619 dismissal *** for lack of standing was proper as a matter of law." *Id.* ¶ 21.

¶ 17 The guarantors alleged in their affirmative defenses that NorthSide refused to provide accounting documentation and returned Clark & Leland's checks for insufficient funds when their account had sufficient funds to cover the checks. NorthSide allegedly repudiated its duty to maintain true and correct books and to be responsive to Clark & Leland's questions on tax matters and disbursements. The guarantors alleged that NorthSide refused to provide an accounting of the operating account and invoices for attorney fees allegedly payable to NorthSide. They also alleged that NorthSide issued assignment of rent letters to tenants of the subject property demanding rent be paid to NorthSide instead of Clark & Leland in violation of Illinois foreclosure law and public policy. The guarantors argue that the Third Modification Agreement imposed a requirement on the guarantors to replenish the operating account, and

required the guarantors to submit their tax returns. The guarantors assert NorthSide breached the terms of the Third Modification Agreement by withdrawing attorney fees without notice and without providing an itemization of the fees, resulting in direct injury to the guarantors because they were required to replenish the operating account. The guarantors also argue that NorthSide breached the Third Modification Agreement when it failed to turn over the financial information the guarantors needed to submit their tax returns.

¶ 18 NorthSide argues the guarantors have no standing to assert these defenses or claims, which it asserts are based on Clark & Leland's injuries. NorthSide argues all of the guarantors' affirmative defenses and counterclaims are based on either (1) the terms of the loan documents themselves, (2) the manner of the declaration of default, or (3) the improper notarization of the Third Modification Agreement. NorthSide argues a "guarantor has standing only to bring claims or defenses based on an injury independent of the debtor's injury," and claims based on the lender's alleged conduct in respect to the debtor constitute only a derivative injury to the guarantor, for which a guarantor does not have standing to sue. In support of that argument, NorthSide cites *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355 (1995), and *Performance Electric, Inc. v. CIB Bank*, 371 Ill. App. 3d 1037 (2007).

¶ 19 In *Northern Trust Co.*, a lender filed a claim against guarantors of a partnership's indebtedness. The guarantors in that case brought counterclaims and affirmative defenses alleging that the lender committed fraud, breached its duties of good faith and fair dealing, had unclean hands and was equitably estopped from asserting its claims. *Northern Trust Co.*, 276 Ill. App. 3d at 358. On appeal, the court agreed with the trial court's finding "that the Guarantors only had standing to bring a claim for injury independent of [the partnership] and not for general losses suffered by the other investors within the entity." *Id.* at 363. "[W]hen a guarantor has only a derivative injury, the investor may seek redress only in the name of the corporation." *Id.*

at 363. The court held that in "alleging that they lost their investment in [the partnership] because of [the lender's] action, *** the Guarantors have alleged only a derivative injury." *Id.*

¶ 20 In *Performance Electric, Inc.*, the plaintiffs were guarantors of a loan to Performance Electric, Inc., and one of the plaintiffs was the company's sole shareholder. *Performance Electric, Inc.*, 371 Ill. App. 3d at 1038. When the lender learned the company was in financial distress, it placed a hold on the company operating account and instructed a number of the company's clients to send payments directly to the lender. *Id.* The parties met and came to an agreement, which was memorialized in a letter written by the lender that would allow the parties' relationship to continue. *Id.* at 1038-39. The company complied with its obligation under this new agreement but the lender still "advised Performance that it was terminating their relationship and exercising its setoff rights pursuant to the terms of their agreements." *Id.* at 1039. The plaintiff filed a complaint against the lender for breach of contract (both the original loan agreements and the letter written by the lender) alleging that the lender owed the guarantors an implied duty of good faith and fair dealing as guarantors to the agreements and the lender breached that duty several ways and in direct contravention of the terms of the letter agreement. *Id.*

¶ 21 The lender in *Performance Electric, Inc.* argued that the plaintiffs "do not have standing to assert their complaint because any injury they endured was merely derivative to the losses experienced by Performance." *Id.* at 1040. The court held the plaintiffs did not have standing to assert an affirmative cause of action against the lender. *Id.* at 1041. The court noted that the plaintiffs "brought their claim under the loan and letter agreements between Performance and [the lender,] not the guaranty." *Id.* The plaintiffs were not parties to those agreements but argued they had standing to bring their claims under the agreements as guarantors because they suffered independent and distinct damages. *Id.* The distinct injury to the plaintiffs asserted was

a liability to the Internal Revenue Service that resulted from the business having to file for bankruptcy. *Id.*

¶ 22 The court cited the rule that "to assert an affirmative claim against a lender, a guarantor must establish that he suffered a direct injury as a result of the lender's alleged breach against the principal, which is independent from and not merely derivative of the resulting injury suffered by the principal." *Id.* at 1040. The court rejected the plaintiffs' argument of an independent and direct injury by the lender under the parties' agreements, finding that Performance's inability to satisfy its debts under the agreements directly caused the plaintiffs' injuries "because, as guarantors, they remained liable for the outstanding debts." *Id.* As for the IRS liability, the court found that the plaintiff was responsible to the IRS because she was President of the company, not as a guarantor to the agreements, therefore she "would have remained liable for the IRS debts even if she had not been a personal guarantor. Consequently, the resulting IRS liability cannot confer standing as a guarantor." *Id.* at 1041.

¶ 23 In this case, the guarantors argue both cases cited above are inapposite and not applicable because here, unlike in those cases, the guarantors "are claiming that they have been injured directly by [NorthSide,] not Clark & Leland." Specifically, the guarantors argue that their affirmative defenses and counterclaims are based on breaches of duties of good faith and fair dealing and fiduciary duties arising out of the Third Modification Agreement between the guarantors and NorthSide. NorthSide responds the Third Modification Agreement did not convert the obligations running from NorthSide to Clark & Leland into obligations to the guarantors. As to specific language requiring Baek to submit a tax return, NorthSide argues "this provision creates a condition precedent to NorthSide's obligations and does not create a direct obligation in favor of Guarantors to receive any financial information from NorthSide." In

reply, the guarantors argue that the Third Modification Agreement merged the terms of all of the loan documents, including the loan agreement and guaranty.

