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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KENNETH R. BARRICK,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 16-L-752
)	
WILLIAM BARRICK, TRIAD FIRST, LLC,)	
and ANTHONY KEMP,)	Honorable
)	Dorothy French Mallen,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* Appellant forfeited his arguments that the trial court erred in dismissing two defendants and striking certain allegations from his first amended complaint, because he did not preserve the dismissed parties and the disputed allegations in his second amended complaint. Further, the trial court did not err in dismissing the second amended complaint. Therefore, we affirmed.

¶ 2 Plaintiff, Kenneth R. Barrick, appeals from the trial court's dismissal of his second amended complaint against defendant, his brother William Barrick. Kenneth argues that the second amended complaint sufficiently alleged a cause of action for breach of an oral contract. He also argues that the trial court erred in dismissing defendants Anthony Kemp and Triad First,

LLC, from his first amended complaint, and in striking certain paragraphs of that complaint as irrelevant. We affirm.

¶ 3

I. BACKGROUND

¶ 4

A. Complaint

¶ 5 On August 8, 2016, Kenneth brought a complaint for fraud against William, Anthony, and William's and Anthony's company, Triad First, an Illinois limited liability company (Triad Illinois). Kenneth alleged as follows, in relevant part. Kenneth's and William's mother, Carrole Collins, had a one-half interest in a farm property along with a woman named Connie White. In 2007, they had fallen behind on loan payments on the property and asked for Kenneth's assistance. He contacted Salvatore DiBenedetto, who had helped him obtain a mortgage on his home. DiBenedetto proposed that they take out a much larger loan on the farm to repay the existing loans and provide regular payments to Carrole and Connie. He said that the arrangement would require Kenneth to be added as a title-holder to the property and become one of the loan's obligors. They agreed, and a loan of over \$600,000 was taken out against the property; the loan was arranged through Arcola Homestead Savings Bank (Arcola Bank). However, DiBenedetto defrauded the parties and did not use all of the funds to pay off the original mortgages.

¶ 6 Kenneth alleged that as a result, in August 2009, a mortgage foreclosure proceeding was filed against Carrole, Connie, and Kenneth. A series of entities were substituted as the party plaintiff in the proceeding, including the Federal Deposit Insurance Corporation (FDIC), at which point the case was removed to federal court. Stolat Financial LLC (Stolat) then bought FDIC's interest in the loan and became the party plaintiff.

¶ 7 Kenneth further alleged that William advised Kenneth that he and Anthony had made arrangements to purchase Stolat's interest for about \$450,000 and that after the transaction was complete, Carrole would be able to continue residing on the property. William said that Kenneth did not have to take any action in the foreclosure suit because William would not require Kenneth to pay off any loans on the property. Kenneth therefore did not bid on the property at the foreclosure sale, even though he had the means to do so. After a judgment of foreclosure and sale was entered, Triad Illinois became the party plaintiff on June 11, 2015. Carrole passed away on November 1, 2015. Five days later, Triad Illinois obtained an order approving the report of the foreclosure sale and a deficiency judgment of \$156,815.77. Triad Illinois filed suit against Kenneth to recover the deficiency on April 18, 2016. Kenneth alleged fraud in that he had the statutory right and means to bid on the property at the foreclosure sale but was induced not to by William.

¶ 8 Defendants filed a motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)) on September 21, 2016. They argued, among other things, that Kenneth had failed to plead all of the elements of fraud. On December 1, 2016, the trial court granted the motion, without prejudice, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). At the hearing, defendants stated that Triad First, an Iowa limited liability company (Triad Iowa), owned the deficiency judgment, rather than Triad Illinois.¹

¶ 9 **B. First Amended Complaint**

¶ 10 Kenneth filed a first amended complaint on February 2, 2017, against William, Anthony, and Triad Iowa, which was also held by William and Anthony. The amended complaint

¹ Triad Illinois and Triad Iowa were distinct companies.

contained similar factual allegations but alleged breach of oral contract as the cause of action. Defendants filed a section 2-619.1 motion to dismiss the complaint on March 2, 2017. They argued that the complaint: sought relief pursuant to an unenforceable contract under the Frauds Act (740 ILCS 80/1 *et seq.* (West 2014)); was an improper collateral attack on the federal foreclosure proceedings; asserted claims for damages that Kenneth lacked standing to assert; and failed to plead any cause of action against defendants. They further argued that the trial court should strike allegations within the complaint that were unrelated to Kenneth's claim for breach of an oral contract.

