2019 IL App (2d) 181036-U
No. 2-18-1036
Order Filed September 17, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT SEIDEL and MARSHA SEIDEL,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 18-L-126
	)	
SILVERGATE BANK,	)	Honorable
	)	Jorge L. Ortiz,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the judgment of the trial court granting defendant's motion to dismiss plaintiffs' claim for a breach of a mortgage contract where (1) the claim was barred by the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1101 *et seq*. West 2016)), (2) the claim was barred by principles of *res judicata*, and (3) plaintiffs forfeited their argument that the claim was not barred by the statutes of limitations.

¶ 2 Plaintiffs, Robert and Marsha Seidel, appeal the order of the circuit court of Lake County granting defendant's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Seidel I

¶ 5 On October 2, 2007, Residential Funding Company, LLC (RFC), as agent of defendant, Silvergate Bank, filed a foreclosure suit against plaintiffs, Robert and Marsha Seidel. The trial court entered a judgment of foreclosure on February 13, 2008, and an order confirming the judicial sale on June 4, 2008. The court denied each of a series of postjudgment motions filed by plaintiffs, where they argued, *inter alia*, that RFC wrongly refused to reinstate the mortgage.

¶ 6 We affirmed the judgment of foreclosure and the confirmation of the sale in *Residential Funding Company, LLC v. Seidel* (*Seidel I*), 02-09-0496 (2010) (unpublished order under Illinois Supreme Court Rule 23). We rejected plaintiffs' argument that they had timely attempted to reinstate the mortgage, noting that the trial court found that plaintiffs "had multiple chances to redeem the property" and that they "never proved in any substantial way that they tendered a correct amount in certified funds and ignored subsequent overtures by the bank to redeem the property." *Seidel I*, 02-09-0496 at 7. We further rejected plaintiffs' argument that they were wrongfully denied their right to reinstate as contemplated by *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 300-01 (1995), where the borrower detrimentally relied on the lender's incorrect statements. *Seidel I*, 02-09-0496 at 10-11.

¶ 7 B. Seidel II

¶ 8 In October 2012, following our order in *Seidel I*, plaintiffs filed in the trial court a verified petition to vacate "any and all orders" relating to the foreclosure case under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). They alleged that the court lacked subject matter jurisdiction in the original suit because RFC fraudulently obtained the assignment of the mortgage and associated note, and thus, did not have standing to bring the suit. Plaintiffs argued that Silvergate was the actual holder of the note. The purchasers at the judicial sale intervened

and moved to dismiss the petition under section 2-615 of the Code (735 ILCS 5/2-216 (West 2012)). The trial court dismissed the petition, and we affirmed in *Seidel v. Residential Funding Company, LLC* (*Seidel II*), 2016 IL App (2d) 150161-U (unpublished order under Illinois Supreme Court Rule 23).

¶ 9 C. Seidel III

¶ 10 On February 16, 2018, plaintiffs filed the present complaint that alleged a breach of the mortgage contract by Silvergate. Plaintiffs asserted that Silvergate owned the mortgage and associated note and that RFC acted as Silvergate's "undisclosed agent" in the foreclosure proceedings. Plaintiffs alleged that they attempted to pay the reinstatement amount in December 2007, but that Silvergate, through its loan servicer, Homecomings Financial, wrongfully rejected the payment. Plaintiffs further alleged that they detrimentally relied on statements contained within a series of letters sent in early 2008 by Homecomings Finanacial and Silvergate's new loan servicer, Dovenmuehle Mortgage, Inc., that led them to believe that the "mortgage would be kept in force." According to their complaint, plaintiffs "fully complied with the applicable terms of the contract provision for reinstatement," and the wrongful refusal to accept their payment was a breach of Silvergate's obligation under the mortgage contract. Plaintiffs asserted that Silvergate concealed its identity as the true owner of the mortgage by knowingly permitting false representations by RFC to go unanswered: "During the years of ensuing litigation attempting to right that wrong, Silvergate hid slyly in the background while its agents and attorneys shielded them with misrepresentations to the court." Plaintiffs sought compensatory and punitive damages.

¶ 11 Silvergate responded to the complaint by filing a motion to dismiss pursuant to section 2-619 of the Code, arguing that: (1) there was no contract on which to sue because the foreclosure

proceeding extinguished the underlying mortgage contract; (2) section 15-1509 of the Code (735 ILCS 5/15-1509 (West 2016)) affirmatively barred the claim; (3) each of the issues raised by plaintiffs was barred by the doctrines of *res judicata* and collateral estoppel; and (4) the claim was barred by the 10-year statute of limitations on written contracts (735 ILCS 5/13-206 (West 2016)) and the 5-year statute of limitations for fraud (735 ILCS 5/13-205 (West 2016)).

