2016 IL App (1st) 151235-U

SIXTH DIVISION
February 5, 2016

No. 1-15-1235

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GERSHON BASSMAN, BASSMAN FAMILY BEVERLY TRUST, THE GERSHON BASSMAN GIFT TRUST, BASSMAN FAMILY BEVERLY LLC, BASSMAN FAMILY LP, and 613 TRUST,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 14 CH 02569
YISROEL GLUCK,	)	Honorable Sophia Hall,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court correctly granted summary judgment in favor of plaintiffs and against defendant. Defendant was not entitled to leave of court to file an amended answer to assert new affirmative defenses and a counterclaim.

¶ 2 This appeal concerns a claim to collect a promissory note in the original principal amount of $5,611,853.86. The circuit court entered partial summary judgment on liability against defendant Yisroel Gluck and in favor of plaintiffs, Gershon Bassman, Bassman Beverly Trust, The Gershon Bassman Gift Trust, Bassman Family Beverly LLC, Bassman Family LP, and 613

Trust (collectively, the Bassman plaintiffs). Thereafter, the Bassman plaintiffs filed supplemental materials regarding damages, calculating the interest owed on the principal amount of the promissory note. Gluck then retained substitute counsel, who sought an extension of time to file an affidavit under Illinois Supreme Court Rule 191(b) (Ill. S. Ct. R. 191(b), eff. Jan. 4, 2013)) and informed the court of a potential fact issue regarding a mistake in the principal amount of the note. The court continued the matter to allow Gluck to submit a statement by the end of that court day explaining the mistake. When Gluck filed the statement later that day, he included a section requesting leave to file an amended answer to raise the affirmative defense of mistake and a counterclaim for reformation, which had not been previously alleged in Gluck's original answer to the Bassman plaintiffs' complaint. During oral argument the following day, the court considered Gluck's statement regarding the mistake, denied his request for an extension of time to file a Rule 191(b) affidavit, and entered summary judgment on damages against Gluck and in favor of the Bassman plaintiffs in the amount of $7,921,149.74. Gluck moved to vacate summary judgment and renewed his request for leave to file an amended answer and Rule 191(b) affidavit, which the court denied.

¶ 3 On appeal, Gluck argues the circuit court erred as a matter of law when it concluded that it could not reform the promissory note and made a factual finding that the principal amount of the note constituted a negotiated number. Gluck also asserts the court erred when it denied his request for leave to amend his answer to add an affirmative defense and counterclaim. Gluck contends this court should grant him leave to file his proposed amended answer pursuant to Illinois Supreme Court Rule 366(a) (Ill. S. Ct. R. 366(a), eff. Feb. 1, 1994)). We affirm.

¶ 4 BACKGROUND

¶ 5 Gershon Bassman and Gluck have invested together in numerous real estate ventures over the years. The Bassman plaintiffs have loaned money to Gluck in connection with these real estate ventures and have continued to invest in other real estate ventures while the loans remained outstanding. In 2011, Gluck was in default on various legal obligations that were due and owing to the Bassman plaintiffs. The parties, however, agreed that the Bassman plaintiffs would forbear from enforcing these outstanding debt obligations in exchange for the execution of a substitute promissory note (Substitute Note).

¶ 6 In October 2011, the parties executed a forbearance agreement and assignment of distribution of rights (Forbearance Agreement), which recited that Gluck, the borrower, "is indebted to Lender [(the Bassman plaintiffs)] in the agreed upon aggregate amount of Five Million Six Hundred Eleven Thousand Eight Hundred Fifty-three and 86/100 Dollars ($5,611,853.86), as of September 30, 2011, pursuant to those certain promissory notes and other debt instruments as detailed on Exhibit A attached hereto and made a part hereof ('The Notes')." The recitals also stated that Gluck "is in default under the Notes, having failed to make timely payment upon maturity of any and all of the Notes, which default is continuing ('the Default')." Gluck requested that the Bassman plaintiffs forbear from exercising their rights and remedies under the Notes until the sale of the property located at 233 South Wacker Drive in Chicago, otherwise known as the Willis Tower, in which he had a partial ownership interest. In addition, the recitals state that Gluck "has agreed to enter into, and Lender has agreed to accept, a substitute promissory note [(Substitute Note)], in the form attached hereto as Exhibit B, in connection with all of the unpaid indebtedness set forth in Exhibit A hereto." The recitals were

incorporated into the Forbearance Agreement and "evidenc[ed] the intent of the parties in executing this Agreement, and describing the circumstances surrounding its execution."

