2016 IL App (3d) 150413-U

Order filed July 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

ROBERT D. BUSH,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-15-0413
	)	Circuit No. 11-CH-2758
	)	
CENTRAL MORTGAGE COMPANY	)	Honorable
and FIRST MIDWEST BANK,	)	Daniel Rippy, Thomas A. Thanas, Richard J.
	)	Siegel, and Joseph C. Polito,
Defendants-Appellees.	)	Judges, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The court should have considered the allegations set out in counts I, II, and IV to be presumptively true for purposes of the combined section 2-619.1 motions to dismiss. Viewing the complaint in this light, the allegations reveal the borrowers provided a timely notice of rescission within three years from the date of consummation of each loan agreement. In addition, the borrowers were not required to allege the ability to tender the full amount of the loan in order to properly state a claim for rescission.

¶ 2 Robert D. Bush filed a two-count complaint in Will County case No. 11-CH-2758 requesting the court to enter an order rescinding two mortgage loan agreements with separate

banks, Central Mortgage Company and First Midwest Bank. In 2011, the circuit court granted Central Mortgage Company's combined motion to dismiss count I of Bush's initial complaint. Additionally, in 2014, the circuit court granted First Midwest Bank's combined motion to dismiss counts II, III, and IV of Bush's amended complaint. We reverse.

¶ 3 BACKGROUND

¶ 4 On March 17, 2008, Robert D. Bush and his wife (the borrowers)[1] executed a mortgage for $417,000 to refinance their residence located at 26750 Hawthorne Trail, Monee, Illinois. Central Mortgage Company (Central) became the owner and holder of this mortgage and note.

¶ 5 On March 17, 2008, the borrowers executed a second mortgage against their residence with First Midwest Bank (First Midwest) for a revolving line of credit against the equity in the home. By 2010, the borrowers defaulted on both loans.

¶ 6 On September 13, 2010, Central filed a foreclosure complaint in case No. 10-CH-5616 against the borrowers regarding the first loan. On October 15, 2010, First Midwest filed a complaint against the borrowers in case No. 10-L-829 alleging default on the note and requesting return of the principle amount of the loan along with additional fees.

¶ 7 On June 3, 2011, after being named as a defendant by Central in case No. 10-CH-5616 and First Midwest in case No. 10-L-829, the borrowers filed a complaint seeking rescission of both loans in case No. 11-CH-2758. Count I of the initial rescission complaint (initial complaint) in case No. 11-CH-2758 alleged the original lender did not provide the borrowers with the requisite number of copies of the truth in lending disclosure statement or the notice of right to cancel as required by the Truth in Lending Act (TILA). Count I of the initial complaint further alleged the borrowers did not receive copies of the notice of right to cancel until after

[1]The record indicates Mr. Bush and his wife could both be considered borrowers under the loan agreements. However, only Mr. Bush is named as plaintiff/defendant throughout the litigation.

their three-day unconditional right to rescind had expired. The borrowers also alleged they did not receive copies of the notice of right to cancel until after a document indicating the loan would not be rescinded was signed by the borrowers. Therefore, based on the original lender's purported noncompliance with the TILA notice requirements, the borrowers exercised their right to rescind this $417,000 loan within the extended three-year time period for rescission of the loan allowed under TILA. 15 U.S.C. §1601 *et seq.* (2010); 12 C.F.R. § 226.23 *et seq*. (2011)). The borrowers also claimed Central failed to acknowledge the timely notice of rescission provided by the borrowers to Central. Therefore, in count I, the borrowers asked the court to rescind the loan now held by Central and award costs and damages.

¶ 8 Based on similar violations of TILA with respect to the other loan, the borrowers asked the court to rescind the loan from First Midwest in count II, along with requesting costs and damages.

¶ 9 On June 16 2011, the circuit court consolidated case Nos. 11-CH-2758, 10-CH-5616, and 10-L-829. On August 24, 2011, Central filed a combined motion to dismiss count I of the borrowers' initial complaint in case No. 11-CH-2758 pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)).

