**SIXTH DIVISION**
March 2, 2012

No. 1-10-3794



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| DLJ MORTGAGE CAPITAL, INC., | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 07 CH 8734 |
| | ) | |
| JONI MASON a/k/a JONI P. MASON, HOPE MASON a/k/a HOPE H. MASON a/k/a HOPE HICKMAN-MASON, STATE OF ILLINOIS, UNITED STATES OF AMERICA, UNKNOWN OWNERS AND NON-RECORD CLAIMANTS, | ) | The Honorable |
| | ) | Jeffrey L. Warnick, |
| Defendants-Appellants. | ) | Judge Presiding. |

JUSTICE GARCIA delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice R. E. Gordon specially concurred, joined by Justice Palmer.

**ORDER**

¶ *1* *HELD*: The circuit court did not abuse its discretion in striking the defendants' motion to vacate the order of summary judgment as an improper second postjudgment motion. The defendants' argument that the plaintiff lacked standing to file its mortgage foreclosure complaint is rejected because it is both untimely and foreclosed by a previous judicial admission. The circuit court properly denied the defendants' motion to reconsider and vacate the order dismissing the defendants' counterclaim and the order confirming the foreclosure sale.

¶ 2 This appeal arises from a foreclosure action brought by the plaintiff, DLJ Mortgage Capital, Inc. (DLJ), against the defendants, Joni Mason a/k/a Joni P. Mason and Hope Mason a/k/a Hope H. Mason a/k/a Hope Hickman-Mason, regarding a mortgage and note executed by the defendants for property located at 1524 West Monroe Street in Chicago. In response to the plaintiff's mortgage foreclosure complaint, the defendants filed a counterclaim asserting common law fraud. The circuit court of Cook County granted summary judgment on liability in favor of the plaintiff and against the defendants on the foreclosure complaint and dismissed the defendants' counterclaim. On April 9, 2009, the court entered judgment of foreclosure and sale. Following the August 9, 2010 order approving and confirming the sale of the underlying property, the defendants filed, on September 7, 2010, a motion to reconsider and vacate the order dismissing the counterclaim and confirming the foreclosure sale. On October 15, 2010, while the motion to reconsider was pending, the defendants filed a motion to vacate the order granting summary judgment to the plaintiff on the foreclosure complaint. The plaintiff moved to strike the defendants' motion as untimely and as an improper second postjudgment motion. The circuit court denied the defendant's motion to reconsider and granted the plaintiff's motion to strike the defendant's motion to vacate the summary judgment order. The defendants challenge the court's order striking their motion to vacate and the order dismissing their counterclaim. We affirm.

¶ 3 BACKGROUND

¶ 4 On March 14, 1998, the defendants executed a mortgage and note from JVS Financial Group, Inc. (JVS), in the amount of $402,000 for real property located at 1524 West Monroe Street in Chicago, consisting of a two-family frame residence with a one-car detached garage.

The mortgage provided, "The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower."

¶ 5 Shortly after closing, a loan officer from JVS contacted the defendants and indicated it was necessary for the defendants to refinance the mortgage and note. On June 30, 1998, the defendants again executed a mortgage and note from JVS in the amount of $402,000 for the same property. The June mortgage and note contained nearly identical language with the exception of a provision in the note for calculation of monthly interest payment changes based on the LIBOR Index, an index of "the average of interbank offered rates for 6 month U.S. dollar-denominated deposits in the London market." The date on which the interest rate could change was labeled in the note as the "Change Date." In the March note, the provision stated, "Before each Change Date, the Note Holder will calculate my new interest rate by adding SIX AND 16/100 percentage points (6.160%) to the Current Index." Pursuant to the June note, however, the new interest rate would result by adding "SIX AND 28/100 percentage points (6.280%) to the Current Index." Also, unlike the March mortgage and note, in the June refinance, the defendants executed an "Adjustable Rate Rider," which provided limits on interest rate changes: "The interest rate I am required to pay at the first Change Date will not be greater than 12.500% or less than 9.500%. Thereafter, my interest rate will never be increased or decreased on any single percentage points (1.000%) from the rate of interest I have been paying for the preceding 6 months. My interest rate will never be greater than 15.500%. Nor less than 9.500%." The defendants stopped payment on the mortgage and note in October 2001.