¶ 7 Paragraph 2(a) of the Forbearance Agreement, entitled "Acknowledgement of Default/Investment Obligations," states:

> "Borrower acknowledges the Default, and specifically acknowledges that [he] has been given or otherwise waived all notices required under the Notes. Borrower hereby acknowledges and agrees that as of September 30, 2011, the outstanding balances of the Notes, including all accrued and unpaid interest, penalties, and default interest, is in excess of $5,611,853.86. The Notes, together with interest accrued and accruing thereon, and fees, costs, expenses and other charges now or hereafter payable by the Borrower to Lender are unconditionally owing by Borrower to Lender, without offset, defense or counterclaim of any kind, nature or description whatsoever. Borrower further acknowledges and agrees that, in an effort to reach a compromise in this matter and avoid recourse to litigation or other remedies, Lender has agreed to forego certain of the penalties, compound interest and default interest under the Notes and to accept the [Substitute Note] in the aggregate principal amount of $5,611,853.86, as provided for in paragraph 4 below. It is understood and agreed that the [Substitute Note] is accepted solely in substitution of the Notes identified on Exhibit A hereto, and that any and all other indebtedness of the Borrow[er] to Lender not so reflected shall be and remain in full force and effect."

¶ 8 Paragraph 4 of the Forbearance Agreement required Gluck to execute the Substitute Note "in the principal amount of Five Million Six Hundred Eleven Thousand Eight Hundred Fifty-

Three and 86/100 Dollars ($5,611,853.86), payable to the order of Lender, duly executed by Borrower." Gluck represented, warranted, and covenanted in paragraph 6 that "all information and statements contained in this Agreement are true and correct."

¶ 9 Finally, paragraph 9(b) of the Forbearance Agreement states that Gluck "expressly, irrevocably and unconditionally waives":

> "EVERY DEFENSE, INCLUDING A DEFENSE BASED ON THE IMPLIED COVENANT OF GOOD FAITH, CAUSE OF ACTION, COUNTERCLAIM OR SETOFF WHICH BORROWER MAY NOW HAVE TO ANY ACTION BY LENDER IN ENFORCING THE NOTES, THIS AGREEMENT OR ANY DOCUMENT EXECUTED IN CONNECTION WITH OR IN FURTHERANCE OF THIS AGREEMENT OR THE NOTES."

¶ 10 Exhibit A attached to the Forbearance Agreement listed the loan amounts as follows:

> "

Borrower		**Loan Amount**	**Principal and Accrued Interest**
1.	Roney	$160,000.00	$160,000.00
2.	Superior	60,000.00	60,000.00
3.	Sears Landmark	425,000.00	670,000.00
4.	Tri State	180,000.00	252,000.00
5.	Tri State	180,000.00	252,000.00
6.	Parsippany 1 & 2	2,605,684.23	4,255,353.86

> Total loan amount: $5,611,853.86, reflects reduction for Beverly loan to Sears Landmark in the amount of $37,500.00."

Exhibit A also contained a second section that identified the Bassman plaintiffs' investment amounts to be secured.

¶ 11 The Substitute Note, also executed in October 2011, included a promise to pay the principal amount of $5,611,853.86, "which sum includes principal and accrued interest, as agreed by the parties in accordance with the terms of the Forbearance Agreement and Exhibit A

thereto, together with interest from and after the date hereof on the principal balance outstanding from time to time at the rate of ten percent (10%), upon demand." The Substitute Note required Gluck to pay $5,000 per month commencing December 2011 and each month thereafter "until demand is made." A default under the Substitute Note would increase the interest payment to fifteen percent. The Substitute Note stated that in the event of default, "Lender may declare the entire unpaid balance on this Note and all accrued unpaid interest immediately due, and then Borrower shall pay that amount."