¶ 10 I. Central's Motion to Dismiss

¶ 11 In their motion to dismiss, Central argued count I should be dismissed with prejudice because the borrowers' right to rescind or cancel the transaction expired on March 20, 2008, three days after the closing date. Therefore, any notice of rescission provided to Central after March 20, 2008, would be untimely. Alternatively, Central argued that even if the three-year extended right to rescind applied due to TILA issues, the borrowers did not provide Central with a timely notice of intent to rescind as none had been received by the end of the day on March 16, 2011. Finally, pursuant to section 2-615, Central claimed count I of the initial complaint in case

No. 11-CH-2758 failed to allege a cause of action because the count did not plead sufficient facts alleging the borrowers had "An Ability or Willingness To Tender Back The Property (or Money) He Received From Origination." 735 ILCS 5/2-615 (West 2010).

¶ 12 On November 17, 2011, the court granted Central's motion to dismiss count I. On December 12, 2012, the borrowers filed a notice of appeal from the November 17 ruling dismissing count I of the initial complaint. See *Central Mortgage Co. v. Bush*, 2014 IL App (3d) 121041-U.[2]

¶ 13 II. The Amended Rescission Complaint

¶ 14 On April 21, 2014, while the appeal before this court was pending, the trial court granted the borrowers' request for leave to file an amended pleading in the circuit court in case No. 11-CH-2758. Thereafter, on May 2, 2014, the borrowers filed an amended rescission complaint (amended complaint) which restated the original allegations against Central in count I and included additional allegations against First Midwest set forth in counts II, III, and IV.[3]

¶ 15 Count II of the amended complaint asserted that TILA documentation violations committed by First Midwest at the closing on March 17, 2008, resulted in an extended three-year period of rescission. The borrowers further alleged a timely written cancellation was sent to First Midwest on May 13, 2010 and March 2, 2011. Count IV of the amended complaint alleged First Midwest improperly failed to honor the 2010 and 2011 requests to rescind. Consequently, the

[2]On August 19, 2014, this court determined the borrowers' attempt to appeal the dismissal of count I in case No. 11-CH-2758 was premature because there had been no final judgment as to other counts of the same complaint and the order at issue did include a Rule 304(a) finding. *Central Mortgage Co. v. Bush*, 2014 IL App (3d) 121041-U.

[3]While borrowers' appeal regarding count I remained pending, borrowers reasserted count I in their amended complaint to preserve count I for purposes of appeal in the event that borrowers' first appeal was found to be premature, which did indeed occur.

borrowers requested both rescission and the award of statutory damages for First Midwest's failure to honor the timely notice of rescission.

¶ 16 On June 12, 2014, First Midwest filed their own combined motion to dismiss counts II, III, and IV of the amended complaint pursuant to section 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2010). Regarding count II, like Central, First Midwest claimed the rescission count against First Midwest was based on an untimely notice from the borrowers since the extended three-year right to rescission did not apply. In addition, First Midwest asserted the amended complaint failed to sufficiently state a cause of action for rescission because the borrowers failed to allege they had the ability to tender the principal balance of the loan in the pleadings.

¶ 17 Regarding count IV of the amended complaint, First Midwest argued they did not receive a timely notice to cancel the loan and were not liable for any statutory or actual damages for not honoring a request for rescission. Based on these arguments, First Midwest asked the court to dismiss the counts against First Midwest as included in the amended complaint.

¶ 18 III. Resolution of First Appeal

¶ 19 On August 19, 2014, this court dismissed the borrowers' appeal from the November 17, 2011, order allowing Central's motion to dismiss count I of the initial complaint after concluding the appeal was premature.[4] *Central Mortgage Co. v. Bush*, 2014 IL App (3d) 121041-U. The matter was remanded to the trial court. This decision allowed the borrowers to elect whether to attempt to obtain the requisite Rule 304(a) finding or simply wait for final judgment before appealing the dismissal of count I. Shortly after the issuance of our mandate pertaining to the first appeal by the borrowers, all parties began the process of settlement negotiations with the assistance of the trial court.