¶ 24 The provision in the Third Modification Agreement that the guarantors claim requires them to replenish the operating account states, in pertinent part, as follows: "Borrower will deliver and will promptly cause Guarantors to deliver for deposit into the operating existing account, all payments on leases and other related obligations received by them." The provision allegedly regarding tax returns in the Third Modification Agreement reads as follows: "The parties agree that Lender's obligations under this Agreement shall be subject to the Lender's receipt of the following on or before December 14, 2009: (c) An updated personal financial statement from HYUN K. BAEK-LEE."

¶ 25 The plain language of the Third Modification Agreement does not impose a personal responsibility on the guarantors to replenish the operating account or to submit their tax returns. We note that the guarantors' brief before this court states that "[t]he events which give support to [the Baeks'] affirmative defenses arose in 2010 after the date of the Third Modification Agreement, which was purportedly executed on December 14, 2009." The Third Modification Agreement requires Baek-Lee to submit a financial statement on or before December 14, 2009. Therefore, any alleged withholding of financial information for preparation of tax returns after that date is not a violation of the provision in the Third Modification Agreement on which the guarantors rely to claim a direct injury in support of their affirmative defenses. Regardless of the construction of the contract, however, the guarantors' liability to NorthSide is not based on replenishing the operating account, and NorthSide is not claiming any indebtedness resulting from the guarantors' failure to submit their tax returns. Although listed as an "Event of Default" in NorthSide's notice, NorthSide's amended guaranty complaint does not claim the guarantors' failure to submit tax returns as a basis for default of the loan agreement. All of the guarantors'

other allegations against NorthSide are based on conduct falling under NorthSide's agreement with Clark & Leland. Therefore, the guarantors did not suffer a direct injury. The guarantors' damage in these proceedings is their liability for Clark & Leland's indebtedness to NorthSide. Even if NorthSide breached a contractual duty with regard to the payment of attorney fees, that claim belongs to Clark & Leland and not the guarantors.

¶ 26 Here, as in *Performance Electric, Inc.*, Clark & Leland's "inability to satisfy its debts under the agreements directly caused [the guarantors'] injuries because, as guarantors, they remained liable for the outstanding debts." *Performance Electric, Inc.*, 371 Ill. App. 3d at 1040. The guarantors' affirmative defenses and counterclaims are not independent of Clark & Leland's. Accordingly, we hold the guarantors lack standing to assert their affirmative defenses and counterclaims based on any alleged breach of contract, breach of fiduciary duty, or fraud by NorthSide in the enforcement of the loan agreements against Clark & Leland. *Id.* at 1040-41; *Northern Trust Co.*, 276 Ill. App. 3d at 36.

¶ 27 II. Dismissal of the Baeks' Original Claims in the "2012 Complaint"

¶ 28 The Baeks argue Counts I, II, and V of the original 2012 complaint state a claim, but they make no argument beyond adopting the arguments in opposition to the affirmative grounds stated to defeat the original affirmative defenses and counterclaims. Based on those arguments the Baeks argue that NorthSide and Kivit's argument the Baeks's complaint is also barred due to a lack of standing, *res judicata*, and collateral estoppel should fail. NorthSide and Kivit argue that even if the Baeks sufficiently stated claims in Counts I through VII of their complaint, "the only party with standing to assert such claims is Clark & Leland, and its recovery is precluded by *res judicata* and collateral estoppel." The final count, Count VIII, was for emotional distress by Baek-Lee. The Baeks' have conceded that the allegations of the complaint on this count were insufficient, as they have with Counts III, IV, and VI, and made no further argument in support

of those counts. The Baeks have waived consideration of the propriety of the judgment dismissing those counts.

¶ 29 The Baeks argue that NorthSide and Kivit's argument "falls short except for the *res judicata* argument as to Clark & Leland." Because of the Baeks's concession and waiver regarding other counts, the only claims in the Baeks' original 2012 complaint that are left to be addressed are under Count I for breach of contract—bad faith, Count II for breach of fiduciary duty, and Count V for accounting by Baek and Baek-Lee individually. We agree with NorthSide and Kivit that these claims do not seek relief on behalf of Soo, and plaintiffs have made no argument to the contrary, resulting in waiver.

¶ 30 Count I of the Baeks's complaint is based on an alleged breach of the loan agreement. We make this determination based on the totality of the allegations in the 2012 complaint. Count II alleges that the Baeks, "in particular" Mr. Baek, "reposed trust and confidence" in NorthSide and Kivit, therefore they "gained an influence and superior position over [Baek] *** causing a fiduciary relationship and duty to arise by [NorthSide and Kivit] as to [Baek.]" Although Count II alleged a fiduciary relationship between NorthSide and Baek individually, the allegations in the complaint are of breaches of fiduciary duties to Clark & Leland under the loan agreement. Specifically, Count II alleges NorthSide and Kivit breached their duties "[i]n executing on the short-term loans and default triggers, charging unfair, inequitable and unreasonable fees and charges" and in "refusing to maintain open books and to responsibly maintain the operating account for the Subject Property." The Baeks argue that agreement "required *Clark & Leland* to entrust its operating account to the Bank" (emphasis added) which evidences NorthSide's degree of control allegedly giving rise to a fiduciary duty.

¶ 31 Finally, as to Count V, the Baeks argue on appeal that Baek "sufficiently alleged [NorthSide's] violation of contractual and fiduciary duty" because NorthSide had sole control of

the operating account and refused to provide financial information on the account, and therefore, "they have sufficiently pleaded [*sic*] a claim for accounting."

¶ 32 Any duties that were allegedly breached were duties NorthSide owed to Clark & Leland. We hold Baek has no right to sue NorthSide and Kivit in his individual capacity for breach of duties NorthSide owed to Clark & Leland. *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 14. "A corporation is a legal entity, separate and distinct from its shareholders, officers and directors, and generally must sue or be sued in its own name." *Perfection Carpet, Inc. v. State Farm Fire & Casualty Co.*, 259 Ill. App. 3d 21, 26 (1994). Moreover, the Baeks have conceded these counts are *res judicata* as to Clark & Leland. Accordingly, Counts I, II, and V of the Baeks's complaint were properly dismissed.