¶ 12 On February 13, 2014, the Bassman plaintiffs filed their verified complaint, consisting of three counts alleging breach of contract, accounting, and injunctive relief. The Bassman plaintiffs alleged that they demanded payment in full of the amounts due under the Substitute Note on January 27, 2014. They requested payment including accrued interest totaling $6,647,271.28 by January 29, 2014. Gluck failed to pay the amount demanded.

¶ 13 On April 1, 2014, the Bassman plaintiffs moved for summary judgment on all counts. They attached exhibits to their motion, including the Forbearance Agreement with the Exhibit A loan amounts and the Substitute Note.

¶ 14 Gluck moved to extend time to answer the complaint, which the circuit court granted. Gluck filed an answer to the verified complaint on April 29, 2014. Gluck admitted to the execution of the Substitute Note, but denied that he was indebted a total of $5,611,853.86 to the Bassman plaintiffs. Gluck stated that he was without sufficient knowledge to admit or deny that the Substitute Note is a demand note, which provides for payment in full of the entire indebtedness of $5,611,853.86, plus interest accruing at 10% per annum. Gluck admitted that the payment demanded, $6,647,271.28, had not been paid. Notably, Gluck's answer did not include any affirmative defenses or counterclaims.

¶ 15 Gluck also responded to the Bassman plaintiffs' motion for summary judgment. Gluck asserted a fact issue remained regarding whether a good faith basis existed to declare the loan insecure and whether the notice of default was sent to the correct address. As to damages, Gluck argued that Gershon Bassman's affidavit failed to comply with Illinois Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a), eff. July 1, 2002)), because it did not state that if sworn as a witness he could testify competently thereto. Gluck also contended that Gershon Bassman failed to attach sworn or certified copies in support of his claim of the amount of damages as required by Rule 191(a). He argued "[n]o documents are attached that relate to any computation of damages or the underlying documents on which the claim of damages is based." Gluck asserted that even if the affidavit was admissible, "nothing in the affidavit establishes the amount of money owed under the loan documents" and that the Bassman plaintiffs make "a conclusionary statement as to the total principal and interest owed." Gluck, however, never raised an argument alleging a mistake in the principal amount of the loan.

¶ 16 The Bassman plaintiffs replied to Gluck's response and included a new affidavit executed by Gershon Bassman addressing some of the arguments Gluck raised in his response. The circuit court granted Gluck leave to file a surreply relating to matters contained in the affidavit. Gluck again argued that Gershon Bassman's affidavit failed to comply with Rule 191(a) because the affiant did not attach sworn or certified copies of all documents upon which he relied to assert the amount of damages. Gershon Bassman had attached to his affidavit a spreadsheet listing the payments Gluck made, as well as debits for certain returned checks, which was neither sworn nor certified. Gluck argued that the spreadsheet did not show the interest being charged or how interest was computed. Gluck's surreply did not raise the issue of mistake in calculating the principal amount of the loan.

¶ 17 On July 24, 2014, the circuit court denied the Bassman plaintiffs' motion for summary judgment. The Bassman plaintiffs moved to reconsider and included a request that summary judgment be entered on both liability and damages. In Gluck's response, he did not raise the issue of mistake in the principal amount of the loan and did not challenge the amount of damages asserted by the Bassman plaintiffs.[1]

¶ 18 On February 26, 2015, the circuit court granted the Bassman plaintiffs' motion to reconsider, but entered summary judgment on liability only. The court requested that the Bassman plaintiffs file an updated damages calculation, and granted Gluck leave to file a Rule 191(b) affidavit in response.

¶ 19 On March 16, 2015, the Bassman plaintiffs filed their supplement with respect to damages. They sought a total amount of $7,921,149.71, which included interest accrued as of March 25, 2015. Gluck moved to substitute counsel and to extend time to file a Rule 191(b) affidavit on March 19, 2015. This motion did not raise the issue of a mistake in the principal amount of the loan. The circuit court granted Gluck's motion to substitute counsel and continued the motion for extension of time to file the Rule 191(b) affidavit to March 25, 2015.