¶ 11 A hearing on the motion to dismiss took place on May 3, 2017. The trial court granted defendants' request to strike certain allegations from the first amended complaint. It further granted the motion to dismiss under section 2-615 as to Anthony and Triad Iowa with prejudice² because Kenneth did not allege that they were involved in the oral agreement. It granted the motion to dismiss under section 2-615 as to William without prejudice based on a lack of sufficient allegations of an oral contract. The trial court stated that Kenneth failed to allege, *inter alia*, when the oral agreement took place, what words were said, and whether there was any consideration. It further stated that Triad Iowa held the deficiency judgment, not William, and that Kenneth never alleged that William was speaking as Triad Iowa's agent during the agreement.

¶ 12 C. Second Amended Complaint

¶ 13 Kenneth filed a second amended complaint on June 16, 2017, against only William, alleging breach of an oral contract. He additionally alleged as follows. In October 1999, Carrole

² Though it is not clear from the record, the parties agree that the dismissal as to Anthony and Triad Iowa was with prejudice.

and Connie took out a mortgage on the farm of \$155,000. In November 2006, they took out a second mortgage on the property of \$70,000. After the over \$600,000 loan was taken out through DiBenedetto in 2007, the second mortgage was paid off, and \$194,660 was paid to Carrole and Connie by DiBenedetto's company. A foreclosure proceeding stemming from the 1999 mortgage was filed on August 21, 2009. A default judgment was entered against Kenneth on February 24, 2015.

¶ 14 Kenneth alleged that he reached an oral agreement with William during a telephone conversation "during the first quarter of 2015," during which time Kenneth's wife was present. Specifically:

"The agreement was that [William] and his domestic partner, [Anthony], and their entity, Triad [Iowa], would take over the position of Stolat in the foreclosure proceeding. [Kenneth] would agree not to exercise his *rights of redemption* when Stolat or Triad moved for foreclosure and [Kenneth] would agree not to bid for the property for the property [*sic*] financed by a loan to [Kenneth] from Citizens National Bank. In exchange, [William] represented to [Kenneth] that he, [Kenneth,] did not have to take any action in connection with the foreclosure suit because he, [William], would not require [Kenneth] to pay any money to pay off the loans on the property. [William] specifically agreed that he, [William], would not seek to enforce any deficiency against [Kenneth]. As a result, [Kenneth] would give up any rights he had to the property and he, [Kenneth], would not bid on the property at the foreclosure sale. The brothers agreed that their mother would continue to reside on the property." (Emphasis added.)

Kenneth alleged that William breached this agreement because on April 22, 2016, “through his entity,” he served a citation to discover assets on Kenneth seeking a deficiency judgment of \$156,815.77. Kenneth alleged damages of attorney fees in defending against that action.

¶ 15 On July 13, 2017, William filed a motion to dismiss the second amended complaint under section 2-619.1. He argued, among other things, that Kenneth failed to adequately plead a breach of contract because he did not sufficiently allege: when the agreement took place, what consideration supported the agreement, how William breached the agreement, and damages. William further argued that Kenneth failed to plead an agency relationship between William and Triad Iowa.

¶ 16 The trial court granted the motion to dismiss with prejudice under section 2-615 on September 14, 2017, stating as follows. The alleged consideration by William was illusory because Triad Iowa owned the judgment, rather than William.

“So at the time this agreement was reached, William owned nothing, and William *** never owned the deficiency judgment. So the consideration of William saying I will not enforce the deficiency judgment, he didn’t own the deficiency judgment, so there is no consideration. He didn’t own it at the time[,] and he didn’t own it later. He still doesn’t own it.”

Kenneth’s consideration to give up his right to redemption was also illusory because under section 15-1601 of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1601 (West 2014)), it had to be in writing to be effective. Further, the redemption period expired on June 20, 2015, meaning that Kenneth would have had to exercise his right of redemption by June 5, 2015, which he did not do, and Triad Iowa was not substituted as a plaintiff until June 11,

2015.³ Kenneth did not allege that he would not refrain from bidding on the property at the foreclosure sale as consideration. There was also no breach by William or resulting damages because Triad Iowa, and not William, was attempting to enforce the deficiency judgment, was, and Kenneth never alleged that William made the oral agreement on Triad Iowa's behalf or had the authority to do so.

