2019 IL App (2d) 180251-U
No. 2-18-0251
Order filed July 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NATIONWIDE FREIGHT SYSTEMS, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	14CH438
	)	
RANDALL POINT BUSINESS CENTER, INC.; NAI HIFFMAN; PANCOR CONSTRUCTION & DEVELOPMENT, and ADAM MARSHALL,	)	
	)	
Defendants-Appellees.	)	
	)	Honorable
(The Realty Associates Fund IX, LP, Defendants.)	)	David Akemann,
	)	Judge, Presiding

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Appellant forfeited its right to have this court review the original complaint when the first and second amended complaints did not incorporate or refer back to the allegations in the original complaint. It also forfeited its right to have us review the allegations in count II of the second amended complaint because it failed to provide any argument with regard to that issue. Finally, the trial court properly granted summary judgment on count III of the second amended complaint because the brokers-appellees did not have a duty to independently verify future property tax estimates under the Illinois Real Estate Act of 2000 (225 ILCS

454/15-5, 15-45 (West 2014), and there was sufficient evidence presented that the brokers did not act as dual agents. The judgment of the trial court was affirmed.

¶ 2 Appellant Nationwide Freight Systems (Nationwide) appeals from several orders of the trial court: (1) a 2018 order granting appellees NAI Hiffman's (Hiffman) and Adam Marshall's (Marshall) joint motion for summary judgment on Nationwide's second amended complaint (735 ILCS 5/2-1005(c) (West 2018)); (2) a 2016 order granting appellee PanCor Construction & Development LLC's (PanCor) combined motion to dismiss Nationwide's second amended complaint (735 ILCS 5/2-619(4), 2-615 (West 2016)); (3) a 2014 order granting appellee Randall Pointe's motion to dismiss Nationwide's original complaint (735 ILCS 5/2-615 (West 2014)); and (4) a 2014 order granting Hiffman's motion to dismiss Nationwide's original complaint (735 ILCS 5/2-615 (West 2014)). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 26, 2014, Nationwide filed a five-count complaint against Randall Point, Hiffman, and The Realty Associates Fund IX, LP (TRA).[1] Count I requested declaratory relief for breach of contract against Randall Point and TRA. The remaining counts were directed at all three defendants. Count II was a count for intentional misrepresentation. Count III was a count for negligent representation. Count IV was a count for material mistake, and count V requested "damages for intentional or negligent representation against original lessor and its agents."

¶ 5 In the complaint Nationwide alleged that in 2012 it signed a commercial lease to rent property located at 1385 Madeline Drive in Elgin, Illinois (the property), for its transportation business. Nationwide alleged that Randall Point and Hiffman were respectively the original

[1] Nationwide subsequently voluntarily dismissed all claims against TRA with prejudice and they are not a party to this appeal.

lessor and a real estate broker who assisted in the leasing of the property. PanCor was not named as a defendant but was alleged to have provided services in connection with the development and lease of the property on Randall Point's behalf.

¶ 6 Nationwide alleged that it contacted Hiffman, who introduced Nationwide to PanCor and the property. According to Nationwide, it received an "Industrial Lease Analysis" from Hiffman dated January 25, 2012. In that document Hiffman estimated that the real estate taxes for that property would be $ 0.02 per square foot (psf) in 2011, $ 0.50 psf in 2012 and $ 0.99 psf in 2013. Nationwide also alleged that Hiffman projected the expenses under the lease for the Common Area Maintenance (CAM) and taxes on a square foot basis between 2012 and 2020. It said that PanCor made a similar "projection and representation" about the expected real estate taxes.

¶ 7 TRA moved to dismiss counts I through IV of Nationwide's complaint, Hiffman moved to dismiss count V of the complaint, and Randall Point moved to dismiss counts I through V of the complaint. All motions were filed pursuant to section 2-615 of the Code of Civil Procedure. (735 ILCS 5/2-615 (West 2014)). On October 9, 2014, the trial court entered three separate orders, each order dismissing one or more of the counts in Nationwide's original complaint. In the order granting Randall Point's motion to dismiss, the trial court dismissed all counts of the original complaint, but granted Nationwide leave to amend count I against Randall Point. In those orders the court held that statements regarding future property taxes were only expressions of opinion and not material statements of fact. Nationwide moved to reconsider the orders. The motion to reconsider was denied.

¶ 8 On May 28, 2015, Nationwide filed an amended complaint (first amended complaint). In that complaint Nationwide only sought relief against TRA. It did not seek any relief against Randall Point or refer to the claims against Randall Point that it raised in the original complaint.

The first amended complaint also did not refer to or incorporate the original complaint in any way.