¶ 20 On March 25, 2015, the parties appeared before the circuit court for argument on the Bassman plaintiffs' supplement with respect to damages and Gluck's motion to extend time to file a Rule 191(b) affidavit. At this hearing, Gluck raised the mistake of fact issue for the first time:

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[1] The Bassman plaintiffs also note that Gluck served them with interrogatories and a request for production of documents, none of which included a request for information relating to an alleged mistake in the principal amount of the loan or to the formation of the Forbearance Agreement and Substitute Note. The record includes certificates of service regarding Gluck's propounding of written discovery, but does not include copies of the interrogatories or request for production and, therefore, we cannot consider the substance of the written discovery on appeal. *George v. Ospalik*, 299 Ill. App. 3d 888, 891 (1998) (reviewing court will not consider anything that is not contained in the record).

"[DEFENSE COUNSEL]: We have consulted with the client; reviewed documentation, and there is one disputed issue, but it's a large one. Its value is about $2.38 million. Their calculation is about $7.9 million. Our calculation based on this error is about $5.5 million.

And the reason is that the principal amount of the note, there is a mistake in the note as to the principal amount, and it has to do with -- it's actually we think a mutual mistake with respect to the value of a real estate investment in New Jersey that was part of the calculation that went into the principal amount of the note.

So we think there is a mutual mistake and that we are going to need some discovery to develop that and then present the issue to the Court."

¶ 21 After hearing argument, the circuit court granted Gluck leave until the end of the day to file a written statement explaining the nature of the purported mistake. When defense counsel requested additional time, the court stated:

"Here is my question. Apparently when you were not here, the conversation before was that it was just about the math.

Counsel has indicated that there is no question being raised before the Court about it just about an interest calculation.

Counsel has indicated that the issue before the Court is whether there is some mistake about the agreed upon number. And what counsel has presented to the Court is there is an attachment that puts forth some information about the agreed upon number.

> So I'm just trying to figure out whether this is just simply a question about the math or something else. And I will be able to better understand the presentation here about an issue of the note itself having some error in it because there was a motion for summary judgment already about the note, and if there was an issue about the note itself, it could have been raised before.
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> * * *
>
> Counsel, I know the history of this case and I have been through it in great detail. We are now at this point. There is no motion before me to reconsider something. It now is about what the dollars are."

¶ 22 Pursuant to the circuit court's order, Gluck filed a statement later that day which included argument concerning why the doctrine of mistake applied in this case. He asserted that the principal amount listed in Exhibit A of the Forbearance Agreement mistakenly included both Parsippany investments when only one should have been included. He attached to the statement a copy of an April 27, 2011 notice of default letter from plaintiffs' counsel that listed the total debt of the Parsippany properties as $2,605,685. Gluck argued that Parsippany 1 and Parsippany 2 were two separate investment entities controlled by the Bassman plaintiffs. Only Parsippany 2 generated a debt obligation that should have been included in the list of loan amounts in Exhibit A. According to Gluck, Parsippany 1 had no debt obligation and, instead, constituted an equity investment that should have been included under the list of investment amounts to be secured. Gluck requested discovery to confirm how the mistake originated. He contended that the mistake concerned damages and not liability, requiring litigation on the merits. Gluck also included a preliminary Rule 191(b) statement and a section requesting leave to amend his answer to assert the affirmative defense of mistake and a counterclaim for reformation.

¶ 23 On March 26, 2015, the circuit court heard argument regarding the statement Gluck submitted.[2] The court found that the mistake of fact issue was an untimely attempt to relitigate the question of liability and add a new cause of action. The court stated:

> "I did have an opportunity to read the statement, and I also reviewed for myself the history in this case which occurred since the matter started in April. The Court is going to enter the $7.59 [*sic*] million judgment as specifically indicated. The Court does find it is a negotiated number.
>
> There is no cause of action for reformation that's ever been raised in this proceeding. There is no dispute being raised right now that there is a problem with the partial motion for summary judgment as to liability. The cause of action for reformation is being intimated through this damages phase, that is untimely."