[4] *Supra* footnote 2.

¶ 20 III. Settlement Conference and Decision

¶ 21 The parties participated in a scheduled off-the-record settlement conference with the trial judge on November 17, 2014. However, the parties were unable to reach a settlement. On December 1, 2014, Judge Thanas entered a written memorandum decision dismissing counts II, III, and IV of the amended complaint, with prejudice, pursuant to section 2-619.1 of the Code.[5] Judge Thanas did not address count I against Central as it remained dismissed.

¶ 22 In the written decision, the court found dismissal of count II was warranted because the borrowers' attorney informed the court during the 2014 settlement conference that "rescission was no longer being sought" by the borrowers against the First Midwest loan. The court also made several findings of fact. First, the court found the borrowers did not receive copies of the TILA notices on March 17, 2008, but received copies of the documents on March 21, 2008. Second, based on this finding, the court reasoned March 21, 2008, "started the three-day 'change your mind' clock to tick" as a matter of law. Finally, the court found the borrowers could only have rescinded the loan by March 26, 2008, and concluded the borrowers' action was untimely. The court stated the borrowers "had until midnight on March 26, 2008, to cancel his [First Midwest] loan." Therefore, the court dismissed count IV.

¶ 23 On December 29, 2014, the borrowers filed a motion to reconsider the court's December 1, 2014, ruling dismissing counts II, III, and IV against First Midwest. On April 15, 2015, Judge Daniel Rippy was assigned to decide the borrowers' motion to reconsider the dismissal of counts II, III, and IV. On May 13, 2015, Judge Rippy announced his ruling on the motion to reconsider in open court, by stating as follows:

> "I think there is [*sic*] compelling arguments to be made, but not to the point where I think that Judge Thanas made a mistake. I don't know that I would have gone that

[5]On appeal, the borrowers do not challenge the dismissal of count III of the amended complaint, so it is not necessary to discuss count III in this order.

way, but that's not my standard at this point. My standard is to say whether or not there was a glaring error in what he did, and I don't believe that there is, so I am going to deny the motion to reconsider at this point in time.

***

Like I say, if it had been in front of me the first time, I don't know that I would have done what he did, but I also am not prepared to say that he made a mistake of law."

The borrowers filed a timely notice of appeal on June 11, 2015.[6]

¶ 24 ANALYSIS

¶ 25 The record reveals that both Central and First Midwest filed separate combined motions to dismiss. 735 ILCS 5/2-619.1 (West 2010). Central's motion to dismiss pertained to count I of the initial complaint and First Midwest's motion to dismiss pertained to the remaining counts of the amended complaint. We will separately address the court's rulings on each defendant's combined section 2-619.1 motion below.

¶ 26 I. Count I - Central

¶ 27 On appeal, the borrowers argue the court improperly granted Central's combined motion to dismiss count I of the initial complaint without making any specific findings regarding the sufficiency of the complaint under section 2-615 of the Code or as to any affirmative matters barring relief under section 2-619 of the Code. 735 ILCS 5/2-615 (West 2010); 735 ILCS 5/2-619 (West 2010)). The borrowers assert a *de novo* standard of review applies with respect to the 2011 order dismissing count I of the initial complaint. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31.

[6] Due to the consolidated nature of the proceedings in the trial court, borrowers' appeal regarding the trial court's ruling dismissing count I could not proceed until the final judgment regarding all claims involving all parties took place.

¶ 28 In contrast, Central argues an abuse of discretion standard of review applies on appeal because this court's review should be limited to the merits of the borrowers' motion to reconsider the dismissal of count I. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006). Central's argument suggests this court is confined to a review of whether the trial court correctly found the borrowers' 2012 motion to reconsider was untimely with respect to section 2-1203 of the Code. 735 ILCS 5/2-1203(a) (West 2010).