¶ 33 III. The Proposed Amended Pleadings

¶ 34 The guarantors and the Baeks filed motions to reconsider the order dismissing their affirmative defenses, counterclaims, and complaint, and sought leave to file amended pleadings. "A motion to reconsider enables a party to bring to a court's attention newly discovered evidence, changes in the law, or errors in the court's application of existing law. [Citation.] The decision to grant a motion to reconsider lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 33. "[W]e review the circuit court's denial of leave to file an amended complaint under the abuse of discretion standard." *Boffa Surgical Group LLC v. Managed Healthcare Associates Ltd.*, 2015 IL App (1st) 142984, ¶ 15.

> "The trial court has broad discretion in determining whether to permit an amendment to the pleadings and its ruling on the matter will not be disturbed on review absent an abuse of discretion. [Citation.] Four factors are relevant to an assessment of the propriety of the trial court's ruling on a motion to amend (1)

> whether the proposed amendment would cure the defect in the pleading; (2) whether other parties would be prejudiced or surprised by the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether the party seeking to amend had other opportunities to do so. [Citations.] The trial court should freely exercise its discretion to allow amendments so that a party may fully present its cause of action. [Citation.]" (Internal quotation marks omitted.) *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 947 (1995).

¶ 35 The guarantors' amended affirmative defenses to the guaranty complaint consist of (1) breach of contract, (2) breach of fiduciary duty, (3) common law fraud, and (4) violation of the Illinois Consumer Fraud Act. The guarantors' proposed amended counterclaims were identical to their proposed amended affirmative defenses by incorporation. Counts II through VI of the Baeks's proposed amended complaint also mirror the amended affirmative defenses and counterclaims. The April 2014 proposed amended complaint purported to state 11 claims:

1. Breach of contract by Mr. Baek against NorthSide based on failure to release the lien on Mr. Baek's residence (Count I).
2. Breach of contract by Baek and Baek-Lee against NorthSide for failing to provide Clark & Leland's bank statements in breach of good faith and fair dealing (Count II).
3. Breach of contract by Mr. Baek and Clark & Leland against NorthSide for violating the Third Modification Agreement by withdrawing funds from the Clark & Leland operating account for attorney fees without any demand and without providing an itemization of the fees despite numerous requests (Count III).
4. Breach of fiduciary duty by Mr. Baek and Clark & Leland against NorthSide for assuming a fiduciary duty related to Clark & Leland's operating account then improperly returning

checks to vendors for insufficient funds and withdrawing attorney fees without demand or notice (Count IV).

5. Common law fraud by Mr. Baek and Clark & Leland against NorthSide and Kivit for falsely claiming the loan was "out of balance" and demanding additional collateral from Mr. Baek (Count V).
6. Violation of the Illinois Consumer Fraud Act by Baek and Baek-Lee against NorthSide and Kivit for their conduct related to the signing of loan documents by Baek-Lee and the request for additional collateral in the form of Mr. Baek's home (Count VI).
7. Civil conspiracy by Baek and Baek-Lee against NorthSide, Kivit, and Baier for their conduct related to the signing and notarization of the guaranty and Third Modification Agreement (Count VII).
8. Interference with prospective economic advantage by Clark & Leland and Soo against NorthSide for interfering with Soo's lease negotiations with the receiver appointed for the subject property during foreclosure proceedings (Count VIII).
9. Interference with contractual relations by Soo against NorthSide for allegedly coming into the restaurant Soo operated at the subject premises and announcing that the restaurant would lose its lease and be shut down (Count IX).
10. Fraud by scheme or artifice by Soo against NorthSide for falsely representing NorthSide was acting as a fiduciary for the subject property (Count X).
11. Violation of the RICO Act by Baek, Baek-Lee, and Clark & Leland against NorthSide, Clausen, Kivit, and Baier (Count XI).

¶ 36 The Baeks argue the "proposed amended complaint mirrors the proposed amended affirmative defenses and counterclaim, and therefore, also stated a cause of action as [a] matter of law." Accordingly, we will address the proposed amended pleadings together. We note this

assertion applies to Counts I through IV of the amended affirmative defenses and amended counterclaims (which are identical to each other) and Counts II through VII of the amended 2012 complaint. We will address Count I of the amended 2012 complaint separately.

¶ 37 Count I of the amended 2012 complaint alleged Kivit breached his agreement to release the bank's lien on Mr. Baek's residence if he deposited an additional $700,000. NorthSide argues the claim is barred by the Illinois Credit Agreement Act (Credit Agreement Act) (815 ILCS 160/2) because it was an oral agreement. The Baeks respond Kivit's promise "has nothing to do with the loan or loan documents" therefore the Illinois Credit Agreement Act does not apply.

¶ 38 Section 2 of the Credit Agreement Act states that "[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). We have no need to decide whether this provision applies to Kivit's alleged promise. It is clear from the pleadings that if Kivit made the alleged promise he did so in enforcing NorthSide's rights under the loan agreement. We have already held that Mr. Baek and Mrs. Baek-Lee individually lack standing to assert claims based on any alleged breach of contract, breach of fiduciary duty, or fraud by NorthSide in the enforcement of the loan agreements against Clark & Leland, and any claim Clark & Leland had is barred by *res judicata*. The trial court properly denied leave to file this claim.

¶ 39 As to the remaining claims, NorthSide argues, *inter alia*, that *res judicata* applies to bar the amended affirmative defenses, counterclaims, and claims. NorthSide relies on the judgment in foreclosure proceedings against Clark & Leland based on alleged events of default and the

judgment in an eviction proceeding against Soo, a commercial tenant in the subject property, in support of its arguments.

¶ 40 A. 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. [Citation.] The doctrine prohibits not only those matters which were actually litigated and resolved in the prior suit, but also any matter which might have been raised in that suit to defeat or sustain the claim or demand. [Citation.] More to the point in the case at bar, the doctrine bars suits based on facts that would have constituted a counterclaim or defense in the earlier proceeding where successful prosecution of the later action would either nullify the earlier judgment or impair the rights established in the earlier action. [Citation.]" (Internal quotation marks omitted.) *Kosydor v. American Express Centurion Services Corp.*, 2012 IL App (5th) 120110, ¶ 19.

¶ 41 "For the doctrine to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *Id.* ¶ 20.