¶ 9 On July 15, 2015, Nationwide filed a new complaint entitled "Second Amended Complaint." Like the original complaint, this complaint again sought relief against Randall Point, Hiffman and TRA. However, Nationwide also joined PanCor and Marshall as defendants to the second amended complaint. Count I was a breach of contract claim against TRA only. Nationwide alleged that it incorporated count I of the first amended complaint (against TRA only) into the current complaint. Count II asserted a claim of fraud against PanCor. Count III was brought against Hiffman and Marshall based upon violations of section 15 of the Illinois Real Estate Act of 2000 (Act) (225 ILCS 454/15-5, 15-45 (West 2014)). In that count Nationwide alleged that Hiffman and Marshall acted as dual agents for the landlord and for itself without making the required disclosures or obtaining written consent. By failing to disclose the alleged conflict of interest, it claimed, as well as failing to obtain the information for Nationwide to make an informed decision on the costs it would incur under the lease, including the expected real estate taxes, Hiffman and Marshall had breached their duties and Nationwide thereby sustained damages.

¶ 10 On August 24, 2015, PanCor moved to dismiss count II of the second amended complaint pursuant to section 2-619(4) of the Code as barred by the doctrine of *res judicata* or, in the alternative, under section 2-615 of the Code. 735 ILCS 5/2-619(4); 2-615 (West 2014).

¶ 11 On September 11, 2015, Nationwide filed a new pleading entitled "Second Amended Complaint (With Amended Exhibit C)". Exhibit C contained copies of the real estate tax information, assessment and payment details for other PanCor properties near the instant property. Otherwise, the complaint was the same as the second amended complaint. Like the

first amended complaint, this complaint did not incorporate or refer to any portion of the original complaint.[2]

¶ 12 On March 4, 2016, the trial court dismissed the second amended complaint against PanCor with prejudice based on the doctrine of *res judicata* (PanCor was in privity with Randall Point, the causes of action were the same, and the dismissal of Randall Point in the first complaint was a final judgment on the merits.). No later pleading was ever filed that incorporated or referred back to the original claims against Randall Point.

¶ 13 On August 17, 2017, Hiffman and Marshall filed a motion for summary judgment. Specifically, they alleged: (1) they had no duty to forecast or independently verify future taxes because rates were set by governmental bodies that decide how to assess properties and select tax rates; (2) the Act imposed no duty on real estate professionals to forecast property taxes; and (3) even if the Act imposed a duty, Nationwide's claim still failed because it did not show how it was damaged.

¶ 14 The following evidence was presented through depositions during summary judgment proceedings. Prior to signing the lease for the property Nationwide engaged Hiffman in its search for commercial property for its trucking business. Marshall, an independent contractor, was introduced to Nationwide through another Hiffman broker, Matt Novak, who had a previous relationship with Nationwide. Marshall took over as broker for Nationwide because Novak specialized in office leases and Nationwide was looking for around 45,000 square feet of warehouse space in the Elgin area. Marshall had also been involved with several industrial transactions in the greater Elgin area.

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[2] For purposes of this appeal, the "Second Amended Complaint (With Amended Exhibit C)" will be referred to as the second amended complaint.

¶ 15 Marshall met with Nationwide's representatives in November 2011. He visited several properties with Nationwide and prepared requests for proposals (RFPs) for them. In the RFPs Marshall asked prospective lessors for their tax bills and the projected fully-assessed tax bills. He had a general understanding of taxes, but not how assessed value was determined.

¶ 16 Marshall first emailed Nationwide about the property that PanCor was developing on January 3, 2012. He believed that the cost to lease the property would be less than other properties because the property was still under construction. He expected taxes to increase once the property was fully occupied and reassessed. With Nationwide's agreement he put together an RFP to PanCor.

¶ 17 PanCor performed management and construction work for Randall Point regarding the property. Marshall worked with Peter Nelson, a construction manager at PanCor and a contractor for Randall Point. Nelson was not a licensed real estate agent, but was involved in preparing an RFP for that location. Nelson, like Marshall, had a general understanding of property taxes but did not know how they were calculated.

¶ 18 Marshall emailed Nationwide's representatives, Robert Kuehn and Frank VanBuskirk, with his analysis of PanCor's proposal on January 17, 2012. Two days later, Marshall emailed Nelson and copied Kuehn and VanBuskirk and explained that Nationwide wanted to know more about property taxes and CAM expenses for the property. The email stated, in relevant part:

> "[T]his building is appealing because of the low tax basis that can be realized for the first few years of the lease. However, it is only appealing if [Nationwide] can realize the actual cost savings in years 1-3 with a Landlord cap for tax and CAM at $0.89 psf."