¶ 29 First, we agree with the trial court that the borrowers did not file a timely motion to reconsider the November 17, 2011, order. The record documents the motion to reconsider was submitted on May 24, 2012. Clearly, timely motions to reconsider must be filed within 30 days after the entry of a contested order pursuant to section 2-1203 of the Code. 735 ILCS 5/2-1203(a) (West 2010). Therefore, the trial court did not abuse its discretion by summarily denying the borrowers' motion to reconsider the dismissal of count I as untimely on September 6, 2012.

¶ 30 Importantly, although the first appeal was premature, the borrowers have *now* filed a timely notice of appeal within 30 days of the final judgment pertaining to all parties and issues. Therefore, we conclude the proper standard of review to be applied to the trial court's 2011 order allowing Central's combined motion to dismiss count I pursuant to section 2-619.1of the Code is *de novo*. *City of Naperville*, 2012 IL 113148, ¶ 31; 735 ILCS 5/2-619.1 (West 2010)). Now, we turn our attention to the allegations presented to the trial court in support of Central's request to dismiss count I.

¶ 31 Central argued count I should be dismissed for two reasons. Central claimed count I was insufficient on section 2-615 grounds because the count did not include allegations revealing whether the borrowers could tender the loan amounts back to Central. In addition, Central argued count I should be dismissed on section 2-619 grounds because the borrowers' notice of

rescission was not timely and therefore, ineffective. For purposes of this appeal, we examine only the precise issues raised in Central's 2011 combined motion to dismiss.

¶ 32 When reviewing the sufficiency of the pleadings under a section 2-615 motion to dismiss, the court must look at the allegations of the complaint when viewed in a light most favorable to a nonmoving party. 735 ILCS 5/2-615 (West 2010); *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004)). Under a section 2-615 motion, a trial court should dismiss the cause of action "only if it is clearly apparent that no set of facts can be proven which will entitle the plaintiff to recovery." *Id*. at 382-83.

¶ 33 Central's contention that the borrowers' ability to tender must be pled in their complaint revolves around traditional common law principles of rescission; principles TILA expressly overrides according to a recent United States Supreme Court decision. *Jesinoski v. Countrywide Home Loans, Inc*., 135 S. Ct. 790, 793 (2015). Additionally, other federal cases have held, at a motion to dismiss stage, TILA imposes no requirement that a borrower plead their ability to unconditionally tender loan proceeds to the lender. *Lonberg v. Freddie Mac*, 776 F. Supp. 2d 1202, 1207-08 (2011); *Yamamoto v. Bank of New York*, 329 F. 3d 1167 (2003). Accordingly, we conclude the borrowers were not required to include allegations asserting their ability to tender the principal balance in the complaint to withstand a section 2-615 motion to dismiss.

¶ 34 The cases cited by Central for purposes of this appeal, *Iroanyah v. Bank of America*, 753 F. 3d 686, 692 (2014) and *Regency Savings Bank v. Chavis*, 333 Ill. App. 3d 865, 868 (2002), are easily distinguished from the case at hand because those cases do not address the sufficiency of the complaint. Instead, those cases stand for the proposition that rescission *may not* be available to a party if tender is impossible for the borrower, but observe the trial court is free to make that decision in each case based on equitable considerations. See *Iroanyah*, 753 F. 3d at 692; *Chavis*,

333 Ill. App. 3d at 868. Consequently, count I of the complaint against Central sufficiently stated a proper cause of action for rescission.

¶ 35 Next, we consider whether the allegations in Central's combined section 2-619.1 motion support the involuntary dismissal of count I because the notice of rescission to Central was not timely. 735 ILCS 5/2-619.1 (West 2010). When ruling on a section 2-619 motion to dismiss based on an affirmative matter barring the requested relief, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Borowiec*, 209 Ill. 2d at 383.