> "[T]o determine whether there is an identity of the cause of action, Illinois now uses the transactional test ***. [Citation.] [P]ursuant to the transactional analysis, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. [Citation.] Under the transactional test, claims are considered part of the same cause of action even if there is not a

> substantial overlap of evidence, so long as they arise from the same transaction. [Citations.]" *Treadway v. Nations Credit Financial Services Corp.*, 383 Ill. App. 3d 1124, 1131 (2008).

¶ 42 The guarantors argue that because the foreclosure judgment did not adjudicate their rights and liabilities under the guaranty, the foreclosure judgment does not bar their claims under the doctrine of *res judicata*. The guarantors do not dispute the foreclosure judgment was a final judgment on the merits or that there was an identity of the parties or their privies in that proceeding. The guarantors cite *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570 (1990), in support of their argument concerning lack of identity of the causes of action.

¶ 43 In *Ascher*, the plaintiffs' complaint alleged claims for foreclosure of an installment agreement in Count I, for an accounting in Count II, and for enforcement of the defendants' personal guaranty in Count III. *Ascher*, 196 Ill. App. 3d at 572. The plaintiffs pled Count I against the purchaser of the building and Count II against the guarantors of payments under the installment contract to purchase the building. *Id.* Count III alleged the guarantors would be liable for any deficiency that could result from the foreclosure sale. *Id.* at 573. The plaintiffs obtained a judgment of foreclosure on Count I. *Id.* The guarantor-defendants moved to dismiss Count III based on the language of the contract. *Id.* The plaintiffs argued that "under the doctrine of *res judicata*, the judgment of foreclosure and sale entered on Count I of their complaint bound [the] defendants to the deficiency judgment sought in Count III. *Id.* at 574. The *Ascher* court disagreed. The court held the foreclosure judgment "did not address defendants' liability for a deficiency based on their guaranty and for this reason, the doctrine of *res judicata* is inapplicable to the resolution of the issue in this case." *Id.*

¶ 44 We find *Ascher* distinguishable as to Mr. Baek and Mrs. Baek-Lee's affirmative defenses and counterclaims. In *Ascher*, the issue was the scope of the guaranty. The court found that

under the language of the contract, the scope of the guaranty was limited by the purchaser's obligation under the installment agreement. *Id.* at 575. The installment agreement gave the plaintiffs an exclusive remedy—forfeiture—and not the remedy of foreclosure. *Id.* Because the guaranty was for the obligations under the installment agreement, which did not include liability for a deficiency after a foreclosure, the court held the defendants' guaranty "cannot encompass liability for a deficiency judgment resulting from a foreclosure as alleged under count III of the complaint." *Id.* at 576. The *Ascher* defendants' argument was not directly addressed to the underlying liability.

¶ 45 In *Ascher*, the defendants raised a claim related to the guaranty contract and whether they were liable under that contract. In fact, the plaintiffs in *Ascher* argued that the guaranty "must be construed as a separate contract from the installment agreement" (*id.* at 575), but the court rejected that argument. The court reasoned that "the guaranty states that [the] defendants guaranteed [the seller's] 'indebtedness, obligations and liabilities' under the installment agreement and therefore, in determining the scope of the guaranty, we must consider the extent of [the seller's] obligation under the installment agreement." *Id.* at 575. In other words, the *Ascher* court only considered the document giving rise to the underlying liability—the installment contract—to construe the guaranty contract and not to determine the validity of the underlying liability. See *Id.*

¶ 46 Therefore, if the guarantors seek to attack their liability to NorthSide because of some defect or defense to the guaranty itself, they could under *Ascher*. The guarantors nor the Baeks may, however, raise claims "based on facts that would have constituted a counterclaim or defense in the earlier proceeding where successful prosecution of the later action would either nullify the earlier judgment or impair the rights established in the earlier action" (*Kosydor*, 2012 IL App (5th) 120110, ¶ 19) or from the "group of operative facts" (*Treadway*, 383 Ill. App. 3d at

1131) involved in the foreclosure. In this case such facts include alleged breaches of the loan agreement. NorthSide's foreclosure complaint specifically claims that Clark & Leland "has defaulted under the terms of the Promissory Note and Construction Loan Agreement *** by failing to pay the balance due upon acceleration of the indebtedness for non-payment of the regular monthly payments and other charges ([related to attorney fees and maintaining insurance]) set forth herein." The parties' respective obligations under the loan agreement, express or implied, and whether they breached those obligations, could have been raised in the foreclosure proceeding or formed the operative facts in that proceeding or both. Any claims based on those facts are barred by *res judicata*.

¶ 47 With the forgoing principles in mind, we turn to the amended claims.

¶ 48 B. Breach of Contract—Violation of Good Faith and Fair Dealing

¶ 49 i. income tax returns

¶ 50 Count I(a) of the proposed amended affirmative defenses is for breach of contract—violation of good faith and fair dealing (income tax returns). The guarantors claim NorthSide breached its duty of good faith and fair dealing under the guaranty by refusing to provide Mr. Baek with bank statements related to the loan and operating account so that he could prepare his 2009 tax return and submit it to NorthSide as required by the guaranty. These allegations correspond to the allegations in support of Count II of the proposed amended 2012 complaint. We note that *res judicata* does *not* apply to bar this claim as it is based on the terms of the guaranty itself. Nonetheless, the trial court did not err in denying the plaintiffs leave to file this amended claim.

¶ 51 The duty of good faith and fair dealing "requires a party vested with contractual discretion to exercise it reasonably, and further he may not do so arbitrarily, capriciously, or in a manner inconsistent with reasonable expectations of parties." *Kirkpatrick v. Strosberg*, 385 Ill.

App. 3d 119, 131 (2008). On appeal the guarantors admit none of the loan documents obligated NorthSide to tender Clark & Leland's financial information to Baek or Baek-Lee but assert the failure to do so "highlights NorthSide's bad faith." We hold that NorthSide's alleged failure to turn over the documents would not be a breach of a duty of good faith and fair dealing. The parties' agreement on this point is informative. Mr. Baek agreed in the loan agreement that he had means of obtaining financial information about Clark & Leland. The representations and warranties in the guaranty also contain the following provision:

> "Guarantor has established adequate means of obtaining from [Clark & Leland] on a continuing basis information regarding [Clark & Leland's] financial condition. Guarantor agrees to keep adequately informed from such means of any facts, events, or circumstances which might in any way affect Guarantor's risks under this Guaranty, and Guarantor further agrees that, absent a request for information consented to by [Clark & Leland], [NorthSide] shall have no obligation to disclose to Guarantor any information or documents acquired by [NorthSide] in the course of its relationship with [Clark & Leland]."