¶ 6 On March 28, 2007, the plaintiff filed its complaint to foreclose mortgage, seeking a

judgment of foreclosure and sale, a judgment for attorney's fees, costs, and expenses, and orders approving the foreclosure sale and granting possession. The plaintiff claimed it had the capacity to bring the complaint as "owner, agent or nominee of the owner, of the Mortgage given as security." The plaintiff alleged the defendants owed the principal balance of $395,717.77, plus interest, costs, and fees. As to the allegations that the plaintiff had the capacity to bring the foreclosure complaint, the defendants answered they were without knowledge or information sufficient to form a belief as to the allegations and denied them.

¶ 7 On June 18, 2007, the circuit court entered judgment in favor of the plaintiff and against the defendants, due to nonappearance, for the foreclosure and sale of the property with principal, accrued interest, advances, costs of suit, and attorneys' fees totaling $653,626. The defendants moved to vacate the foreclosure judgment, which the court granted on August 13, 2007.

¶ 8 The defendants filed their counterclaim against the plaintiff "as assignee of JVS Financial Group, Inc." on August 13, 2007, alleging common law fraud in Count I and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2006)) in Count II. The defendants alleged that, despite numerous requests, JVS did not provide them with an explanation for the request to refinance the March mortgage and note. The defendants claimed JVS assured them the terms of the refinancing would be identical to the March mortgage and note and that the refinancing would be completed with no additional cost to the defendants. Claiming they relied on JVS's assurances, the defendants executed the June mortgage and note. The defendants alleged that the terms of the June mortgage and note were not identical to the March mortgage and note: "the [defendants'] interest rate under the June Note

following each Change Date thereunder is higher, rather than identical to, the interest rate following each Change Date under the March Note." The defendants also claimed that, despite JVS's representations to the contrary, the defendants paid $1,886.08 in settlement charges at the closing of the June mortgage and note. The defendants alleged that JVS knew the defendants would be unable to obtain the June mortgage and note under the same terms they had executed in March and that JVS was aware the defendants would incur settlement costs at the closing of the June mortgage and note. The defendants claimed they reasonably relied on JVS's representations concerning the June mortgage and note and that they incurred damages as a result of JVS's misrepresentations.

¶ 9 On November 8, 2007, the plaintiff moved to dismiss Count II of the defendants' counterclaim as time-barred. The circuit court agreed and dismissed Count II of the defendants' counterclaim on November 15, 2007.

¶ 10 Shortly thereafter, on November 26, 2007, the plaintiff moved to dismiss Count I of the defendants' counterclaim pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)). The plaintiff asserted the defendants failed to allege a claim of common law fraud against the plaintiff because "[a]n assignee of a mortgage cannot be affirmatively liable for common law fraud for the purported deceptive and fraudulent acts of the assignor," citing *Manufacturers & Traders Trust Co. v. Hughes*, No. 99 C 5849, 2003 WL 21780956 (N.D. Ill. July 31, 2003). The plaintiff contended that because "the sole basis of their counterclaim concern[s] representations made by JVS and not DLJ, [the defendants] can prove no set of facts what would entitle [them] to recovery on their counterclaim."

¶ 11 In lieu of a response to the plaintiff's motion to dismiss Count I of their counterclaim, on December 13, 2007, the defendants moved for voluntary dismissal of counterclaim and for additional time to file affirmative defenses. The plaintiff filed a response asserting that because the defendants failed to properly plead a common law fraud claim, the circuit court "should not delay the inevitable dismissal of Count I of the counterclaim by allowing [the defendants] to voluntarily dismiss Count I against DLJ, especially since the ruling on DLJ's pending motion to dismiss could result in a final disposition of Count I of the counterclaim."

¶ 12 On January 8, 2008, the circuit court granted the plaintiff's motion to dismiss Count I of the defendants' counterclaim with prejudice, which meant the defendants' motion to voluntarily dismiss Count I of the counterclaim was denied as well.