¶ 17 Kenneth filed a motion to reconsider on October 13, 2017. He argued that the trial court erred in ruling that he had no right of redemption when Triad Iowa became the plaintiff in the foreclosure proceeding. He argued that Triad Iowa became a plaintiff in the foreclosure suit on June 11, 2015, and that his right of redemption did not expire until June 20, 2015. Kenneth maintained that he additionally had a special right to redeem for 30 days after the November 6, 2015, order confirming the sale, under section 15-1604 of Foreclosure Law (735 ILCS 5/15-1604 (West 2014)). Thus, Kenneth argued that he had both a statutory right to redeem and the special right to redeem while Triad Iowa was the plaintiff in the foreclosure suit.

¶ 18 The trial court denied the motion at a hearing on October 31, 2017, reasoning as follows. The “basic misunderstanding in this case [was] thinking that William Barrick [was] the same as Triad LLC legally,” but a limited liability company was a separate entity from its members and managers. Triad Iowa was not a defendant in the second amended complaint, and Kenneth did not allege that Triad Iowa made an agreement with him or that William made an agreement with

³ At the hearing, defendants' attorney stated that Triad Iowa “legally acquired” the deficiency judgment from Stolat in April 2015 but did not file as a plaintiff until June 11, 2015. The trial court stated that it had to consider the facts alleged in the complaint, which did not include the April 2015 date, and even then “there would have been time for the parties to have entered into a written agreement” and filed it with the court.

him as an agent of Triad Iowa. The alleged agreement was that William, Anthony, and Triad Iowa would take over Stolat's position, but only Triad Iowa did so. The trial court had erred in previously not interpreting the allegations of the complaint to include Kenneth bidding outright in the foreclosure sale, but the error did not change the ultimate analysis because the crux of the problem was that Kenneth thought that William and Triad Iowa were the same entity, which they were not.

¶ 19 The trial court continued by stating that Kenneth argued in his motion to reconsider that the trial court did not consider the proper redemption date. However, this argument was incorrect because the trial court had stated that the redemption period expired on June 20, 2015, and that Kenneth had to give notice that he was going to exercise his right of redemption by June 5, 2015, which he did not do, and Triad Iowa did not become the plaintiff until June 11, 2015. Kenneth also raised the issue that he had a special right of redemption under section 15-604 until December 5, 2015, but he had forfeited this argument by failing to raise it in the original hearing. Even otherwise, this did not change the trial court's analysis because it still constituted alleged consideration by Kenneth of foregoing a right to buy the property. The problem was that the parties did not agree that Triad Iowa would refrain from enforcing the deficiency judgment. Also, Kenneth knew at this time that William was not the plaintiff in the foreclosure case and was not going to hold the deficiency judgment. Therefore, the oral contract was "an illusory agreement that never came to pass."

¶ 20 Kenneth timely appealed.

II. ANALYSIS

¶ 21 On appeal, Kenneth argues that: (1) the second amended complaint sufficiently plead a cause of action for breach of an oral contract; (2) the trial court erred in ruling that the second

amended complaint failed to adequately allege the relationship between William and Triad Iowa; (3) the trial court improperly dismissed Triad Iowa and Anthony as defendants in the first amended complaint; and (4) the trial court erred in striking allegations in the first amended complaint as irrelevant.

¶ 22 We begin with Kenneth's third and fourth arguments, regarding the first amended complaint. We conclude that Kenneth has forfeited these arguments by failing to reincorporate or otherwise preserve the dismissed parties and the disputed allegations in his second amended complaint.

¶ 23 Our supreme court has stated that once a party files an amended pleading, he forfeits any objection to the trial court's rulings on former complaints. *Boatmen's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99 (1995); see also *Bonhomme v. St. James*, 2012 IL 112393, ¶ 23 (reaffirming holding). "Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963). The need to replead applies even where the trial court has dismissed counts with prejudice. *Ward v. Decatur Memorial Hospital*, 2018 IL App (4th) 170573, ¶ 50. Accordingly, because Kenneth did not refer to or adopt the first amended complaint within his second amended complaint, and the second amended complaint did not name Anthony or Triad Iowa as parties or include the stricken allegations, he has forfeited arguments related to them on appeal.