¶ 52 Even if this provision does not encompass disbursements from the operating account, the guarantors cannot now claim a lack of good faith when access to the information was within the parties' contemplation when they entered their agreements. Mr. Baek agreed to give NorthSide the power to consent to his requests for information while simultaneously giving it a warranty he had adequate means of obtaining information regarding Clark & Leland's financial condition on a continuing basis. The guarantors have not alleged any discretion granted to NorthSide that was exercised unreasonably. Mr. Baek has pointed to nothing to establish and made no allegations he had a reasonable expectation NorthSide would provide the requested information or that

NorthSide should have expected Mr. Baek would not have the information without their assistance. The allegations fail to state a claim.

¶ 53 Moreover, NorthSide's alleged failure to provide any information, and the resulting inability to provide information to NorthSide, was not the source of any injury claimed in the complaint. The failure to tender an income tax statement is not a basis alleged in the guaranty complaint for default of the loan. The guarantors have not alleged any damage or asked for any relief from the alleged withholding of the statements and inability to submit the tax return. Therefore, this claim is defective because it is not a defense or counterclaim to the guaranty complaint. *Benford v. Everett Commons, LLC*, 2014 IL App (1st) 131231, ¶ 19 (an affirmative defense attempts to defeat a plaintiff's cause of action while a counterclaim seeks affirmative relief).

¶ 54 ii. attorney fees

¶ 55 Count I(b) of the proposed amended affirmative defenses is for breach of contract—violation of good faith and fair dealing (attorney fees). The claim is that NorthSide violated the attorney fee provisions in the Third Modification Agreement "by withdrawing funds from Clark & Leland's operating account without any demand and by failing to provide an itemization of the fees despite numerous requests." These allegations correspond to the allegations in support of Count III of the proposed amended 2012 complaint.

¶ 56 Kivit averred in support of NorthSide and Kivit's motion for summary judgment that NorthSide incurred the attorney fees that formed the basis of the notice of an event of default "in resolving mechanics lien claims, including defending against multiple mechanics lien foreclosure actions, which affected the priority of [NorthSide's] mortgage lien on the [subject property.]" That same allegation was part of NorthSide's complaint for foreclosure, and the court found NorthSide proved all of the allegations in the foreclosure complaint. The failure of Clark &

Leland to reimburse NorthSide for its attorney fees was a basis for default stated in the foreclosure complaint. Therefore, whether or not NorthSide properly demanded payment of those fees pursuant to the parties' agreement could have been raised and was an operative fact in the foreclosure proceedings. Prevailing on this claim would nullify the prior judgment that NorthSide proved every allegation in the foreclosure complaint, including that Clark & Leland breached its duty to reimburse NorthSide's attorney fees. Therefore, this claim is barred by *res judicata*.

¶ 57 iii. operating account

¶ 58 Count I(c) of the proposed amended affirmative defenses is for breach of contract—violation of good faith and fair dealing (operating account). NorthSide allegedly returned checks to vendors when funds were available to pay those checks, forcing Clark & Leland to place its operating account with another financial institution. The guarantors assert NorthSide breached the Third Modification Agreement by (1) failing to pay vendors from the operating account, (2) preventing Clark & Leland from paying vendors from the operating account (presumably because Clark & Leland moved their funds somewhere else—although that is not alleged in the pleading), (3) subjecting tenants to danger (presumably because the electricity was cut off—which is alleged in another portion of the pleading), (4) taking funds from the operating account to pay attorney fees without notice, and (5) making it impossible for Mr. Baek and Mrs. Baek-Lee to prepare their tax returns.

¶ 59 This claim is barred by *res judicata* because NorthSide's alleged breach could have been raised as a defense in the foreclosure proceedings. Moreover, the guarantors' claim that the Third Modification Agreement does not allow NorthSide's attorney fees to be paid out of the operating account is belied by the agreement itself. The modification to the loan agreement in the Third Modification Agreement specifically states that "other sums owing" to NorthSide will

be paid from the operating account. That language is not ambiguous and encompasses Clark & Leland's obligation to reimburse NorthSide for its attorney fees. The claim that NorthSide improperly withdrew funds from the operating account for attorney fees without notice or an accounting is barred by *res judicata*, as the failure to reimburse attorney fees was an operative fact in the foreclosure proceeding.

¶ 60 C. Breach of Fiduciary Duty

¶ 61 The basis of the affirmative defense and counterclaim in Count II is the guarantors' allegation that NorthSide had a fiduciary duty based on its alleged "full control of the operating account." Similarly, Count IV of the Baeks's proposed amended complaint alleges that by "virtue of such actions taken by the Lender, it assumed a fiduciary duty related to the operating account." The guarantors assert NorthSide breached its duty by returning checks to vendors as insufficient when funds were in the account and by withdrawing its attorney fees without demand or notice. The only distinction in this count from when the guarantors previously made the same claims is that the guarantors allege damages in that they were "forced to procure funds from other sources and paying the vendors directly and having to defend this lawsuit which was created by [NorthSide] who was the defaulting party." This count in each of the pleadings is barred by *res judicata*. If NorthSide defaulted on its obligations under the loan agreement then such default could have been raised as a defense to the foreclosure proceedings. In proceedings to enforce the guaranty contract or in separate proceedings by Clark & Leland that claim is barred by *res judicata*.

¶ 62 Also, defending this lawsuit is a direct consequence of Clark & Leland's liability under the foreclosure judgment, which could have been challenged in the prior proceeding. Further, if any duty did exist with regard to collecting and disbursing funds from the operating account, that duty was owed to Clark & Leland, not to Mr. Baek and Mrs. Baek-Lee individually or in their

capacity as guarantors. We also note that Clark & Leland, not the guarantors, had to pay the vendors. Therefore, alternatively, the guarantors and Soo lack standing to raise this claim. *Performance Electric, Inc.*, 371 Ill. App. 3d at 1040 ("to assert an affirmative claim against a lender, a guarantor must establish that he suffered a direct injury as a result of the lender's alleged breach against the principal, which is independent from and not merely derivative of the resulting injury").