¶ 13 On October 20, 2008, the plaintiff moved for summary judgment on its mortgage foreclosure complaint. The plaintiff attached to its motion an affidavit executed by Mindy Leetham, "a duly appointed officer for Select Portfolio Servicing, Inc., [the] attorney-in-fact and servicing agent for DLJ Mortgage Capital, Inc." As to the June mortgage and note, Leetham averred, "In 2007, the Mortgage and Note were assigned to DLJ." The summary judgment motion attached no additional documentation concerning the purported assignment of the June mortgage and note to the plaintiff. In their response to the plaintiff's motion for summary judgment, the defendants contested only the plaintiff's calculations of the amounts due under the mortgage and note.

¶ 14 On January 27, 2009, the circuit court granted the plaintiff's summary judgment motion as to the defendants' liability on the foreclosure complaint. On April 9, 2009, the court entered a

judgment of foreclosure and sale in favor of the plaintiff and against the defendants, calculating damages totaling $786,760.73. The court specifically found the defendants "did default in their obligations and performances under the Note and Mortgage" and "[a]ll of the material allegations of the Complaint are true and proven, that the equities in this cause are with Plaintiff, as holder of the Note secured by the Mortgage, and Plaintiff is entitled to a Judgment of Foreclosure in accordance with the prayer of the Complaint." On August 9, 2010, the court entered an order approving report of sale and distribution and confirming the sale, and entered an order for possession.

¶ 15 On September 7, 2010, the defendants moved to reconsider and vacate the order dismissing the counterclaim and the order confirming the sale. The defendants retained new counsel and argued in their motion that "new counsel who first appeared in the matter in late July 2010 are not able to discern from the pleadings and other papers on file the basis upon which Count I of the Counterclaim was dismissed." The defendants asserted that any claims they had against JVS "as set forth in their counterclaim, were good claims against the new lender," citing *Dunlap v. Peirce*, 336 Ill. 178 (1929) and *Pacific States Life Insurance Co. v. Richcreek*, 288 Ill. App. 469 (1937). The defendants also argued that, after the order confirming the sale of the subject property was entered, the property was not correctly advertised for sale considering that the value of the property was more than double the listed sales price. In addition, the defendants contended they were entitled to an evidentiary hearing on the value of the property prior to the entry of an order confirming the sale of the property. The defendants requested that the court vacate (1) its order of January 8, 2008 dismissing Count I of their counterclaim, and (2) the

August 9, 2010 order confirming the sale of the property, and conduct an evidentiary hearing.

¶ 16 On October 15, 2010, while their September 7, 2010 postjudgment motion was pending, the defendants moved to vacate the order of summary judgment entered on January 27, 2009. The defendants claimed the complaint to foreclose mortgage was defective on its face because the plaintiff failed to allege how and when it received assignment of the mortgage and note in violation of section 2-403 of the Illinois Code of Civil Procedure (735 ILCS 5/2-403 (West 2006)) ("The assignee and owner of a non-negotiable chose in action may sue thereon in his or her own name. Such person shall in his or her pleading on oath allege that he or she is the actual *bona fide* owner thereof, and set forth how and when he or she acquired title."). The defendants asserted Leetham's affidavit was defective under Illinois Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. July 1, 2002)) because it failed to explain how and when the alleged assignment of the June mortgage and note occurred. The defendants attached to their motion an "Affidavit of Lost Assignment of Mortgage," recorded with the Cook County Recorder of Deeds on November 21, 2002, as document 0021294748 by Jim Hartigan, assistant vice-president of Mortgage Electronic Registration Systems, Inc. (MERS). This affidavit averred that MERS assigned the June mortgage as of 2002, "the assignment of the mortgage had been lost or destroyed," and "no duplicate assignment could be obtained because JVS was no longer in business." The defendants argued it was apparent there were "document irregularities" that required further investigation by the court; to further support this claim, the defendants attached newspaper articles reporting mortgage fraud.