¶ 24 Kenneth's remaining arguments challenge the trial court's dismissal of his second amended complaint. William moved to dismiss the complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). A section 2-619.1 motion to dismiss allows combined motions under sections 2-615 (735 ILCS 5/2-615 (West 2016)), 2-619 (735 ILCS 5/2-619 (West

2016)), and 2-1005 (735 ILCS 5/2-1005 (West 2016)) of the Code. 735 ILCS 5/2-619.1 (West 2016). The trial court granted the motion to dismiss pursuant to section 2-615.

¶ 25 A section 2-615 motion to dismiss challenges a complaint's legal sufficiency. *Bogenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 23. In ruling on a section 2-615 motion, a court must accept as true the complaint's well-pleaded facts and all reasonable inferences that may arise from them. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. The main inquiry is whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *Bogenberger*, 2018 IL 120951, ¶ 23. We review *de novo* an order granting a section 2-615 motion to dismiss. *Id.*

¶ 26 Kenneth alleged that William breached an oral contract. The elements of a breach of contract action are: (1) offer and acceptance; (2) consideration; (3) definite and certain terms; (4) the plaintiff's performance of all the required conditions; (5) the defendant's breach of the contract's terms; and (6) damages resulting from the breach. *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶ 44.

¶ 27 Kenneth argues that the trial court erred when it suggested that his right to redeem had already expired when Triad Iowa substituted as plaintiff, and that he had no special rights of redemption after the order approving the sale because he did not file a written waiver. Kenneth cites section 15-1603(b)(1) of the Foreclosure Law (735 ILCS 5/15-1603(b)(1) (West 2014)), which provides, as relevant here, that the redemption period ends on the date three months after the entry of the foreclosure judgment. He points out that the foreclosure judgment was entered on March 18, 2015, and that the federal court ruled that the right of redemption expired on June 20, 2015. He maintains that, therefore, Triad Iowa's June 11, 2015, substitution occurred before

the expiration of his statutory redemption period, and that Triad Iowa had acquired Stolat's position even before then, in April 2015. Kenneth argues that "William" did not need to formally acquire Stolat's rights before entering into the agreement with him. Kenneth additionally argues that because the federal court confirmed the judicial sale on November 6, 2015, his special redemption period continued for 30 days, until December 5, 2015 (see 735 ILCS 5/15-1604 (West 2014)), long after he and William entered the oral contract.

¶ 28 Kenneth asserts that the trial court erred in relying on section 15-1601(c) of the Foreclosure Law (735 ILCS 5/15-1601(c) (West 2014)) for the proposition that he could waive his rights of redemption only in writing. That section states:

"After commencement of a foreclosure proceeding under this Article a mortgagor of residential real estate or other mortgagor who is otherwise so prohibited may waive the mortgagor's rights of reinstatement and redemption, or either of them, if (i) the mortgagor expressly consents in writing to the entry of a judgment without such right of reinstatement or redemption, (ii) such written consent is filed with the clerk of the court, and (iii) the mortgagee consents and agrees to waive any and all rights to a deficiency judgment." *Id.*

Kenneth cites *Household Bank v. Lewis*, 229 Ill. 2d 173, 183 (2008), for the proposition that a party may waive a statutory provision designed for its benefit. He argues that *Lewis* makes clear that litigants are masters of their cases and free to resolve issues between them. Kenneth argues that although a mortgagee can obtain good title faster with a written waiver from the mortgagor, section 15-1601(c) does not prohibit the type of oral contract that he alleged. Kenneth further argues that section 15-1601(c) does not apply to a special right of redemption under section 15-1604. Kenneth argues that because he had statutory rights of redemption that he agreed not to

exercise, his consideration was not illusory. He also argues that his agreement not to bid at the foreclosure sale constituted independent consideration.