¶ 12 On July 12, 2018, following arguments, the trial court granted Silvergate's motion to dismiss, finding that: (1) the foreclosure proceeding and the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/12-1101 *et seq*. (West 2016)) barred the claim as an "affirmative matter" pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)); (2) the principles of *res judicata* barred the complaint pursuant to section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2016)); and (3) the statutes of limitations on written contracts and fraud claims barred the claim pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)).

¶ 13 On November 20, 2018, in denying plaintiffs' motion to reconsider, the court further clarified its ruling, finding that: (1) section 15-1509 of the Foreclosure Law (735 ILCS 5/15-1509 (West 2016)) precluded the complaint; (2) the *res judicata* doctrine precluded the claims in the complaint because there was (a) a final judgment on the merits, (b) an identity of causes of action, and (c) an identity or commonality of parties or their privies; and (3) the action was barred by the relevant statutes of limitations because the claim of a breach of a written contract was not commenced within ten years and, to the extent that the complaint alleged fraud, it was not brought within five years. Plaintiffs timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Before addressing the merits of this appeal, we note that we took with the case Silvergate's motion for leave to cite additional authority. Silvergate seeks leave to cite *Taylor v. Bayview Loan Servicing*, LLC, 2019 IL App (1st) 172652, which was published after the parties submitted their briefs. We grant the motion to cite additional authority over plaintiffs' objection.

¶ 16 The purpose of a motion to dismiss under section 2-619 is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Specifically, section 2-619(a)(9) of the Code permits dismissal where the claim asserted is barred by other affirmative matter that avoids the legal effect of or defeats the claim. *Van Meter*, 207 Ill. 2d at 367. The effect of filing a section 2-619(a)(9) motion is that the moving party admits the legal sufficiency of the complaint, but asserts an affirmative matter outside the complaint that defeats the cause of action. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. If, after construing the pleadings in the light most favorable to the nonmoving party, the court finds that no set of facts, if proven, would support the claim, then the court should grant the motion. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 31. We review *de novo* a dismissal under section 2-619. *Van Meter*, 207 Ill. 2d at 368.

¶ 17 Plaintiffs argue that the court erred in granting Silvergate's section 2-619 motion to dismiss for the following reasons: (1) Silvergate's motion to dismiss was predicated on an erroneous premise that the foreclosure judgment extinguished the mortgage contract and terminated plaintiffs' right of reinstatement; (2) the Foreclosure Law does not bar a common law claim for breach of a mortgage contract; (3) *res judicata* is not applicable because (a) this common law claim is independent of the previous proceedings under the Foreclosure Law, (b) this claim was never the subject of the confirmation of the judicial sale, and (c) Silvergate was not a party to and has not demonstrated that it was in privity with any party in the previous

proceedings; and (4) the statute of limitations on written contracts did not bar the action because the material breach did not occur until the date of the confirmation of the judicial sale, but plaintiffs make no argument regarding the court's ruling that the five-year statute of limitation on fraud claims also barred this claim.

¶ 18 Silvergate responds that: (1) any claim regarding the refusal to reinstate was extinguished by the foreclosure; (2) the plain language of section 15-1509 bars "all claims of parties to the foreclosure"; (3) the *res judicata* doctrine applies because there was a final judgment on the merits on the same issue between the same parties or their privies; (4) alternatively, if *res judicata* does not apply, then the claim is still barred by collateral estoppel because the factual issues have been previously litigated and determined; and (5) the claim is time-barred by the statute of limitations on written contracts.

¶ 19 A. Section 15-1509 of the Foreclosure Law

¶ 20 Section 15-1509 of the Foreclosure Law outlines the procedure for transferring title to real property as part of a judicial foreclosure proceeding. Subsections (a) and (b) provide that the court or its appointee shall promptly execute a deed sufficient to convey title to the holder or purchaser following confirmation of the sale and payment, and that delivery of the deed "shall be sufficient to pass the title thereto." 735 ILCS 5/15-1509(a),(b) (West 2016). Subsection (c), which is titled "Claims Barred," states in relevant part: "Any vesting of title *** by deed pursuant to subsection (b) of Section 15-1509, *** *shall be an entire bar of* *** *all claims of parties to the foreclosure*." (Emphasis added.) 735 ILCS 5/15-1509(c) (West 2016).

¶ 21 Silvergate argued in its motion to dismiss and maintains in its appellate brief that the plain language of section 15-1509 of the Foreclosure Law bars the breach of contract claim because plaintiffs were a party to the foreclosure proceedings that had long since been decided.