¶ 19 Nelson answered, copying Kuehn and Vanbuskirk, and stated:

> "I wish we could predict the actions of the assessor's group, but part of the equation is when the assessor actually changes the property tax status from a lot to improved (or partially improved). I think I would estimate the property taxes a little more conservatively using the current $0.02, then a second year bump to $0.50 and then a third year at fully assessed estimating $0.99. Getting to full assessment can be a three year period."

¶ 20 According to Nelson, the tax estimate was a "snapshot." It was his best, good faith representation based upon his experience and what he knew at the time after speaking with PanCor's controller, Dan Walsh, who had reviewed and paid the tax bills and who had confirmed the estimate. However, it was not a prediction. Nelson did not alter the numbers to convince Nationwide to enter into the lease.

¶ 21 Thirteen minutes after Nelson provided the tax estimate Marshall emailed Nelson with Nationwide's proposed lease terms, with Kuehn and VanBuskirk copied on the email. Kuehn never asked Marshall to verify Nelson's estimates.

¶ 22 On January 25, 2012, Nelson sent Marshall a letter on PanCor's behalf with an updated lease proposal. Paragraph 5 of the letter stated:

> "Based on our experience with comparable buildings in this area, we anticipate that real estate taxes, when fully assessed, will be between $0.90 and $1.10 per square foot per year. The current tax bill is $0.02 SF."

¶ 23 According to Nelson, these numbers were an estimated range of the taxes that he expected for a project at that time and location based on a comparable, adjacent building at 1360 Madeline Drive that PanCor had managed. Paragraph 18 of the letter identified Marshall as

Nationwide's representative. It did not list Marshall or Hiffman as Randall Pointe's representative.

¶ 24 Based upon PanCor's proposal, Marshall prepared the Hiffman Industrial Analysis for the property. According to Marshall, his analysis summarized the terms of PanCor's proposal and put them into a spreadsheet. Marshall took the average between $0.90 and $1.10 per square foot per year and came up with $1.00 per square foot. He looked at the tax estimates that Nelson provided from 2011 to 2013 and noted that they were comparable to other properties that he received information about in response to his RFPs. Based upon his experience and the tax information he had received for several buildings in the area, Marshall believed that the tax estimate that PanCor provided seemed reasonable at the time.

¶ 25 Marshall said that Nationwide wanted a cap of the property taxes at the property but the landlord would not agree to one, so Nationwide signed the lease without any cap. The lease was negotiated with Nationwide's attorneys and not Marshall. Marshall only reviewed the economic terms of the lease. He did not remember if he reviewed paragraph 31 of the lease, which he said inaccurately identified him as both the agent for the lessor and the lessee. Instead, Marshall said that he only represented Nationwide in this transaction. It was standard practice for the lessor to pay Marshall a commission in procuring a tenant for the lease. However, Marshall did not represent PanCor in leasing the rest of the building space at the property.

¶ 26 Over a year after the lease was executed in February 2012, Hiffman entered into an agreement with TRA in March 2013 and became the leasing agent for the entire business park, including the 1385 Madeline Drive property. Marshall did not represent Randall Point in connection with the sale to TRA.

¶ 27 According to Marshall and Nelson, property taxes began to increase significantly for all property in the Elgin area in 2013 because the tax rates were assessor-driven. The assessor sets the tax rates and the assessed values, and there had been an increase in both in 2013 in that area. Nelson said he did not anticipate those increases and he had never seen such increases before on any of the buildings with which he was familiar. If Nationwide had leased property other than 1385 Madeline Drive, the taxes on that property also would have been higher over what was projected at the properties that Nationwide was looking at leasing in 2012.

¶ 28 Alan Kravets, Nationwide's opinion witness, testified that an assessor would not tell someone exactly what his or her taxes were going to be. Actual taxes could not be predicted because one did not know what the future tax rate would be in the next year, or what the equalization factor would also be in the next year. The process included too many variables and involved not only the county assessor but also the township assessor. Taxes were a function of the property's assessed value, tax rate and the equalization factor that was calculated by the assessor. Kravets did not consider himself an expert in how property taxes are determined in Illinois. He identified how the sale of the property affected the property tax projections and did not offer any opinion on what figures would have been a proper tax estimate for the property. He did not know of any computer program that could predict property taxes. Finally, Kravets had no opinion as to what damages, if any, Nationwide sustained.

¶ 29 Kravets was asked the following questions:

> "Q. Those obligations, in terms of whatever [Marshall] had to do with respect to estimating future property taxes, would those obligations have been the same, whether he was a dual agent, with respect to the transaction or if he was only representing one entity or would they somehow change?

A. They would not change.

Q. Okay. So whatever he was supposed to do with respect to real estate taxes, he would have had to do whether he was representing one entity or was representing both entities as a dual agent. Agree?

A. Correct.

Q. So from your opinion perspective, in terms of the standard of care, it's irrelevant whether Marshall was a dual agent or not, because he had the same obligation to Nationwide either way?"