¶ 17 The plaintiff moved to strike the defendants' October 15, 2010 motion to vacate the order

of summary judgment, claiming it constituted a second postjudgment motion and was procedurally barred because more than 30 days had elapsed since the circuit court entered summary judgment.

¶ 18 On November 19, 2010, the circuit court heard argument on the parties' pending motions. The defendants argued that their motion to vacate was not a successive postjudgment motion because "there was no final order in place." The plaintiff asserted that the final order that began the "30-day clock" to file a postjudgment motion was the August 9, 2010 order approving sale of the foreclosed property. Citing *Sears v. Sears*, 85 Ill. 2d 253, 259 (1981) and Illinois Supreme Court Rule 274 (Ill. S. Ct. R. 274 (eff. Jan. 1, 2006)), the plaintiff contended, "A party may make only one post-judgment motion directed at a judgment order that is otherwise final."

¶ 19 Following arguments, the circuit court issued its ruling:

> "I think in this case here, certainly [the defendants' motion to vacate] - - and I've read it. Frankly I could entertain it and say, Okay, that's fine. And I - - Basically I see nothing really new. I see nothing here other than there's been some press clippings in the press about some problems in the field of foreclosures that deal with some affidavits. There's an attack with regard to the summary judgment in this one. But, again, this was something where it was represented, the affidavit was found to be sufficient. This Court doesn't find any errors with that and because some other companies or other banks may have had some headlines at presses doesn't necessarily vacate that either. But I don't think I need to do that because I think following the *Sears* case and the Supreme Court Rule, I think this

> is a second or successive post-judgment motion that could have, should have been made if it was going to or could have or should have been made as a motion to reconsider sometime after January of '09 when it was entered. Here we are today in mid November of 2010. This case has been going on for three and a half years. And frankly I would think that - - I agree with plaintiff's position here that this motion is stricken. So I will go ahead and strike the motion to vacate the order of summary judgment for those reasons stated."

¶ 20 Following the hearing, the circuit court entered a written order denying the defendants' motion to reconsider its order dismissing the counterclaim and to vacate the order confirming the sale; the court granted the plaintiff's motion to strike the defendants' October 15, 2010 motion to vacate the summary judgment order. The defendants timely appeal.

¶ 21 ANALYSIS

¶ 22 The defendants initially assert that the circuit court erred by failing to consider their motion to vacate the order granting the plaintiff summary judgment. The defendants claim, "It is not unusual to allow additional time after a final judgment to supplement a post trial motion with additional facts or arguments prior to ruling. Notwithstanding the general rule that the circuit court retains jurisdiction only for 30 days after entry of a final order, a court may modify its judgment *nunc pro tunc* at any time." According to the defendants, the filing of their motion to vacate the order of summary judgment was proper, as a supplemental postjudgment motion, considering the court had yet to rule on their motion to reconsider. The defendants argue the "trial judge should have interpreted the Motion to Vacate as a supplemental matter and ruled on

the motion rather than to strike the motion out of hand." The defendants assert their motion to vacate had merit in that the plaintiff lacked standing to pursue a mortgage foreclosure action against the defendants because it failed to allege and prove a chain of assignments relating back to the original execution of the June mortgage and note. Finally, the defendants argue the court erred when it dismissed Count I of their counterclaim because they properly alleged all the elements of common law fraud.

¶ 23 The plaintiff responds that pursuant to Illinois Supreme Court Rule, a party may make only one postjudgment motion directed at a judgment order that is otherwise final. The plaintiff asserts the circuit court properly characterized the defendants' motion as a second postjudgment motion and struck it. The plaintiff contends the defendants waived their argument on the issue of standing. Finally, the plaintiff contends the court correctly dismissed the defendants' common law fraud counterclaim because the claim failed to allege any of the elements of fraud against the plaintiff.

¶ 24 Plaintiff's Motion To Strike

¶ 25 The parties disagree on the standard of review to be applied to the circuit court's decision to grant the plaintiff's motion to strike the defendants' motion to vacate order of summary judgment. The defendants seek *de novo* review because the court's ruling involved "a summary judgment disposition." The plaintiff responds that review of this issue should be under the abuse of discretion standard.