¶ 29 Kenneth additionally argues that the trial court erred in ruling that the second amended complaint failed to adequately allege the agency relationship between William and Triad Iowa. He cites several allegations that William and Anthony formed Triad Iowa and were its managers, and that William owned an interest in it. He also cites allegations that Triad Iowa was never qualified to do business in Illinois; that he was “induced to forego his statutory right to redeem a mortgage foreclosure brought by Triad”; that Triad Iowa was substituted as the plaintiff in the foreclosure proceedings; and that William, “through his entity, Triad First, served a ‘Citation to Discover’ assets on [Kenneth] seeking a deficiency judgment in the amount of \$156,815.77.”

¶ 30 Kenneth contends that under the standards of section 2-615, he adequately alleged that William formed Triad Iowa and acted through it in acquiring Stolat’s position and then proceeding to final judgment. He argues that he also alleged that William breached the oral agreement by seeking to enforce the deficiency judgment against Kenneth through Triad Iowa. Kenneth maintains that it is clear from the complaint’s allegations that Triad Iowa was the means by which William acquired the position of Stolat and proceeded with the mortgage foreclosure case.

¶ 31 Defendants respond that the oral contract was illusory because it was barred by the Foreclosure Law. Using June 20, 2015, as the date Kenneth’s right to redeem expired, defendants argue that Kenneth would have had to give notice before approximately June 1, 2015, under section 15-1603(e) of the Foreclosure Law (735 ILCS 5/15-1603(e) (West 2014)), which states that that an owner who intends to redeem property “shall file with the clerk a certification of the giving of such notice,” and that the “notice of intent to redeem must be received by the

mortgagee's attorney at least 15 days (other than Saturday, Sunday or court holiday) prior to the date designated for redemption." Defendants argue that Stolat was the only party that Kenneth could have legally made such an arrangement with because Triad Iowa did not substitute in the action until June 11, 2015, and William never had any interest in the judgment. Defendants point out that Kenneth did not allege that he complied with this procedure with Stolat.

¶ 32 Defendants additionally argue that the type of agreement alleged, where a mortgagor waives his rights of reinstatement and redemption in exchange for a mortgagee's waiver of his rights to a deficiency judgment, is required to be memorialized in writing under section 15-1601(c) (see *supra* ¶ 25), which Kenneth did not allege occurred. Defendants argue that the alleged oral contract was therefore void as a matter of law.

¶ 33 Defendants maintain that in Kenneth's motion to reconsider, he asserted two new arguments, specifically that the "right of redemption" referred to in the second amended complaint included the special right to redemption, and that *Lewis* permits the extra-statutory waiver of the redemption rights. Defendants note that the trial court ruled that Kenneth forfeited these arguments by failing to raise them earlier, and defendants argue that we should reach the same conclusion.

¶ 34 Defendants further contend that *Lewis* actually supports the trial court's ruling that Kenneth could not orally agree to waive his special right of redemption without a written waiver. Defendants cite the following passage from *Lewis*:

"Finally, we note that while the statutory right of redemption inures to the benefit of mortgagors, the temporal limitations on the exercise of that right, including the bar against revival of expired redemption rights (see 735 ILCS 5/15-1603(c) (West 2004)), are designed to benefit mortgagees ***. Illinois law recognizes that a party may waive a

statutory provision designed for its benefit. [Citations.] Exceptions to the waiver rule may be established by the General Assembly (see, e.g., 735 ILCS 5/15–1601(a) (West 2004) (restricting mortgagor’s right to waive its rights of reinstatement and redemption)), but no restriction has been imposed on a mortgagee’s freedom to permit redemption, as a matter of grace, after the statutory redemption period has passed and before the judicial sale has been confirmed.” *Lewis*, 229 Ill. 2d at 183-84.

Defendants argue that *Lewis* holds that while a party may waive a statutory provision for his benefit, there are exceptions to that rule, including section 15-1601(a)’s requirements restricting a mortgagor’s right to waive its rights of reinstatement and redemption. Therefore, argue defendants, a waiver of any right of redemption, either statutory or special, must be in writing, rendering any oral contract predicated upon an unwritten waiver void and illusory based on lack of consideration.

¶ 35 Defendants argue that the trial court also properly dismissed the second amended complaint because it failed to plead agency. They cite *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996), where the supreme court stated: “A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency.” Defendants assert that Kenneth pled no allegations, even conclusory, concerning any agency relationship nor the extent, if any, of apparent or express authority or the ability to bind.