Silvergate cites *Aldrich v. Sharp* to support its contention that section 15-1509 is a codification of the long-standing "merger doctrine," and that the mortgage ceased to exist when it merged into the judgment:

> "[W]here a judgment is obtained on a contract, the contract is at an end, being merged in the judgment, and the judgment is controlled, not by contract, but by statute. *** We see no reason why the rule should not be applicable to decrees in chancery for the foreclosure of mortgages." *Aldrich v. Sharp*, 4 Ill. 261, 263 (1841).

Silvergate additionally cites *Poilevy v. Spivack*, 368 Ill. App. 3d 412, 414 (2006), where the First District described the merger doctrine as follows:

> "[W]hen a judgment based on a contract or instrument is obtained, the instrument becomes entirely merged into the judgment. [citation] By the judgment of the court, it loses all of its vitality and ceases to bind the parties to its execution. [citation] Once the instrument is merged into the judgment, no further action at law or equity can be maintained on the instrument."

Here, the court entered its judgment of foreclosure in February 2008 and confirmed the sale and ordered delivery of the deed in June 2008. Silvergate argues that the mortgage ceased to bind the parties when it merged into the judgment and that no further action on that instrument is permitted.

¶ 22 Plaintiffs responded to the motion to dismiss below by categorizing Silvergate's argument as an "absurdity" that asked the court "to grossly misinterpret and misapply § 15-1509." Plaintiffs stated, without citing authority, that section 15-1509 is "narrowly tailored to pertain to claims seeking to 'undo' a foreclosure—which this suit is patently not trying to accomplish." On appeal, again without citing authority, plaintiffs dismiss Silvergate's merger

argument as being "contradictory to the statutory language and well-settled case law." They proclaim that merger does not apply to Silvergate but rather "would be applicable as against Residential Funding and any future claims it might assert against the plaintiffs herein."

¶ 23 In raising their arguments, plaintiffs cherry-pick inapposite phrases from section 15-1506(i) of the Foreclosure Law:

> "Upon the entry of the judgment of foreclosure, all rights of a party in the foreclosure *against the mortgagor* provided for in the judgment of foreclosure or this Article shall be secured by a lien on the mortgaged real estate, which lien shall have the same priority as the claim to which the judgment relates and shall be terminated upon confirmation of a judicial sale in accordance with this Article." (Emphasis added in plaintiffs' brief.) (735 ILCS 5/15-1506(i)(1) (West 2016)), and,
>
> "Upon the entry of the judgment of foreclosure, the *rights in the real estate subject to the judgment of foreclosure* of (i) all persons made a party in the foreclosure and (ii) all nonrecord claimants given notice in accordance with paragraph (2) of subsection (c) of Section 15-1502, shall be solely as provided for in the judgment of foreclosure and in this Article." (Emphasis added in plaintiffs' brief.) (735 ILCS 5/15-1506(i)(2) (West 2016)).

Plaintiffs argue that the language in section 15-1509 "mirrors" the language in section 15-1506(i). They ask that we construe this language in section 15-1506(i) as a limit to the bar against "all claims" in section 15-1509. Specifically, plaintiffs assert that "all claims" means only claims "against the mortgagor" and claims to "rights in real estate subject to the judgment of foreclosure." Plaintiffs cite no authority for this theory, and we find no basis in the statutory text or case law to so limit the clear and unambiguous language of section 15-1509.

¶ 24 Plaintiffs then cite *1010 Lake Shore Association v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶¶ 35-36 to support their errant conclusion that section 15-1509 "serves only to extinguish all junior lien interests of the parties." In *1010 Lake Shore*, our supreme court confirmed that section 15-1509 "acts as a bar to claims of parties to the foreclosure action," and thus, that it "extinguishes junior liens." *1010 Lake Shore*, 2015 IL 118372, ¶ 38. Claims on junior liens are clearly a subset of "all claims." Nothing in the court's language expressed or implied that the claim preclusion in section 15-1509 was limited to junior liens.

¶ 25 Plaintiffs lastly assert that Silvergate "was not the purchaser at the judicial sale and holds no standing to raise 15-1509." They cite only inapposite authority and do not develop this argument beyond this single conclusory statement. Accordingly, plaintiffs have forfeited this argument. See *Sakellariadis v. Campbell*, 391 Ill. App. 3d 795, 804 (2009) (failure to elaborate, cite persuasive authority, or present a well-reasoned argument results in forfeiture).

¶ 26 The plain language of section 15-1509 of the Foreclosure Law is clear and unambiguous. It is a complete bar of all claims of parties to the foreclosure. Nothing in plaintiffs' arguments convinces us that section 15-1509 does not bar their claim. Accordingly, we determine that the trial court did not err in granting Silvergate's motion to dismiss the claim.