¶ 36 From the onset, we emphasize that the purpose of our review is *not* to determine whether the three-year extended period for rescission applies. Instead, the focus of our review is limited to whether count I of the initial complaint states sufficient facts, which if true, entitled the borrowers to a three-year window for proper notice regarding rescission of the loan.

¶ 37 In the case at hand, count I of the initial complaint alleged the borrowers did not receive four copies of the notice of right to cancel, as required by TILA, until after the initial three days for rescission had passed. 12 C.F.R. § 226.23(b)(1) (2010). Count I of the initial complaint also alleged Central provided the borrowers with some copies of the notice of right to cancel, as required by TILA, after the borrowers had signed another form on the same day which documented the borrowers did not wish to rescind the loan. Count I further alleged that at *no time* were the proper number of copies delivered to the borrowers. The case law provides that simultaneous delivery of these particular documents creates confusion for the borrowers that may trigger the three-year window for a timely notice of rescission. For example, in *Rand Corp. v. Yer Song Moua*, 559 F. 3d 842, 847-48 (2009), the lender also simultaneously delivered the notice of the borrowers' three-day right to rescind on the same date and at the same time the

borrowers received and signed an election not to rescind. In that case the court held the lender's noncompliance with TILA resulted in an extended three-year period of rescission.

¶ 38 Therefore, after viewing the allegations set forth in count I in the light most favorable to the borrowers, we conclude dismissal of count I was not appropriate on section 2-619 grounds based on the existing case law set forth above. Consequently, we reverse the trial court's order dismissing count I of the borrowers' complaint.[7]

¶ 39 II. First Midwest - Counts II and IV

¶ 40 On December 1, 2014, the trial court issued a ruling on First Midwest's 2012 combined motion to dismiss, dismissing counts II, III, and IV of the borrowers' amended complaint with prejudice.[8] On appeal, the borrowers and First Midwest agree that this court reviews the decision dismissing portions of a complaint, pursuant to either section 2-615 or section 2-619 of the Code, *de novo. City of Naperville,* 2012 IL 113148 at ¶ 31.

¶ 41 In the December 1, 2014, memorandum decision, the court found count II of the amended complaint was "no longer in issue," because, during the November 17, 2014, settlement conference, the borrowers' attorney informed the court that the borrowers no longer wished to pursue an action for rescission of the First Midwest loan. Section 2-1009 of the Code requires a party to file a motion to dismiss any of his claims before those claims should be voluntarily dismissed by court order. 735 ILCS 5/2-1009 (West 2010). In this case, the borrowers' attorney discussed abandoning this request during negotiations, but did not file a voluntary motion to dismiss. Therefore, we conclude the trial court erred by dismissing count II, with prejudice, on

[7]On appeal, Central further contends the borrowers' attempt to raise issues on appeal beyond those issues presented to the court before November 17, 2011. Central's contention is not persuasive as the record supports the view that the issues raised on appeal are confined to the arguments presented by Central in support of the 2011 combined motion to dismiss.

[8]On appeal, the borrowers do not challenge the dismissal of count III of the amended complaint, so it is not necessary to discuss count III in this order.

grounds that the borrowers' attorney offered to abandon count II during the settlement conference that did not result in a settlement between the parties.

¶ 42 In the interest of judicial economy, we will also address the merits of the arguments advanced by First Midwest in support of their motion to dismiss count II, which the trial court did not reach. Our careful review of First Midwest's combined motion to dismiss count II indicates First Midwest argued count II should be dismissed for two reasons. First Midwest claimed count II was insufficient under section 2-615 for the failure to allege the borrowers' ability to tender the loaned amount back to First Midwest. Second, First Midwest argued count II should be dismissed on section 2-619 grounds because the notice of rescission was not timely provided within three days of receipt of all loan documents from First Midwest. These issues are substantially similar to those raised by Central with respect to the dismissal of count I of the initial complaint. The allegations set forth in count II are also substantially similar to those made by the borrowers in support of count I. Therefore, we rely on our analysis of the allegations and issues set forth above. Applying the same analysis, we conclude the allegations set forth in count II are sufficient to withstand dismissal on both 2-615 and 2-619 grounds.