¶ 63 D. Common Law Fraud and Fraud Act

¶ 64 The guarantors begin this count in their proposed amended affirmative defenses and counterclaims by noting that "[s]ection 1.3 of the Construction Loan Agreement *** governs the disbursement of the loan proceeds." Their common law fraud count goes on to claim that NorthSide falsely stated the loan was "out of balance" and as a result NorthSide could not disburse any more funds from the construction loan. The count alleges that in detrimental reliance on the representation about the loan being out of balance, "Baek suffered damages when he was forced to sell one of his other commercial property and tendered $700,000.00 to [NorthSide.]" The count further alleges damage to Mr. Baek and Clark & Leland when sale of units in the subject property was delayed. All of the foregoing claims in both pleadings could have been raised in the foreclosure proceedings as a defense to NorthSide's claim of default under the loan agreement. At minimum, the parties' respective duties and conduct under the loan agreement was an operative fact in the foreclosure. The fraud claims are barred by *res judicata*.

¶ 65 The Fraud Act claims in the proposed amended affirmative defenses and counterclaims and proposed amended complaint make some of the same allegations raised in previous counts concerning disbursement of loan proceeds, payments to vendors, and the demand for additional capital because the loan was allegedly "out of balance." Those claims have already been

addressed above and are barred by *res judicata*. Specifically, the guarantors claim that Kivit committed fraud by demanding the additional capital. These claims would have been a defense to NorthSide's complaint based on the loan agreement in the foreclosure proceeding. Therefore, *res judicata* applies.

¶ 66 However, the Fraud Act claims in the amended affirmative defenses and counterclaims also allege Kivit and NorthSide "forced Baek-Lee to sign the modification agreements which reaffirmed the Commercial Guaranty." Similarly, Count VII of the Baeks's proposed amended complaint alleges a civil conspiracy in that NorthSide, Kivit, and Baier conspired to notarize the guaranty contract and Third Modification Agreement in violation of the Illinois Notarial Act to "illegally and fraudulently bind [Baek-Lee] to the terms of the documents." To the extent this claim is directed to Baek-Lee's signature on the guaranty contract it is not barred by *res judicata* because it goes to the validity of the guaranty contract as to Baek-Lee. *Ascher*, 196 Ill. App. 3d at 575. Nonetheless, we hold the trial court properly denied leave to file this amended claim.

¶ 67 The Third Modification Agreement contains the following provision:

> "Except as expressly herein provided, Borrower, Guarantors and Lender, as applicable, hereby reaffirm and incorporate herein by reference each and every term, provision, representation and warranty contained in the Loan Agreement, Note, Mortgage, Assignment of Rents, Guaranties, First Modification Agreement, Second Modification, and Other Documents (the 'Loan Instruments') and Borrower, Guarantors, and Lender agree that said terms, provisions, representations and warranties shall remain in full force and effect."

¶ 68 "Merger occurs when a contract supersedes and incorporates all or part of an earlier agreement. [Citation.]" (Internal quotation marks omitted.) *Aon Corp. v. Utley*, 371 Ill. App. 3d

562, 567 (2006). Each modification agreement incorporated and reaffirmed the loan agreement and guaranty.

> "The modified contract is regarded as creating a new single contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, in addition to the new terms on which they have agreed. [Citation.] Furthermore, when a contract is modified or amended by a subsequent agreement, any lawsuit to enforce the [agreement] must be brought on the modified agreement and not on the original agreement." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 469 (2004).

¶ 69 The guarantors assert Baek-Lee "does not recall ever signing the Commercial Guaranty" and deny that she signed the guaranty contract. However, the Third Modification Agreement renders her claims as to the validity of the guaranty contract moot. In the pleadings, Baek-Lee asserts her signature on the Third Modification Agreement reaffirming the guaranty contract was forged, and the notarization was improper. In her affidavit Baek-Lee states: "I am certain that I did not sign the Third Loan Modification Agreement because I was not even in the United States when that document was purportedly signed on December 14, 2009." However, as NorthSide and Kivit point out, on appeal the guarantors claim to be parties to the Third Modification Agreement, arguing that "Mr. & Ms. Baek's affirmative defenses are based on the Third Modification Agreement" and claiming that it "contractually bound all three parties to all of the agreements." [2]

---

[2] The opening brief before this court reads, in pertinent parts, as follows: "More specifically, Mr. & Ms. Baek's affirmative defenses are based on the Third Modification Agreement, which merged all of the agreements including the Construction Loan and Commercial Guaranty. In fact, the preamble of the document indicates that it was being entered into between and among the Lender, Clark & Leland and Mr. & Ms. Baek. In addition to the

¶ 70 We cannot ignore Baek-Lee's admission to being a party to the Third Modification Agreement. *Brummet v. Farel*, 217 Ill. App. 3d 264, 267 (1991) ("A judicial admission is conclusive upon the party making it; it may not be controverted at trial or on appeal. [Citation.] *** Included in this category are admissions made in pleadings"). Moreover, all of her claims and defenses are based on NorthSide's alleged obligations under the Third Modification Agreement. "An individual not a party to a contract may only enforce the contract's rights when the contract's original parties intentionally entered into the contract for the direct benefit of the individual." *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (2009). Baek-Lee does not claim to be a third-party beneficiary of the Third Modification Agreement, and we would not find that she was.

> "Mutuality of obligation is necessary for the contract to be enforceable. [Citation.] Mutuality of obligation is defined as follows:
>
> > 'Mutuality of obligation means that both parties to an agreement are bound or neither is bound. A contract in its nature and character and according to the intention of the parties should involve and impose a reciprocity of obligation and duty.' 12 Illinois Law & Practice Contracts § 7." *Kraftco Corp. v. Kolbus*, 1 Ill. App. 3d 635, 638-39 (1971).