¶ 27 B. *Res Judicata* Doctrine

¶ 28 Application of section 15-1509 of the Foreclosure Law clearly dictates the outcome of this appeal, and we need not look any further to decide this case. In the interest of clarity and justice, however, we briefly address plaintiffs arguments that the trial court erred in applying the doctrine of *res judicata* and the statute of limitations.

¶ 29 Section 2-619(a)(4) incorporates the doctrine of *res judicata* and permits a court to dismiss an action on the grounds that it is barred by a prior judicial judgment. *Marvel of Illinois,*

Inc. v. Marvel Contaminant Control Industries, Inc., 318 Ill. App. 3d 856, 863 (2001). The three elements of *res judicata* are: (1) a final judgment on the merits, (2) an identity of cause of action, and (3) an identity of parties or their privies. *Marvel*, 318 Ill. App. 3d at 863. If all elements are met, then the prior action is conclusive as to all issues that were raised or could have been raised. *Marvel*, 318 Ill. App. 3d at 863.

¶ 30 Plaintiffs argue that elements two and three are not met. They assert that their common law contract claim is independent of the issues decided in the foreclosure proceedings, and that Silvergate was not a party or in privity with a party to the foreclosure action. Thus, according to plaintiffs, this is a different claim involving different parties, and *res judicata* does not apply.

¶ 31 We first address plaintiffs' argument that there was no identity of claims. In Illinois, we use the "transactional test," under which claims are considered the same cause of action if they arise from "a single group of operative facts." *Marvel*, 318 Ill. App. 3d at 864. The claims in plaintiffs' complaint are based entirely on the facts surrounding their attempts to reinstate the mortgage, which are the same facts argued and decided in the foreclosure proceedings. Here, just as in the foreclosure proceedings, plaintiffs claim that they (1) obtained a reinstatement amount from the loan servicer, (2) tendered an amount sufficient to reinstate the mortgage, and (3) fully complied with the terms of the reinstatement provision of the mortgage. Plaintiffs argue that despite these efforts, Silvergate wrongfully rejected their payment. Plaintiffs cannot escape the fact that this complaint arises from the same group of operative facts that were previously involved in the foreclosure action. The second element is met.

¶ 32 As to the third element of *res judicata*, identity of parties or their privies, plaintiffs highlight that RFC, not Silvergate, was the named plaintiff in the foreclosure action. Additionally, plaintiffs assert that Silvergate failed to meet its burden to demonstrate privity with

RFC, and thus, *res judicata* cannot apply. Apparently lost on plaintiffs is the content of their own complaint, where they asserted that Silvergate purchased their mortgage in 2004 and that RFC brought the 2007 foreclosure suit as Silvergate's agent. In deciding a section 2-619 motion, the court considers all of the pleadings and supporting documents. See *Van Meter*, 207 Ill. 2d at 367-68. In determining privity, it is identity of interest, not the nominal identity of the parties that controls—privity exists between parties who adequately represent the same interests. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992). Based on plaintiffs' own allegations, RFC acted as Silvergate's agent with regard to the mortgage. Clearly, RFC acted within that agency in bringing the foreclosure suit, which was premised on plaintiffs' non-payment of the mortgage that Silvergate owned. See *Atherton v. Connecticut General Life Insurance Co.*, 2011 IL App (1st) 090727, ¶ 14 (a decision on the merits in an action against a principal is *res judicata* as to a later action against the agent if the prior action concerned a matter within the agency). Silvergate and RFC were in privity because they shared an identity of interest in the mortgage, and the final element is met. The trial court did not err in granting the motion to dismiss based on the *res judicata* doctrine.

¶ 33 C. Statute of Limitations

¶ 34 Plaintiffs argue that the material breach of the mortgage contract did not occur until the confirmation of the judicial sale, because that was when "they no longer could maintain their title." Plaintiffs cite only *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶¶ 35-36, ostensibly to argue that there was a single material breach of this continuous contract in June 2008, rather than a partial breach in December 2007 that was actionable on its own. Plaintiffs devote all of two paragraphs to their scant argument on this issue. They fail to develop a cogent legal argument that identifies why this was a single breach. Moreover, they cite no authority

whatsoever for their proposition that a material breach of a mortgage contract occurs when the judicial sale is confirmed, rather than when the lender actually commits the alleged breach. Plaintiffs also fail to mention the court's ruling that the five-year statute of limitations of fraud applies to this claim. For all of these reasons, plaintiffs have forfeited this argument. *Sakellariadis*, 391 Ill. App. 3d at 804 (failure to elaborate, cite persuasive authority, or present a well-reasoned argument results in forfeiture).

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 37 Affirmed.