¶ 26 Our supreme court applied an abuse of discretion standard to the question of whether the circuit court properly granted a motion to strike an affidavit submitted in support of a summary

judgment motion. See *In re Estate of Hoover*, 155 Ill. 2d 402, 420 (1993). This appellate court has concluded that the *Hoover* decision's on the applicable standard of review may no longer stand. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 773-74 (2001). In *Jackson*, the appellate court applied *de novo* review on the same issue; it distinguished *Hoover* by noting that *Hoover* did not include discussion of the issue and was decided before *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127 (1999). The *Employers Insurance* case involved a petition for attorney's fees and not a motion to strike. Our supreme court held that, although an abuse of discretion standard is generally the proper standard of review for a petition for attorney's fees, *de novo* review was appropriate in that case because the fee petition was granted in connection with a motion for judgment on the pleadings. *Employers Insurance*, 186 Ill. 2d at 160.

¶ 27 This court has consistently held that the appropriate standard for reviewing a motion to strike in the context of a summary judgment motion is *de novo*. See, *e.g.*, *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 46 (2008); *Camco, Inc. v. Lowery*, 362 Ill. App. 3d 421, 428 (2005); *Filliung v. Adams*, 387 Ill. App. 3d 40, 51 (2008). In *Travel 100 Group, Inc. v. Mediterranean Shipping Co.*, 383 Ill. App. 3d 149, 152 (2008), the appellate court found *de novo* review was warranted because the circuit court's ruling on the motion to strike an affidavit was made in connection with the court's ruling on a motion for summary judgment.

¶ 28 The circumstances in the instant case differ because we are reviewing the circuit court's decision to grant a motion to strike a postjudgment motion to vacate. See *Deutsche Bank National v. Burtley*, 371 Ill. App. 3d 1, 5-6 (2006); *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207

(2004) (the circuit court's decision to deny a motion to vacate is reviewed for an abuse of discretion). In *Burtley*, we held an abuse of discretion standard applied for review of the circuit court's decision to deny a motion to vacate. The *Deutsche Bank* court held, "A *de novo* standard of review does not apply in this case because this case involves a motion to vacate, not a motion to dismiss or a motion for summary judgment." 371 Ill. App. 3d at 5. We followed similar reasoning in *Higgens v. House*, 288 Ill. App. 3d 543, 546 (1997). There the reviewing court applied an abuse of discretion standard to a motion to vacate summary judgment. Based on the foregoing authorities, we conclude that an abuse of discretion standard applies to the circuit court's grant of the plaintiff's motion to strike the defendants' motion to vacate. *Deutsche Bank*, 371 Ill. App. 3d at 5-6; *Higgens*, 288 Ill. App. 3d at 546.

¶ 29 An abuse of discretion occurs when the circuit court "acts arbitrarily without the employment of conscientious judgment or its decision exceeds the bounds of reason and ignores principles of law such that substantial injustice results." (Internal quotation marks omitted.) *Mann v. The Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001). "If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion." *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930 (1997). Thus, we must determine whether the circuit court's ruling was "arbitrary, fanciful, unreasonable," or if "no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 30 The defendants assert that the circuit court had not yet ruled on their motion to reconsider and, as such, should have also considered their motion to vacate as a supplemental motion under

section 2-1203 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203 (West 2006)). The defendants concede in their brief, however, that "courts have refused to allow successive post trial motions on the basis that successive motion[s] would tend to extend the time within which to file a notice of appeal and that litigants could theoretically make a case run forever by filing successive motions."