A. Yes. And I think I mentioned that before. Yeah."

¶ 30 On March 6, 2018, the trial court granted Hiffman and Marshall's motion for summary judgment on count III of the second amended complaint. The court noted that it had previously ruled that statements regarding future property taxes were merely expressions of opinion and not material statements of fact upon which intentional or negligent misrepresentation claims could be sustained. The court also held that Marshall had no duty to provide estimates of future real estate taxes and that the tax estimates were not actionable under section 15 of the Act. 225 ILCS 454/15 (West 2016).

¶ 31 Nationwide timely appealed. In its notice of appeal it stated that it was appealing from the following orders of the trial court:

"(1) the Order and incorporated opinion entered on October 9, 2014, which granted Defendant-Appellee Randall Point Business Center, Inc.'s ("RPB") motion to dismiss pursuant to 735 ILCS 5/2-615 and dismissed Counts I-V as to RPB;

(2) the Order and incorporated opinion entered on October 9, 2014, which granted Defendant-Appellee The Realty Associates Fund IX, LP's ("TRA") motion to dismiss pursuant to 735 ILCS 5/2-615 and dismissed Counts I-IV as to TRA ;

(3) the Order and incorporated opinion entered on October 9, 2014, which granted Defendant-Appelleee Hiffman's ("Hiffman") motion to dismiss pursuant to 735 ILCS 5/2-615 and dismissed Count V as to Hiffman.;

(4) the Order entered on December 17, 2014 denying Plaintiff-/Appellant's Motion to Reconsider the Court's October 9, 2014 Orders;

(5) the Order and incorporated opinion entered on March 4, 2016, which granted Defendant-Appellee PanCor Construction & Development, LLC's ("PanCor") combined motion to dismiss pursuant to 735 ILCS 5/2-619(4) and dismissed Count II as to PanCor.

(6) the judgment Order and incorporated opinion entered on March 6, 2018, which granted Defendant-Appellees Hiffman and Adam Marshall's motion for summary judgment pursuant to 735 ILCS 5/2-1005(c) and dismissed Count II as to Hiffman and Adam Marshall; and

(7) all additional Orders leading up to the March 6, 2018 final judgment order.

Appellant seeks an Order from the Second District Judicial District reversing the Orders entered March 6, 2018, March 4, 2016, and October 9, 2014; remanding this case to the trial court for further proceedings consistent with its ruling; and granting all other relief that the Second Judicial District deems just and equitable."

¶ 32 II. ANALYSIS

¶ 33 On appeal, Nationwide argues that the trial court erred in: (1) granting Randall Point and Hiffman's motions to dismiss the original complaint; (2) granting PanCor's motion to dismiss

the second amended complaint; and (3) granting Hiffman and Marshall's motion for summary judgment on the second amended complaint.

¶ 34 A. Randall Point and Hiffman's Motions to Dismiss the Original Complaint

¶ 35 Nationwide first argues that the trial court erred in granting Randall Point and Hiffman's motions to dismiss the original complaint when it misinterpreted Illinois law and failed to recognize the applicable exception to the general rule that "projections" or "estimates" do not give rise to actionable claims of misrepresentation. It also claims that the trial court applied the wrong standard of law in reaching its decision, and had it applied the correct standard of law, it should have, at the very least, allowed Nationwide an opportunity to replead the claims.

¶ 36 Nationwide contends that defendants' statements to it about the real estate taxes it would owe under the lease were representations of material facts. It acknowledges that a simple expression of an opinion will not usually support an action for fraud. However, it argues that sometimes the expression of an opinion may carry with it an implied assertion that the speaker knows facts that justify that opinion. It claims that such an assertion is to be implied where a defendant holds himself out or is understood as having special knowledge of the matter that the plaintiff does not have, so that the defendant's opinion becomes in effect an assertion "summarizing his knowledge," citing to *Power v. Smith,* 337 Ill. App. 3d 827, 832 (2003) and *Lillien v. Peak6 Investments, L.P.,* 417 F. 3d 667, 671 (2003). However, it acknowledges that whether a statement is one of fact or opinion depends upon the circumstances of each case, citing *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 197 (1978).

¶ 37 Finally, Nationwide claims that "[t]he three orders entered on October 9, 2014, dismissing counts II through V of the complaint as to Hiffman and Randall Point should be reversed, and Nationwide's claims should be permitted to proceed to trial." In the alternative, it

requests that the October 9, 2014 orders should be vacated and the case remanded with instructions to the trial court that Nationwide should be granted leave to replead counts II through V.