¶ 71 Baek-Lee argued her previous admission in an affidavit to signing the loan documents was the result of mistake and, therefore, not a judicial admission. See *Hatchett v. W2X, Inc.*, 2013 IL App (1st) 121758, ¶ 32. She does not, however, argue that the admission in her brief to this court was the result of mistake. In fact, in her reply brief, Baek-Lee concedes the point,

---

clear language of the Third Modification Agreement which contractually bound all three parties to all of the agreements."

arguing that "[f]raudulent notarization is also not removed from the issue even if the document is signed by plaintiff." Later, the reply brief states that Baek-Lee's claim based on the Third Modification Agreement "was based on the premise that if she did knowingly sign that document, certain subsequent events gave rise to her claim." We do not find that the statement "if she did knowingly sign that document" is a sufficient claim that her admission to being a party to the Third Modification Agreement—both by basing her claims thereon on and by her statements to this court—is the product of mistake or inadvertence.

¶ 72 The admission concerning the Third Modification Agreement is also dispositive of Baek-Lee's claim she did not sign the guaranty contract. The Third Modification Agreement is, by its terms, a reaffirmation of the guaranty contract, to which she was a party. Baek-Lee could bind herself to the terms of the guaranty contract by signing the Third Modification Agreement, even if she did not sign the guaranty contract. See *Lynge v. Kunstmann*, 94 Ill. App. 3d 689, 694 (1981) ("a signature is not always essential to the binding force of an agreement. *** The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for example, by acts or conduct of the parties.").

¶ 73 Baek-Lee separately claimed NorthSide committed an act of fraud by notarizing one or more of the loan modification agreements. The purpose of notarization is to prove the authenticity of a signature. *In re Estate of Koziol*, 236 Ill. App. 3d 478, 483 (1992). Baek-Lee cannot now dispute she signed the Third Modification Agreement. *Brummet*, 217 Ill. App. 3d at 267 ("Judicial admissions are not evidence at all but rather have the effect of withdrawing a fact from contention."). Baek-Lee cannot state a claim for fraud based on the notary's signature because Baek-Lee cannot prove, having admitted to signing the Third Modification Agreement, that she relied on the notary's signature.

¶ 74 The trial court properly denied the guarantors' motion to reconsider and to file amended affirmative defenses and counterclaims in Counts I through IV and Counts I through VII in the proposed amended 2012 complaint.

¶ 75 E. Remaining Counts—Proposed Amended 2012 Complaint

¶ 76 The remaining counts in the Baeks's proposed amended complaint are for interference with prospective economic advantage (Count VIII), interference with contractual relations (Count IX), and fraud by scheme or artifice (Count X). The Baeks admit Count XI for a violation of the RICO Act is now moot. The claims in Counts VIII through X relate to Soo's attempt to remain in the subject property once foreclosure proceedings began, and the consequences of NorthSide's alleged conduct seeking to thwart its effort to remain. Specifically, the complaint alleges NorthSide interfered in negotiations concerning a rent agreement between Soo and the receiver appointed for the property during foreclosure (Count VIII); as a result and in the course of NorthSide's alleged interference with negotiations with the receiver to enter a lease to remain in the subject property, Soo's relationship with its vendors for its restaurant was damaged resulting in a loss of business volume (Count IX); and NorthSide fraudulently represented that it was acting to secure and preserve the property for the benefit of all concerned, including Soo, when in fact its only interest was in ousting Soo to devalue the subject property (Count X).

¶ 77 NorthSide argues, first, the Baeks's argument to this court on this issue improperly seeks to incorporate by reference their argument in a document filed in the trial court and, therefore, this argument should be deemed waived. NorthSide argues that if the argument is not waived, then all of the claims are barred by *res judicata* as "there has been a final adjudication on the merits of Soo Corp.'s right of possession in the Soo Corp. Eviction Case and the Foreclosure Case." In response, the Baeks argue the "Soo Corporation eviction proceeding was not a proper

forum *** to raise the affirmative defenses." They cite *Miller v. Daley*, 131 Ill App. 3d 959, 961 (1985), for the proposition that forcible entry and detainer proceedings should not be burdened by other matters unrelated to the issue of possession.

¶ 78 We agree with NorthSide and find that the Baeks waived argument on Counts VIII through X of their proposed amended complaint by failing to properly raise an argument in support thereof in their opening brief in violation of Illinois Supreme Court Rule 341.

> "Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013) requires parties' briefs to include cohesive argument and citations to relevant authority for each of its claims. The appellate court is not merely a repository into which an appellant may dump the burden of argument and research, nor is it the obligation of this court to act as an advocate or seek error in the record. [Citations.] The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue." (Internal quotation marks omitted.) *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18.

¶ 79 We also hold that regardless of forfeiture, the claims in Counts VIII through X are barred by *res judicata*. As to the *res judicata* argument, the Baeks do not address whether the affirmative claims in Counts VIII through X of the proposed amended complaint could have been raised in the Soo eviction proceeding, nor do they assert those claims are "unrelated to the issue of possession." "The Civil Practice Act governs forcible entry and detainer proceedings [citation] and speaks to what matters are permitted to be brought as part of such a proceeding as well as matters which are precluded in a counterclaim in an eviction proceeding." *Miller*, 131 Ill. App. 3d at 960 (quoting Ill.Rev.Stat. (1982), ch. 110, par. 9-106 (now 735 ILCS 5/9-106 (West 2012))). Section 9-106 of the Forcible Entry and Detainer statute states that "[t]he

defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action." 735 ILCS 5/9-106 (West 2012). "While forcible entry and detainer proceedings determine which party has a right to possession of and not title to real estate [citation], equitable defenses may be raised if 'germane' to the action [Citation.]" (Internal quotation marks omitted.) *Wood v. Wood*, 284 Ill. App. 3d 718, 722 (1996) (citing *Rosewood Corp. v. Fisher*, 46 Ill. 2d 249, 256-57 (1970)). "The right to file a counter-claim in forcible entry and detainer has been recognized where the subject matter is germane to the question of possession." *Bleck v. Cosgrove*, 32 Ill. App. 2d 267, 277 (1961).

¶ 80 In *Rosewood*, our supreme court held that:

> "the defenses going to the validity and enforceability of the contracts relied upon by the plaintiffs were germane to the distinctive purpose of the forcible entry and detainer actions and were improperly stricken. That purpose, to repeat, is to restore possession to one who is entitled to the right of possession. 'Germane' has been judicially defined as meaning 'closely allied,' and is further defined in Webster's New Twentieth Century Dictionary, p. 767, as meaning: 'closely related; closely connected; relevant; pertinent; appropriate.' " *Rosewood*, 46 Ill. 2d at 256-57.