¶ 24 The circuit court also addressed the issue of Gluck's request for leave to amend his answer to add an affirmative defense and counterclaim in the statement, noting that he neither filed a motion to do so nor had attached a proposed amendment. Gluck requested that the order reflect the fact that the court had denied his request for leave to file an amended answer. The court initially decided to include the requested language in both the preamble and the body of the order, but then the following colloquy occurred:

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[2] Gluck states in his opening brief that "Bassman's counsel did not dispute the factual question of whether there was a mistake in the Substitute Note, stating that the principal balance in the Substitute Note 'might not necessarily be the true number of what was owed; rather it was a negotiated number that the parties agreed upon due for purposes of creating the substitute promissory note.' " Gluck apparently is implying that plaintiffs' counsel admitted there was a mistake in the Substitute Note, which is a mischaracterization of the Bassman plaintiffs' argument. In the very next paragraph of the hearing transcript Gluck quotes, plaintiffs' counsel noted the language of the Forbearance Agreement, which states the outstanding balance owed, including all accrued and unpaid interest, penalties and default interest "is in excess of $5.6 million," and that "the parties agreed that more than $5.6 million was owed," but "they entered into a promissory note that had the $5.6 million."

"[PLAINTIFFS' COUNSEL]: I think you're really in the same place. There is no motion on file. They --

THE COURT: There is none, right.

[PLAINTIFFS' COUNSEL]: They filed a motion for an extension, that's what the Court should rule on.

THE COURT: So the only thing that was really before me was the 191(b). There was no motion presented to amend or anything like that.

[DEFENSE COUNSEL]: If I could address that?

THE COURT: Sure.

[DEFENSE COUNSEL]: Judge, we were here yesterday, yes, on that 191(b) extension. The Court wanted a one day -- actually, same day turnaround on the issue regarding mistake. In the course of yesterday to prepare that statement, we determined we did want to file an amended pleading, if the Court would allow us.

So we did essentially request for that in the one day turnaround. If --

THE COURT: Well, it is improper. It is improper procedurally because if you were going to amend, you would have to attach a copy of what you wanted to do."

¶ 25 The circuit court again reviewed the prayer in the statement Gluck submitted and concluded:

"All right. The statement regards a mistake in the note, and the requests are for an extension of time. That's denied. And that's what that's saying.

> Grant leave to file. What I would say with respect to that is, with respect to the prayer stated here, there is no motion to amend, answer and counter-claim as allowed. So I can't grant leave to file. If you were asking for some extension of time to file an answer and counter-claim as it relates to damages, which is what you indicated, since there was no claim about the motion for partial summary judgment, I think the record reflects the status of that in light of what you indicated you wanted to do with the -- addressing the principal amount at the damage phase. So that's -- the record is quite clear where we are in the procedure."

Gluck moved *instanter* to amend his answer, which the court denied. Gluck sought to add that denial into the language of the order. The court said, "But it was stated that the purpose of filing it was to address damages, not on the motion for partial summary judgment because you indicated with respect to liability that was not an issue. I think the record reflects the status. So rather than confusing the record with statements that seem to conflict with it, the record will stand as it does." The court entered summary judgment on damages in favor of the Bassman plaintiffs and against Gluck in the amount of $7,921,149.74. The court also denied Gluck's motion for extension of time to file a Rule 191(b) affidavit.

¶ 26 On March 27, 2015, Gluck moved to vacate the judgment entered the previous day and reconsider the ruling denying him an extension of time to file a Rule 191(b) affidavit. He also sought leave to amend his answer to add affirmative defenses and a counterclaim. He attached to his motion a Rule 191(b) declaration and the proposed amended answer. On April 6, 2015, the circuit court denied Gluck's motion. This appeal followed.

¶ 27 ANALYSIS

¶ 28 Gluck argues that the circuit court erroneously denied him his "day in court" to plead and prove his defense of mistake. He asserts that he should have been able to raise the defense of mistake during the damages phase of the litigation because the alleged mistake related only to the calculation of damages, not liability. Gluck also contends that the court made a factual finding that the principal amount of the loans listed in the Substitute Note was a "negotiated" figure. He argues that this finding was: (1) based only on unsworn oral assertions of plaintiffs' counsel; (2) unsubstantiated in the record; (3) contradicted by his court filing; and (4) impermissible in resolving a summary judgment motion. In addition, Gluck asserts the court erred when it concluded that his request for leave to amend was procedurally improper. Finally, Gluck requests that this Court grant him leave to file his proposed amended answer pursuant to Rule 366(a).