¶ 36 Defendants maintain that the failure to plead agency renders any consideration from William illusory, and that Kenneth otherwise failed to allege any consideration from William, based on his misapprehension that William and Triad Iowa are interchangeable. They note that the alleged oral contract was reached in the first quarter of 2015, when Stolat was the plaintiff.

Defendants argue that Kenneth never pled or alleged that William ever owned the judgment or cause of action, so William did not give and could not give any consideration to support the alleged contract.

¶ 37 We conclude that the trial court did not err in granting William's motion to dismiss under section 2-615. Looking first at statutory rights of redemption, under section 15-1601(c) (735 ILCS 5/15-1601(c) (West 2014)) (see *supra* ¶ 25), an agreement in which a mortgagor waives rights of reinstatement and/or redemption, and the mortgagee agrees to waive any rights to a deficiency judgment, requires a written waiver by the mortgagor. Kenneth never executed a written waiver, rendering the alleged oral contract to this effect unenforceable.

¶ 38 Additionally, under section 15-1603(e) of the Foreclosure Law (735 ILCS 5/15-1601(c) (West 2014)), Kenneth was required to file with the clerk a certification that he was giving notice of intent to redeem the property, and ensure that the mortgagee's attorney received the notice at least 15 days before the date designated for redemption. Kenneth pled that his right of redemption expired on June 20, 2015, meaning that Kenneth would have had to give notice before June 5, 2015. Stolat was the party plaintiff at that time, as Triad Iowa did not legally become the party plaintiff until June 11, 2015.⁴ As Kenneth never notified Stolat of an intent to

⁴ Therefore, that Triad Iowa may have "legally acquired" the deficiency judgment in April 2015 is not controlling, as it was not the plaintiff in the suit until June 11, 2015. Regardless, as the trial court pointed out, the April 2015 date was not alleged in the second amended complaint, so it may not be considered. See *Baird & Warner Residential Sales, Inc. v. Mazzone*, 384 Ill. App. 3d 586, 591 (2008) (in ruling on a section 2-615 motion to dismiss, the trial court may only consider the four corners of the complaint).

redeem the property and could not have legally exercised his right to redemption at the time Triad Iowa became the plaintiff, this alleged consideration was illusory.

¶ 39 Looking next at Kenneth's reliance on *Lewis* and on the special right of redemption, defendants assert forfeiture of these arguments. We disagree, as we are exercising *de novo* review of whether Kenneth's second amended complaint sufficiently stated a cause of action upon which relief can be granted, which is a question of law. Kenneth alleged that he agreed not to exercise his "rights of redemption" which, broadly speaking, could include his special right of redemption. Further, his citation to *Lewis* is merely reliance on legal authority. Thus, we find no forfeiture here. *Cf. Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175, ¶ 31 (in reviewing a section 2-615 dismissal, the appellate court rejected the defendant's position that the plaintiff forfeited arguments by not raising them in the trial court, where the relevant allegations were contained in the complaint and the defendant suffered no prejudice from arguments allegedly raised for the first time on appeal concerning a purely legal issue).

¶ 40 That being said, *Lewis* does not aid Kenneth's arguments, as that case directly cited section 1601 of the Foreclosure Law as an exception to the rule that a party may waive a statutory provision designed for its benefit. *Lewis*, 229 Ill. 2d at 183-84. *Lewis* did go on to say that a mortgagee has the "freedom to permit redemption, as a matter of grace, after the statutory redemption period has passed and before the judicial sale has been confirmed" (*id.* at 184), but in such a scenario, the mortgagor would have provided no consideration but rather would be benefitting only from the mortgagee's "grace."