¶ 31 Our Illinois Supreme Court Rules contemplate the filing of only one postjudgment motion. "A party may make only one postjudgment motion directed at a judgment order that is otherwise final." Ill. S. Ct. R. 274 (eff. Jan. 1, 2006). We are also guided by the supreme court's decision in *Sears*:

> "There is no provision in the Civil Practice Act or the supreme court rules which permits a losing litigant to return to the trial court indefinitely, hoping for a change of heart or a more sympathetic judge. Permitting successive post-judgment motions would tend to prolong the life of a lawsuit at a time when the efficient administration of justice demands a reduction in the number of cases pending in trial courts and would lend itself to harassment. There must be finality, a time when the case in the trial court is really over and the loser must appeal or give up. Successive post-judgment motions interfere with that policy. And justice is not served by permitting the losing party to string out his attack on a judgment over a period of months, one argument at a time, or to make the first motion a rehearsal for the real thing next month." *Sears*, 85 Ill. 2d at 259.

¶ 32 In this case, the defendants timely filed their motion to reconsider and vacate the order

dismissing the counterclaim and confirming sale within 30 days of the circuit court entering its August 9, 2010 order approving report of sale and distribution. The defendants' motion to vacate the summary judgment order was not filed until October 15, 2010, 67 days after the order approving the sale was entered.

¶ 33 We conclude that the motion to vacate the summary judgment order was properly struck as untimely because it was not filed "within 30 days after the entry of the judgment" as required by section 2-1203 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203 (West 2006)). Even if the defendants had filed their motion to vacate the order of summary judgment within 30 days of the August 9, 2010 order, consistent with our abuse of discretion review, we conclude the defendants had to seek leave of court to "supplement" its earlier motion to reconsider and vacate the order dismissing the counterclaim. See *Sears*, 85 Ill. 2d at 259. Absent such a request, it was reasonable for the circuit court to consider the tardy motion as a successive postjudgment motion barred by Illinois Supreme Court Rule 274.

¶ 34 Moreover, contrary to the defendants' argument, a review of each of the defendants' postjudgment motions shows there is nothing "supplemental" reflected in the motion to vacate summary judgment. The defendants' motions contain completely different arguments and pray for separate outcomes. The fact that the circuit court had yet to rule on the defendants' first post-judgment motion when the defendants filed their second postjudgment motion is of no consequence because Illinois simply does not allow the filing of a successive postjudgment motion, which the defendants' October 15, 2010 filing clearly was.

¶ 35 Guided by the supreme court's rationale in *Sears*, we hold the circuit court properly

granted the plaintiff's motion to strike the defendants' motion to vacate the summary judgment order. No abuse of discretion in the circuit court's ruling has been shown by the defendants.

¶ 36 Plaintiff's Standing

¶ 37 The defendants claim the plaintiff lacked standing to file its complaint to foreclose mortgage because it failed to allege and prove that title and ownership to the June mortgage and note lay with it. According to the defendants, the plaintiff violated section 2-403 of the Illinois Code of Civil Procedure (735 ILCS 5/2-403 (West 2006)) because it has not shown how and from whom it obtained the assignment of the mortgage and note executed in favor of JVS at the time of closing. The defendants also assert the plaintiff violated section 2-606 of the Illinois Code of Civil Procedure (735 ILCS 5/2-606 (West 2006)), by not attaching a copy of the assignment to the pleading as an exhibit.

¶ 38 The plaintiff points out that the defendants raised this issue for the first time in their second postjudgment motion, which also requested that the circuit court "reconsider its prior order granting partial summary judgment because the plaintiff lacked standing." The plaintiff asserts the standing argument was forfeited when it was not raised in a timely fashion as an affirmative defense.

¶ 39 Illinois courts have held that standing is established by simply demonstrating some injury to a legally cognizable interest. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 745 (2009) (citing *Village of Chatham v. County of Sangamon*, 216 Ill. 2d 402, 419 (2005)). " 'The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit' " and " 'assures that issues are raised only by those parties with a real interest in the

outcome of the controversy.' " *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 6 (2010) (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)). An injury to a legally cognizable interest will give rise to standing whether the claimed injury is actual or threatened. The injury to a legally cognizable interest must be (1) distinct and palpable, (2) fairly traceable to the defendant's actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1028 (2010) (citing *Glisson*, 188 Ill. 2d at 221).