¶ 38 A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11. "In ruling on such a motion, a court must accept as true all well-pled facts in the complaint, as well as any reasonable inferences that may arise from them." *Id*. The critical question is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are adequate to establish a cause of action upon which relief may be granted. *Id*. A cause of action should not be dismissed under section 2-615 unless it is plainly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *Id*. We review an order granting a section 2-615 motion to dismiss *de novo*. *Id*.

¶ 39 In Hiffman and Marshall's joint brief Hiffman argues that Nationwide's second Amended complaint supersedes Nationwide's prior pleadings. Nothing in the first or second amended complaint referred to or adopted the dismissed counts from the original complaint in order to preserve review of Nationwide's claims for appeal. In support of this contention Hiffman cites to *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983) (where pleadings are amended, final pleadings must incorporate all allegations sought to be preserved for review).

¶ 40 Hiffman also argues that even if Nationwide had not "pled over" in the first and second amended complaints, the original complaint did not state a claim for intentional or negligent misrepresentation when the "estimates" and "projections" of future real estate tax increases were

not actionable as statements of material fact. It notes that Nationwide has not cited to a single case where a statement concerning future real estate taxes has been held to be actionable.

¶ 41 In Randall Point and PanCor's joint brief Randall Point also argues that Nationwide has forfeited its objection to the dismissal of its original complaint. It cites to *Foxcroft* and several Illinois appellate and supreme court cases that have held the same as *Foxcroft*. Like Hiffman, Randall Point also argues that even if Nationwide had preserved its claims against it, the trial court properly determined that the claimed "representations" could not support Nationwide's claims of misrepresentations in the original complaint.

¶ 42 In its reply brief, Nationwide first concedes that "to the extent 'Rescission based on Negligent Representation' (Count III) and 'Rescission based on material mistake' (Count IV) are independent, actionable causes of action—as opposed to potential equitable remedies—the *Foxcroft* rules operates to deem those claims forfeited (as to [Randall Point] only) for purposes of this appeal." It does not explain why the claims are not forfeited as to Hiffman as well.

¶ 43 With regard to the dismissal of count II in the original complaint (rescission based on intentional misrepresentation) Nationwide provides two reasons why it has not waived or abandoned its objection to that dismissal: (1) the trial court erred in dismissing count II of the second amended complaint (fraud against PanCor) on *res judicata* grounds and it warrants reversal in light of a recent case from the Fourth District, *Ward v. Decatur Memorial Hospital*, 2018 IL App (4th) 170573; and (2) in ruling that count II was subject to dismissal on *res judicata* grounds the trial court necessarily determined that Nationwide had "incorporated" or "realleged" the previously-dismissed claims against Randall Point. Therefore, it claims, both the October 4, 2014 order and the March 7, 2016 order are properly before this court for purposes of appeal.

¶ 44 Nationwide then contends that it did not forfeit its objection to the trial court's erroneous dismissal of count V in the original complaint ("damages for intentional or negligent representation against original lessor and its agents") against Hiffman. Specifically, it contends, "[w]hile the claims for common law intentional and negligent representation are not pled as separate causes of action in [*sic*] within count II of the second amended complaint, the elements for common-law claims are set forth within that count, and accordingly, there has been no waiver or forfeiture of its rights of review." It claims that count III of the second amended complaint contains allegations that are nearly identical to those set forth in count IV of the original complaint, particularly against Hiffman. By realleging those claims in the second amended complaint, Nationwide claims that it preserved the trial court's dismissal of count V for purposes of appellate review. It argues that by repleading the material allegations of count V of its original complaint in count II of its second amended complaint, Nationwide has preserved its objection to the trial court's October 9, 2014, dismissal against of count V against Hiffman.

¶ 45 "The rules governing the preservation of dismissed claims for purposes of appellate review are clear and well settled." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. Our supreme court has repeatedly and consistently stated that a party filing a complete, amended pleading that does not refer to a prior dismissed pleading forfeits any objection to the ruling on the former complaint. *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983). This court has also made it very clear that a party has three options to avoid forfeiture and preserve a dismissed claim for appellate review. The party can: (1) stand on the dismissed counts, voluntarily dismiss the remaining counts and appeal the dismissal; (2) file an amended pleading, incorporating by reference or referring to the dismissed counts; or (3) appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed

counts. *Gaylor v. Campion, Curran, Rausch, Gummerson & Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 36.

¶ 46 The burden of preserving dismissed claims for appellate review "is not onerous." *Bonhomme*, 2012 IL 112393, ¶ 26 n. 1. Therefore, where a party has failed to use one of the above methods for avoiding forfeiture, ongoing objections to a dismissal order will not be sufficient to preserve the issue for appeal. *Bonhomme*, 2012 IL 112393, ¶ ¶ 20–22. This remains true even where a party raises objections to a dismissal order in a motion to reconsider, in a motion for a new trial, or in motions in limine. *Bonhomme*, 2012 IL 112393, ¶¶ 20–23. Whether a dismissed claim has been preserved for review is a question of law that we review *de novo*. *Bonhomme*, 2012 IL 112393, ¶ 17.