¶ 29 Standard of Review

¶ 30 Gluck seeks *de novo* review of the circuit court's "findings" that the Substitute Note could not be reformed and that the principal balance of the Substitute Note was a "negotiated number." He also seeks *de novo* review of the denial of his requests for leave to file an amended answer to raise affirmative defenses and a counterclaim.

¶ 31 Before addressing the merits of this appeal, we initially note that Gluck's characterization of the circuit court's "findings" is misplaced. First, the court never made any ruling on reformation because the issue was never brought before the court in a procedurally proper manner. Gluck attempted to raise the defense of mistake *sua sponte* after the court had determined liability on February 26, 2015. The court never granted Gluck leave to amend his answer to plead the counterclaim of reformation. Indeed, the court specifically stated during the

hearing on March 26, 2015 that "[t]here is no cause of action for reformation that's ever been raised in this proceeding." Because the court did not make any ruling on the issue of reformation, we lack jurisdiction to consider Gluck's challenge of a ruling that does not appear in the record. *Canel and Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 921 (1999) (citing *Goodrich v. Sprague*, 376 Ill. 80, 86 (1941) (appellate court jurisdiction extends only to those matters in controversy which have been ruled upon by the trial court).

¶ 32 Second, Gluck mischaracterizes that the circuit court made a finding of fact when it stated at the March 16, 2015 hearing that the principal balance of the note "is a negotiated number." This is misleading when reading the transcript from the hearing as a whole and considering the context of the court's statement. The court had already granted summary judgment in favor of the Bassman plaintiffs on the issue of liability. Therefore, the court had already determined that Gluck breached the terms of the Forbearance Agreement and Substitute Note by defaulting on payments of the agreed-upon $5.6 principal amount of the loan. During the March 26, 2015 hearing, the court: (1) denied Gluck's motion for extension of time to file his Rule 191(b) affidavit; and (2) granted summary judgment on damages in favor of the Bassman plaintiffs and against Gluck in the amount of $7,921,149.74, which consisted of whatever amount remained to be paid on the principal and the calculation of interest owed on that remaining amount. In short, when the court stated it found the principal loan amount from the Substitute Note constituted "a negotiated number," it was mere surplusage. No issue of fact remained at the time the court made the statement Gluck challenges. Accordingly, we reject Gluck's argument that the court improperly made a fact determination that the principal amount of the Substitute Note constituted a negotiated number.

¶ 33 Turning to Gluck's argument that the circuit court erred when it denied him his request for leave to file an amended answer and counterclaim, both before granting summary judgment on damages and when he sought to vacate summary judgment on damages, we initially note that Gluck never filed a formal motion for leave to amend. Instead, he included a request for leave to amend in his statement regarding the alleged mistake in the Substitute Note, which was filed on March 25, 2015, after the court had entered summary judgment on liability. The prayer for relief at the end of the statement requested leave to file an amended answer and counterclaim regarding mistake. The court specifically noted during the March 26, 2015 hearing that Gluck did not move to amend his answer and that the statement did not include a proposed amended answer. Thereafter, the court granted summary judgment on damages and denied Gluck's motion for extension of time to file a Rule 191(b) affidavit. Gluck did attach a proposed amended answer and counterclaim to his motion to vacate the March 26, 2015 judgment and motion to reconsider the ruling denying the extension of time to file a Rule 191(b) affidavit. In the motion to vacate, he requested leave to amend his answer to add affirmative defenses and a counterclaim. Gluck argues the court erroneously concluded that a motion for leave to amend must be supported by the proposed amended pleading.

¶ 34 A pleading's substance and not its title determines its character. *R & G, Inc. v. Midwest Region Foundation for Fair Contracting, Inc.*, 351 Ill. App. 3d 318, 321 (2004) (a court is not bound by the title of a pleading). A court should examine the substance of a document to determine how it should be treated. *Id.*

¶ 35 In this case, the circuit court granted Gluck a matter of hours to submit a statement explaining the nature of the mistake he alleged during oral argument on March 25, 2015. Later that day, Gluck submitted to the court a statement regarding mistake, which included a request

for leave to amend his answer. Although not a formal motion, the request for leave to amend set forth substantive argument as to why leave should be granted. Additionally, the record includes a proposed amended answer in which Gluck articulated the substance of the amendment. Gluck also orally moved to amend his answer *instanter* during the March 26, 2015 hearing. Therefore, we will consider Gluck's request for leave to amend his answer to add affirmative defenses and a counterclaim.