¶ 41 Regarding the special right of redemption under section 15-1604 of the Foreclosure Law (735 ILCS 5/15-1604 (West 2014)), Kenneth argues that it was available from the federal court's confirmation of the judicial sale on November 6, 2015, until December 5, 2015. However, as the

trial court pointed out, Kenneth knew during this period that Triad Iowa was the plaintiff in the foreclosure action, as opposed to William, so the alleged contemplated terms of the contract had not come to pass. The same holds true for Kenneth's argument that he did not exercise his opportunity to bid on the property during the judicial sale. Additionally, the special redemption right applies to only "residential real estate." *Id.* If the mortgagor is an individual, the definition requires, among other things, that the mortgagor, his or her spouse, or his or her descendants reside on the property. 735 ILCS 5/15-1219 (West 2014). That is not the situation for Kenneth,⁵ so he would not have been entitled to exercise the special right of redemption in the first place, also rendering the alleged consideration to forego this right illusory.⁶

¶ 42 Kenneth's failure to adequately plead agency provides an independent basis to affirm the trial court's dismissal of his second amended complaint. "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *McNerney v. Allamuradov*, 2017 IL App (1st) 153515, ¶ 64. An agent's authority can be actual or apparent. *Id.* ¶ 65. To prove actual agency, a plaintiff must show that: (1) a principal-agent relationship existed; (2) the principal controlled or had the right

⁵ We further note that Kenneth alleged that Carrole died on November 1, 2015, which was before the period of the special right of redemption began.

⁶ The definition of "residential real estate" also excludes "a single tract of agricultural real estate consisting of more than 40 acres." 735 ILCS 5/15-1219 (West 2014). "Agricultural real estate" is defined as real estate that is used primarily for agriculture or horticulture. 735 ILCS 5/15-2101 (West 2014). It is not clear from the allegations of the second amended complaint whether the 133-acre farm would fit the definition of agricultural real estate, but, as discussed, the property does not qualify as residential real estate for other reasons.

to control the agent's conduct; and (3) the agent's alleged conduct fell within the scope of the agency. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 28. Apparent agency occurs when a principal has created the appearance that someone is the principal's agent, and an innocent third party has reasonably relied on this appearance to his or her detriment. *McNerney*, 2017 IL App (1st) 153515, ¶ 65. Even though whether a principal-agent relationship exists is generally a question of fact for the trier of fact (*Knapp v. Hill*, 276 Ill. App. 3d 376, 382 (1995)), "[a] complaint relying on an agency relationship must plead facts that, if proved, could establish the existence of an agency relationship" (*Bogenberger*, 2018 IL 120951, ¶ 28).

¶ 43 Here, Triad Iowa became the plaintiff in the foreclosure case and brought suit against Kenneth to recover the deficiency judgment, which caused Kenneth's alleged damages in defending against that action. Therefore, in order to survive the motion to dismiss, Kenneth needed to allege that William was acting as an agent of Triad Iowa in making the oral contract. However, despite the trial court's statement when dismissing the first amended complaint that Kenneth failed to allege that William was speaking as Triad Iowa's agent, Kenneth again failed to allege as much in the second amended complaint. To the contrary, his allegations speak of William as an individual, in that he alleged that:

"W. Barrick represented to K. Barrick that he, K. Barrick did not have to take any action in connection with the foreclosure suit because he, W. Barrick, would not require K. Barrick to pay any money to pay off the loans on the property. W. Barrick specifically agreed that he, W. Barrick, would not seek to enforce any deficiency against K. Barrick."

¶ 44 The second amended complaint does include allegations that William formed Triad Iowa, had an interest in it, was a manager, and served a citation to discover assets on Kenneth "through his entity, Triad First," but these statements do not sufficiently allege that William was acting as

an agent of Triad First when making the oral contract. That is, they do not allege actual agency in that they do not allege facts showing that Triad Iowa had the right to control William and that William's conduct fell within the scope of that agency. See *id.* ¶ 28. They also do not allege apparent agency in that there are no facts indicating that Triad Iowa created the appearance that William was its agent. See *McNerney*, 2017 IL App (1st) 153515, ¶ 65. As such, we agree with the trial court that Kenneth failed to plead facts showing that an agency relationship existed. *Cf. Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996) (the plaintiffs' allegations were conclusory and insufficient to plead agency, where the plaintiffs alleged that they purchased their vehicles from authorized Suzuki dealers, who were agents of Suzuki, and that some of the plaintiffs understood the dealers to be Suzuki's agents); *Bogenberger*, 2018 IL 120951, ¶ 30 (the plaintiffs did not adequately plead that a fraternity chapter and its members were agents of the fraternity's national organizations).

¶ 45

III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 47 Affirmed.