¶ 47 We have carefully reviewed the record and must conclude that Nationwide forfeited its right to appeal all of the orders entered by the trial court with regard to the original complaint. We will respond to Nationwide's arguments regarding forfeiture of specific counts.

¶ 48 First, count I of the original complaint was directed against TRA, who is not party to this appeal, so we need not review it.

¶ 49 Second, Nationwide alleges that count II of the original complaint (rescission based on intentional misrepresentation) has not been forfeited for two reasons: 1) the trial court erred in dismissing count II of the *second amended complaint* (fraud against PanCor) on *res judicata* grounds and that ruling should be reversed in light of a recent case from the Fourth District, *Ward v. Decatur Memorial Hospital*, 2018 IL App (4th) 170573; and (2) in ruling that count II of the second amended complaint was subject to dismissal on *res judicata* grounds, the trial court necessarily determined that Nationwide had "incorporated" or "realleged" the previously-dismissed claims against Randall Point.

¶ 50 We reject both of these claims. First, the fact that the trial court dismissed count II of the second amended complaint on *res judicata* grounds and whether it was proper to do so under *Ward* is totally irrelevant to the determination of whether Nationwide forfeited the allegations in count II of the *original complaint* for failing to use one of the three options set out in *Gaynor* to protect that count from forfeiture. Second, the fact that the trial court ruled that count II of the second amended complaint was barred on *res judicata* grounds does not mean that the trial court had "determined that Nationwide had "incorporated" or "realleged'' the previously-dismissed claim, and Nationwide does not support this outlandish proposition with any legal citation.

¶ 51 Third, Nationwide has conceded that it has forfeited its right to have the allegations against Randall Point in counts III and IV of the original complaint reviewed. However, Nationwide does not explain why forfeiture only applies to the allegations against Randall Point but not Hiffman, and we can find no distinction between the two defendants for purposes of forfeiture. Nationwide never employed any of the three options to avoid forfeiture and preserve a dismissed claim for appellate review as set out in *Gaynor*, 2012 IL App (2d) 110718, ¶ 36. Accordingly, even if Nationwide had not conceded forfeiture as to Randall Point, we find that it has also forfeited review of counts III and IV of the original complaint as to both Randall Point and Hiffman.

¶ 52 Last, Nationwide claims that it did not forfeit its objection to the trial court's (allegedly) erroneous dismissal of count V in the original complaint. It contends that while the common law claims in count V of the original complaint are not pled as separate causes of action in count II of the second amended complaint, the elements for common law claims are set forth in count II of the second amended complaint, therefore count V has not been forfeited. We are not persuaded. Count V of the original complaint was a claim for "damages for intentional or negligent

representation against original lessor and its agents." Randall Point was the original lessor, and Nationwide alleged that Hiffman and PanCor were Randall Point's agents. However, only Randall Point, Hiffman and TRA were named as defendants in that complaint. Count II of the second amended complaint was a claim for fraud against PanCor only. Again, as our supreme court has said, the burden of preserving dismissed claims for appellate review "is not onerous." *Bonhomme*, 2012 IL 112393, ¶ 26 n. 1. Here, count V of the original complaint and count II of the second amended complaint are not even directed at the same defendants.

¶ 53 Accordingly, we find that Nationwide has forfeited its right to have the dismissal of all counts directed against Randall and Hiffman in the original complaint reviewed.

¶ 54 B. PanCor's Motion to Dismiss the Second Amended Complaint

¶ 55 Although Nationwide's notice of appeal indicated that it was appealing the trial court's order granting PanCor's combined motion to dismiss, PanCor contends that in Nationwide's opening brief on appeal it failed to argue that the trial court erred in granting that motion. PanCor argues that Nationwide has essentially abandoned any argument regarding the propriety of the trial court's dismissal of it on March 4, 2016. Specifically, Nationwide's only "argument" related to the PanCor dismissal can be found in a portion of a paragraph on page 16 in Nationwide's statement of facts. That section reads:

> "Nationwide seeks reversal of the court's March 4, 2016 [*sic*] because the court's prior adjudication of the claims against Randall Point—Counts II-V—was wrongly decided and is the subject of this appeal. In other words, should Nationwide prevail on its appeal of the court's October 9, 2014 rulings, the March 4, 2016 [*sic*] must be reversed because there will no longer be a final judgment on the merits for purposes of *res judicata*."

¶ 56 PanCor then argues that even if Nationwide had preserved its right to appeal the trial court's order granting PanCor's motion to dismiss, the same arguments that Randall Point had made on appeal regarding its dismissal from the original complaint apply to the second amended complaint against PanCor.