¶ 36 The Illinois Code of Civil Procedure states in relevant part: "Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2012). In deciding whether a post-summary judgment amendment is proper, the following four factors are considered: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 37 Under section 2-1005(g), amendment may be appropriate where summary judgment is entered on the theory pleaded, but the depositions and affidavits indicate that another theory is viable. *Steinberg v. Dunseth*, 276 Ill. App. 3d 1038, 1047 (1995). "As a rule, the circuit court's ruling to allow or deny an amendment is a matter of discretion and will not be reversed absent an abuse of discretion." *Board of Directors of Bloomfield Club Recreation Ass'n v. The Hoffman Group, Inc.*, 186 Ill. 2d 419, 432 (1999). A circuit court abuses its discretion when it refuses to allow a party to amend when a cause of action can be stated if the amendment is permitted. *Moiseyev v. Rot's Building & Development, Inc.*, 369 Ill. App. 3d 338, 343 (2006). The party

seeking leave to amend must establish all four factors set forth in *Loyola*. *I.C.S. Illinois, Inc. v. Waste Managment of Illinois, Inc.*, 403 Ill. App. 3d 211, 220 (2010).

¶ 38 Application of the *Loyola* Factors

¶ 39 Regarding the first element of *Loyola*, we find that the proposed amendment and counterclaim will not cure the defective answer to defeat the entry of summary judgment on damages. The proposed amended answer sought to add the affirmative defenses of mutual mistake and unilateral mistake caused by fraud, and a counterclaim for reformation. Gluck, however, agreed unconditionally to waive every defense and counterclaim when he executed the Forbearance Agreement.

¶ 40 "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008); see also *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007) ("A court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent."). "As a general rule, the parties' intentions are determined from their final agreement." *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 590 (1998). Illinois follows the "four corners rule for contract interpretation in that, " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. ' " *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962)). "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety, Inc.*, 185 Ill. 2d at 462.

¶ 41 The interpretation of a contract presents a question of law subject to *de novo* review on appeal in accordance with the general rules applicable to contract interpretation. *Gallagher*, 226 Ill. 2d at 219. We construe a clear and unambiguous contract as a matter of law. *J.M. Beals Enterprises v. Industrial Hard Chrome, Ltd.*, 194 Ill. App. 3d 744, 748 (1990).

¶ 42 In the Forbearance Agreement, Gluck agreed that he is indebted to the Bassman plaintiffs in the amount of $5,611,853.86 as of September 30, 2011, "pursuant to those certain promissory notes and other debt instruments as detailed on Exhibit A attached hereto and made a part hereof." Gluck himself requested that the Bassman plaintiffs forbear from exercising their rights and remedies under a number of defaulted notes until the sale of his interest in the Willis Tower. Paragraph 2(a) of the Forbearance Agreement specifically stated that Gluck acknowledged his default on the notes and agreed that those notes, "together with interest accrued and accruing thereon, and fees, costs, expenses and other charges now or hereafter payable by the Borrower to Lender *are unconditionally owing by Borrower to Lender, without offset, defense or counterclaim of any kind, nature or description whatsoever*." (Emphasis added.) In paragraph 6 of the Forbearance Agreement, Gluck represented, warranted, and covenanted that "all information and statements contained in this Agreement are true and correct." In addition, paragraph 9(b) stated in all capital letters that Gluck expressly, irrevocably, and unconditionally waived every defense, including a defense based on the implied covenant of good faith, cause of action, counterclaim, or setoff. He has not challenged these provisions.

¶ 43 We find that Gluck's proposed amended answer would not cure the defective pleading because the unambiguous terms of the Forbearance Agreement expressly stated that Gluck unconditionally waived every defense and he warranted that all the information and statements contained in the Forbearance Agreement were "true and correct." "Illinois permits a party to

contractually waive all defenses, and this court is not precluded from upholding it." *RBS Citizens, National Assoc. v. RTG-OakLawn, LLC*, 407 Ill. App. 3d 183, 186 (2011) (citing *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 172 (2010)). Gluck's proposed affirmative defenses and counterclaim would not cure the defective pleading and, therefore, he has not established the first *Loyola* factor.