¶ 81 The *Rosewood* court limited its holding to the situation presented in that case, where "the right to possession a plaintiff seeks to assert has its source in an installment contract for the purchase of real estate by the defendant." *Id.* The court found that "matters which go to the validity and enforceability of that contract are germane, or relevant, to a determination of the right to possession." *Id.* *Rosewood* has since been expanded to cases not involving contract purchases. See *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 359 (1972) ("Insofar as defendants' affirmative defenses alleged the breach of express covenants to repair, they were germane to the

issue of whether the defendants were indebted to plaintiffs for rent and we find no impediment in our earlier opinions to the determination of the issue in one rather than multiple actions. We hold, therefore, that the trial court erred in striking these affirmative defenses.").

¶ 82 The issues raised in the Baeks's proposed amended complaint regarding Soo and NorthSide's alleged conduct while Soo was attempting to negotiate a lease to remain in the subject property are germane to NorthSide's right of possession of the property Soo occupied. Therefore, the matters could have been raised in the forcible entry and detainer proceedings. Again, the Baeks offer no argument that there is not an identity of parties or that there was not a final adjudication on the merits, and we find that no such argument can be made under the facts of this case that would be persuasive. Accordingly, we hold Counts VIII through X of the Baeks's proposed amended complaint are barred by *res judicata*. Therefore, the trial court did not err in denying the Baeks's motion to reconsider or for leave to file the proposed amended complaint instanter pursuant to Illinois Supreme Court Rule 183.

¶ 83 IV. Summary Judgment

¶ 84 Finally, the Baeks argue that "in the event any one of the affirmative defenses, counterclaim or complaint survives, *** a summary judgment for the Bank cannot stand as there are issues of material fact." Since they do not survive, we move to their next argument.

¶ 85 The guarantors argue that even if the affirmative defenses, counterclaims, and the Baeks's complaint fall—which they do—there are still issues of material fact "on the issue of whether Ms. Baek signed the guaranty and Third Modification Agreement and on the issue of whether the bank proved its case." NorthSide first responds "Baek-Lee's claim that she did not sign the Third Modification Agreement is precluded by her prior judicial admission and her position taken in the trial court that her Affirmative Defenses were based upon the Third Modification Agreement." Alternatively, NorthSide argues she does not dispute that she signed

the first and second modification agreements, which NorthSide argues would be "an independent basis to hold Baek-Lee liable on the Commercial Guaranty." "On appeal, our standard of review is *de novo*; and we may affirm the trial court's grant of summary judgment on any ground apparent from the record." (Internal quotation marks omitted.) *Catom Trucking, Inc. v. City of Chicago*, 2011 IL App (1st) 101146, ¶ 9.

¶ 86 We have already explained that the Third Modification Agreement renders the question of whether Baek-Lee signed the guaranty contract moot. She has made a judicial admission to signing the Third Modification Agreement—which incorporates in its entirety and reaffirms a commitment to be bound by the guaranty contract—by basing her defenses on being bound by the Third Modification agreement and admitting to being bound by the Third Modification Agreement before this court. Our determination is not based on Baek-Lee's affidavit admitting to signing the Third Modification Agreement but on her admissions to this court that she signed and is bound by the Third Modification Agreement in her brief, which she has not alleged was the result of mistake. Therefore, this argument fails.

¶ 87 The guarantors argue NorthSide failed to prove its case on the purported October 2010 default because (1) there are problems with the Loan History prepared by Mr. Kivit and the 'Fiserv' computer program which he used to calculate account balances, and (2) Kivit's second affidavit does not comply with Illinois Supreme Court Rule 236 in that he does not state that the records attached thereto were based on the regular course of business to make such a record at the time of the transaction or within a reasonable time thereafter. The guarantors also argue NorthSide failed to prove its case on the December 2010 default because its refusal to release the void confession judgment prevented them from obtaining refinancing.

¶ 88 NorthSide argues that whether it proved the October 2010 default is immaterial because the loan matured on December 14, 2010, and NorthSide asserted the maturity of the loan as an

alternative basis for default. The guaranty complaint does allege that Mr. Baek and Mrs. Baek-Lee are liable because the loan matured on December 14, 2010. The guarantors' only argument in opposition to a finding of default based on the maturity of the loan is the fact NorthSide allegedly prevented Mr. Baek from seeking refinancing from another bank by failing to release the judgment lien. NorthSide responds that a judgment lien automatically lapses when there is no enforceable judgment standing behind the memorandum. "In order to create a lien against real estate, a memorandum of judgment must be recorded and there must be an enforceable judgment standing behind the memorandum." *Maniez v. Citibank, F.S.B.*, 383 Ill. App. 3d 38, 41 (2008).

¶ 89 The guarantors' argument on this point contains no citations to the record, no legal authority, and lacks reasoning for their position NorthSide had a duty to take affirmative action to release a judgment lien on a void judgment so that its borrower could refinance a loan that defaulted, or that the lender's failure to do so somehow precludes judgment in a lender's favor on the defaulted loan or a personal guaranty on the indebtedness.

¶ 90 "When an appellant seeks reversal, theories presented without authority are deemed waived, and the reviewing court should not search the record for reasons to reverse the trial court's judgment. A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research." *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 648 (2007). "[A]ppellate contentions which are not supported by legal reasoning, citation to authority and citation to the pertinent pages of record are waived on appeal and shall not be raised in a reply brief or a petition for rehearing." *Board of Managers of Eleventh St. Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 188 (2007).

¶ 91 The argument in opposition to the summary judgment in favor of NorthSide based on the maturation of the loan is forfeited. Forfeiture aside, we hold the trial court properly entered summary judgment in favor of NorthSide based on the maturation of the construction loan and the guaranty thereof by the guarantors. There is no issue of fact that the loan did mature or that the guarantors are liable for the borrower's remaining indebtedness on the loan by virtue of their personal guaranty. The guarantors have failed to raise an issue of fact or cite to any authority that their inability to refinance the loan, whatever the cause, is a defense to Clark & Leland's, and consequently their personal, liability on the loan. Therefore, the trial court did not err in granting summary judgment in favor or NorthSide or in denying the guarantors' section 2-1203 motion.

¶ 92 CONCLUSION

¶ 93 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 94 Affirmed.