¶ 57 Illinois Supreme Court Rule 341(h)(6) provides that the appellant's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly *without argument or comment*, and with appropriate reference to the pages of the record on appeal in the format as set forth in the Standards and Requirements for Electronic Filing the Record on Appeal." (Emphasis added.) Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). Illinois Supreme Court Rule 341(h)(7) provides in part that the argument section of the appellant's brief "shall contain the *contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on*." (Emphasis added) Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Rule 341(h)(7) also provides that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

¶ 58 Nationwide has violated both Rule 341(h)(6) and (h)(7). PanCor is correct that the only "argument" regarding the trial court's dismissal of count II of the second amended complaint can be found in one paragraph in Nationwide's statement of facts, in violation of Rule 341(h)(6). As a legal argument, however, that section violates Rule 341(h)(7) because it provides no reasons for its contention, nor does it cite any legal authority for its proposition. Mere contentions, without argument or citation to authority, do not merit consideration on appeal. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 881 (2010). We are aware that in its reply brief Nationwide cited to *Ward v. Decatur Memorial Hospital*, 2018 IL App (4th) 170573, a case that Nationwide alleged dealt in relevant part with "the intersection between the

'*Foxcroft* rule' and the doctrine of *res judicata*." We are also aware that *Ward* was published after Nationwide's opening brief in this case was filed. However, a party can not totally abandon an argument in its opening brief and then resurrect it in its reply brief with the citation of one newly published case. It is well settled law that points not raised in the opening brief cannot be raised in the reply brief and are forfeited. Ill. S. Ct. R 341(h)(7) (eff. May 25, 2018). Therefore, we find that Nationwide forfeited its right to argue that the trial court erred in dismissing count II of the second amended complaint and we will not review this issue on appeal.

¶ 59 C. Hiffman and Marshall's Summary Judgment on Second Amended Complaint

¶ 60 Next, Nationwide argues that the trial court erred in granting summary judgment in favor of Hiffman and Marshall on count III of the second amended complaint. In that count Nationwide alleged that Hiffman and Marshall breached sections 15-15(a)(3) and 15-45 of the Act. 225 ILCS 454/15-15, 15-45 (West 2018). Specifically, it contends that they breached their duties under the Act by: (1) failing to exercise reasonable and care and skill in the performance of brokerage services (225 ILCS 454/15-15(a)(3) (West 2018)); and (2) engaging in an undisclosed dual agency (225 ILCS 454/15-45 (West 2018)).

¶ 61 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162 (2007). In determining whether there is a genuine issue of material fact, the pleadings, depositions, admissions, and affidavits must be construed strictly against the movant and liberally in favor of the opponent. *Id.* A triable issue of fact exists where there is a dispute as

to a material fact or where, although the material facts are not in dispute, reasonable minds might differ in drawing inferences from those facts. *Id*. at 162-63. Although summary judgment can aid in the expeditious disposition of a lawsuit, it is a drastic measure and, thus, should be allowed only where the movant's right to judgment is "clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review summary judgment rulings *de novo*. *Id*.

¶ 62 We initially note that in Nationwide's statement of facts it only dedicated one paragraph to the facts underlying the trial court's grant of summary judgment to Hiffman and Marshall. Specifically, it made the following statement: "Though the brokers filed a motion for summary judgment—and indeed, the parties put forth a substantial evidentiary record during briefing on the motion (see generally R C1378-1598, C1601-1723)—the circuit court ultimately ruled that, for the same reasons described in the October 9, 2014 rulings, Nationwide's statutory claims failed as a matter of law." Citing generally to 342 pages of the record to support its argument that the trial court erred in granting summary judgment is wholly insufficient for this court to review Nationwide's claims of error. This court is not a repository into which an appellant may foist the burden of argument and research. *Enadeghe v. Dahms*, 2017 IL App (1st) 162170. Accordingly, we could decline to address any arguments that do not contain appropriate citation to the record. Even though Nationwide does not comply with Rule 341(h)(6), we choose to still address this issue because we have the benefit of Hiffman and Marshall's cogent brief.