¶ 44 As to the second *Loyola* factor, Gluck argues allowing leave to amend his answer would not be prejudicial because the Bassman plaintiffs were involved in the underlying transactions delineated in Exhibit A of the Forbearance Agreement and plaintiffs' counsel drafted the initial letter that contained alleged evidence of the mistaken calculation of the principal amount of the loan. Gluck also asserted that additional litigation would not be prejudicial because discovery had yet to proceed at the time the circuit court entered summary judgment on damages.

¶ 45 "Prejudice to the party opposing an amendment is the most important of the *Loyola* factors, and 'substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant.' " *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (2007) (quoting *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (2004)). Although Gluck insists that prejudice is measured by whether a party would be unprepared to respond to a new theory at trial, Illinois courts have repeatedly found that an attempt to amend a pleading after summary judgment was prejudicial. For example, in *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 107, this court found that the trial court did not abuse its discretion by refusing to allow the plaintiff leave to file an amended complaint after it had granted summary judgment in favor of the defendants. The *Geisler* court stated:

> "Additionally, allowing plaintiff to file a second amended complaint would prejudice defendants because it would allow plaintiff a 'second bite at the apple.'

> Plaintiff failed to raise the issue of judicial estoppel or specifically allege damages for nearly two years since filing the instant case. In that time, plaintiff did not attempt to amend his pleadings until after he moved for summary judgment and lost. Allowing plaintiff to 'start over' based on facts and legal claims that were previously available to him would burden defendants with additional litigation." *Geisler*, 2012 IL App (1st) 103834, ¶ 102.

¶ 46 In this case, Gluck was in possession of the same April 27, 2011 correspondence from plaintiffs' counsel that reflects the alleged mistaken calculation of the principal amount of the loan. From the time the Bassman plaintiffs filed their initial verified complaint on February 14, 2014 to February 26, 2015, when the circuit court entered summary judgment on liability, Gluck did not attempt to amend his answer until he lost. Gluck also never explained why he did not identify the alleged mistake until after the court entered summary judgment on liability. Allowing him to "start over" based on facts and legal claims that were previously available to him would burden the Bassman plaintiffs with additional litigation. Further, as we have already found that the proposed amended answer would not cure a defective pleading in light of Gluck's waiver of defenses, litigation of the affirmative defenses Gluck seeks to add would be futile. See *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004) (finding a court "may consider the ultimate efficacy of a claim as stated in a proposed amended pleading"). Accordingly, we find that Gluck's proposed motion to amend his answer, if granted, would cause prejudice to the Bassman plaintiffs.

¶ 47 As to the third and fourth *Loyola* factors, Gluck argues that his proposed amendment was timely because it was made shortly after the circuit court entered partial summary judgment on liability, but before entry of summary judgment on damages, and that he sought leave to amend

at a reasonable first opportunity. Again, Gluck has proffered no reason why he did not move to amend his answer prior to the court entering summary judgment on liability. *Hartzog*, 372 Ill. App. 3d at 526. Gluck also never claimed he lacked access to the evidence that would allow him to assert the affirmative defenses of mutual mistake and unilateral mistake by fraud. Gluck's answer to the complaint raised no affirmative defenses or counterclaims. He did not raise the issue of a mistake in response to the Bassman plaintiffs' motion for summary judgment or motion to reconsider. In addition, Gluck did not raise the issue of mistake in his motion to substitute counsel and for extension of time to file his Rule 191(b) affidavit.

¶ 48 We find that Gluck's proposed amendments to the answer were not timely because they did not include any new factual or legal allegations that were previously unavailable. We also conclude Gluck had previous opportunities to amend his answer, but failed to do so until the circuit court had ruled on the issue of liability.

¶ 49 We find no abuse of discretion on this issue. As such, we also reject Gluck's request for this Court to grant him leave to file an amended answer under Rule 366(a) (Ill. S. Ct. R. 366(a), eff. Feb. 1, 1994)).

¶ 50 CONCLUSION

¶ 51 We affirm the judgment of the circuit court of Cook County.

¶ 52 Affirmed.