¶ 43 Turning to the merits of the challenge to count IV of the amended complaint, First Midwest's motion to dismiss alleged that a request for statutory damages based upon First Midwest's refusal to honor the borrowers' notice of rescission should be dismissed because the borrowers did not set out allegations revealing First Midwest received timely notice in the three-day cancellation window after March 17, 2008. As stated above, when determining whether the pleadings establish an affirmative matter that defeats the request for rescission, this court must review the allegations of count IV in the light most favorable to the borrowers. *Borowiec*, 209 Ill. 2d at 383. Count IV of the amended complaint alleges the borrowers first received notice of the right to cancel on March 21, 2008, three days after the closing. Count IV alleged the

borrowers first received and signed the election not to rescind on the same date, March 21, 2008. In the *Yer Song Moua* case, under similar factual circumstances, the court held the lender's noncompliance with TILA resulted in an extended three-year period of rescission based on the confusion created by the simultaneous delivery of both notice of the permitted unconditional three-day rescission right and execution of the form electing not to rescind in the first three days. *Yer Song Moua*, 559 F. 3d 842 at 847-48. Therefore, we conclude the allegations set out in count IV, which must be assumed to be true for purposes of the motion to dismiss, were sufficient to support the borrowers' theory that the May 13, 2010 notice of intent to rescind the loan with First Midwest was timely filed within three years of the consummation of the loan.

¶ 44 Again, our analysis is not intended to be construed as indicative of any opinion by this court concerning whether the extended period for rescission should apply. This particular issue is not ripe for review and can only be resolved by the trial court after further pleadings and discovery have been completed. For purposes of this appeal, we conclude the dismissal of count I related to Central and counts II and IV with respect to First Midwest must be reversed for the reasons discussed above.

¶ 45 IV. *Res Judicata*

¶ 46 Finally, we address First Midwest's argument on appeal that the borrowers' amended complaint against First Midwest is now barred by an affirmative matter, the doctrine of *res judicata.* We take judicial notice of the final judgment entered on June 19, 2013, in case No. 10-L-829, involving First Midwest's action against the borrowers. First Midwest filed their combined section 2-619.1 motion to dismiss counts II, III, and IV of the borrowers' amended complaint nearly one year later, on June 12, 2014, without asserting res *judicata*. This issue has been forfeited by First Midwest for purposes of this appeal due to the fact that First Midwest did not address this contention before the trial court.

¶ 47 Assuming for the sake of argument forfeiture of *res judicata* should not apply, the party asserting the application of this doctrine must also demonstrate an identity of the causes of action and the parties in both cases. Simply stated, *res judicata* involves three requirements, not just proof of a prior judgment. *Currie v. Wisconsin Central, Ltd.*, 2011 IL App (1st) 103095, ¶ 28.

¶ 48 Federal courts have recognized the issues involved in an action seeking a judgment for monetary damages in a foreclosure action are not identical to the issues involved in a separate action to rescind the same loan due to the original lender's violations of TILA. *Lippner v. Deutsche Bank National Trust Co.*, 544 F. Supp. 2d 695, 703 (2008)*; In re Walker*, 232 B.R. 725, 733-34 (Bankr. N.D. Ill. 1999). These courts have held the judgment for those money damages could not form the basis for collateral estoppel or *res judicata* of the foreclosure issues. *Id*. at 734. First Midwest bears the burden of demonstrating the doctrine applies and has not done so for purposes of this appeal. *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶ 15.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, we reverse the judgment of the circuit court of Will County regarding the dismissal of count I of the borrowers' initial complaint against Central and the dismissal of counts II and IV of the amended complaint against First Midwest.

¶ 51 Reversed.