¶ 63 1. Failing to Exercise Reasonable Skill and Care as Brokers

¶ 64 Nationwide first argues that Hiffman and Marshall breached section 15-15(a)(3) of the Act when they failed to satisfy their standard of care as brokers. In the argument section of their brief Nationwide points out that their expert testified that based upon their knowledge and expertise, Hiffman and Marshall should have "independently investigated comparable properties

and tax assessments within Randall Park." Such an investigation would have included checking "the local township Assessor's Office to get the assessments on the other [comparable and nearby] properties" which were available 65 days before tax estimates were prepared by Hiffman and Marshall. In failing to conduct this independent investigation, Nationwide claims, Hiffman and Marshall did not exercise the care, skill and diligence that is commonly exercised by reasonable real estate brokers practicing in similar situations. Nationwide argues that Hiffman and Marshall also failed to exercise their duty of care in exclusively relying on the tax figures provided by PanCor. It contends that as the adversarial party to the transaction, it was in PanCor's best interest to project the lowest real estate tax cost over the life of the lease to induce Nationwide to execute the lease. Also, Hiffman and Marshall never told Nationwide that the estimates were prepared by PanCor. They also failed to inquire as to the new sale price of the property or recognize its possible effect on the preparation of the estimate of taxes.

¶ 65 Section 15-15(a)(3) of the Act provides that a licensee shall exercise reasonable care and skill in the performance of brokerage services. 225 ILCS 454/15-15(a)(3) (West 2018).

¶ 66 We agree with Hiffman and Marshall that while they owed a duty to exercise reasonable care and skill in performing their brokerage services, they did not breach that duty. Although several times in the argument section of their brief Nationwide cites to the record for its expert's opinion testimony as to why Hiffman and Marshall violated the Act, it fails to cite to any legal authority that Hiffman and Marshall's actions were in any way improper. We are not concerned with an expert's interpretation of an Illinois statute. As Hiffman and Marshall correctly note, it is the job of the courts, and not witnesses, to interpret statutes.

¶ 67 Here, the Act obligates a licensee to perform the terms of the brokerage agreement with the client, to promote the client's best interests and to exercise reasonable care in the

performance of brokerage services. 225 ILCS 454/15-15 *et seq*. (West 2018). However, nowhere in the Act is it required that a licensee independently verify property tax estimates or to discern the effect of the sale of the property on future taxes. Where, as here, the statute lists things to which it refers, the inference is that all omissions should be understood as exclusions. *Mattis v. State Universities Retirement Systems*, 212 Ill. 2d 58, 78 (2004). Marshall testified that based upon his experience and the tax information he had received for several buildings in the area, PanCor's estimate seemed reasonable at the time. No one can project future property taxes. Even Nationwide's expert said the same. The fact remains that there was no evidence that Hiffman and Marshall could predict that the tax assessor would increase the taxes on the property in question.

¶ 68 2. Dual Agents

¶ 69 Next, Nationwide claims that Hiffman and Marshall breached their duty under section 15-45 of the Act based upon an undisclosed "dual agency." To support this contention, it points to paragraph 31 of the lease, which states, "Lessor and Lessee utilized the services of Adam J. Marshall of Hiffman and Associates ('the Broker') in connection with this Lease." Nationwide contends that since Hiffman and Marshall were dual agents they had a duty to discover and disclose to Nationwide that the "known and expected real estate taxes" under the proposed lease would render the lease of the premises too costly for Nationwide.

¶ 70 Section 15-45 of the Act provides that a licensee may act as a dual agent only with the informed written consent of all clients. 225 ILCS 454/15-45 (West 2018).

¶ 71 Marshall and Hiffman did not violate section 15-45 of the Act. Here, Marshall testified without contradiction that he represented only Nationwide and not the lessor. Nelson also testified that despite paragraph 31 of the lease, Randall did not retain Marshall to represent its

interests in leasing the property. Marshall represented only Nationwide and he was unaware of any conflict of interest. Marshall did not negotiate or prepare the lease.

¶ 72 Even if there is a dispute over the existence of a dual agency here, this issue has no bearing on the appropriateness of summary judgment. Disputed issues of fact are not material and do not warrant the denial of summary judgment if they are unrelated to the elements of the cause of action. *Solomon v. Baron*, 123 Ill. App. 3d 255, 261 (1984). Nationwide's expert agreed that the brokers' duties were the same regardless of whether Marshall was acting as a dual agent. As we have held, Hiffman and Marshall had no duty to and could not forecast future taxes. Accordingly, we find no error.

¶ 73 For these reasons, we hold that the trial court properly granted summary judgment on count III of the second amended complaint to Hiffman and Marshall.

¶ 74 III. CONCLUSION

¶ 75 In sum, Nationwide forfeited its right to have this court review the original complaint when the first and second amended complaints did not incorporate or refer back to the allegations in the original complaint. It also forfeited its right to have us review the allegations in count II of the second amended complaint because it failed to provide any argument with regard to that issue. Finally, the trial court properly granted summary judgment on count III of the second amended complaint because the brokers-appellees did not have a duty to independently verify future property tax estimates under the Illinois Real Estate Act of 2000 (225 ILCS 454/15-5, 15-45 (West 2014), and there was sufficient evidence presented that the brokers did not act as dual agents. The judgment of the trial court was affirmed.

¶ 76 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 77 Affirmed.