¶ 40 The question of whether a plaintiff has standing to sue is determined from the allegations contained in the complaint. *Barber v. City of Springfield*, 406 Ill. App. 3d 1099, 1101 (2011). A plaintiff need not allege facts establishing standing. *Wagner*, 391 Ill. App. 3d at 745. It is the defendant's burden to both plead and prove the plaintiff's lack of standing. *Burnette v. Stroger*, 389 Ill. App. 3d 321, 331 (2009) (citing *Chicago Teachers Union, Local 1 v. Board of Education*, 189 Ill. 2d 200, 206 (2000)). Indeed, our supreme court has held, "lack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988); see also *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) (the defendant has the burden to plead and prove the affirmative defense of lack of standing, which will be forfeited if not timely raised in the circuit court and, under Illinois law, issues of standing do not implicate the court's subject matter jurisdiction).

¶ 41 The defendants' argument that the plaintiff lacked standing was forfeited when they failed to raise it in a timely fashion; the claim is also foreclosed by judicial admission based on the

defendants' counterclaim, which identified the plaintiff "as assignee of JVS Financial Group, Inc." "As a general rule, a statement of fact that has been admitted in a pleading is a judicial admission and is binding on the party making it." *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557 (2005). Judicial admissions " 'are formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *Id*. at 557-58 (quoting J. Strong, *McCormick on Evidence* § 254, at 142 (4th ed. 1992)); see also *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149, 163 (2011). "An admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission." *Knauerhaze*, 361 Ill. App. 3d at 558. "A party cannot create a factual dispute by contradicting a previously made judicial admission." *Burns v. Michelotti*, 237 Ill. App. 3d 923, 932 (1992).

¶ 42 In this case, the defendants brought a counterclaim against the plaintiff for common law fraud and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2006)). The defendants specifically prayed that the circuit court "enter judgment in their favor and against Defendants DLJ Mortgage Capital, Inc., as assignee of JVS Financial Group, Inc." The defendants failed to contest the issue of whether the plaintiff was the assignee of the June mortgage and note until filing their untimely, successive postjudgment motion.

¶ 43 The defendants' counterclaim also constituted a judicial admission that the plaintiff is the assignee of the June mortgage and note. The defendants cannot engender a dispute over the plaintiff's standing to pursue the foreclosure by contradicting their own counterclaim. Allowing

such contradictory pleadings is akin to the defendants having their cake and eating it too.

¶ 44 The defendants' argument that the plaintiff lacked standing was forfeited as untimely; the defendants are also precluded from controverting their own judicial admission spread of record in their counterclaim. *Lawlor*, 409 Ill. App. 3d at 163; *Knauerhaze*, 361 Ill. App. 3d at 557-58; *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d at 252-53; *Greer*, 122 Ill. 2d at 508.

¶ 45 Defendants' Motion to Reconsider and Vacate

¶ 46 Finally, the defendants assert the trial court erred by dismissing Count I of their counterclaim. According to the defendants, section 2-403 of the Illinois Code of Civil Procedure (735 ILCS 5/2-403 (West 2006)) "provides that an assignment is subject to any defense or setoff existing before notice of the assignment." The defendants argue that their counterclaim is viable against the plaintiff as a setoff.

¶ 47 The plaintiff responds that the defendants neither responded to nor contested the plaintiff's motion to dismiss Count I of the counterclaim and, therefore, forfeited the argument now raised on appeal. The plaintiff also contend the defendants' claim that common law fraud may be addressed as a "setoff" was never raised in the court below, which also renders it forfeited. We agree that each of the defendants' claims was forfeited.

¶ 48 The defendants' argument that the counterclaim was a viable setoff is forfeited as never raised in the circuit court below; an issue may not be raised for the first time on appeal. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 306 (2000); *Knaus v. Guidry*, 389 Ill. App. 3d 804, 815 (2009).

¶ 49 The defendants maintain that they properly pled all the elements of common law fraud

against the plaintiff. They contend in their main brief that as assignee of the mortgage and note, the plaintiff "takes subject to the same equities it was subject to in the hands of the assignor such that it is the duty of the assignee to inquire of the mortgagor if there is any reason why it should not be paid." The plaintiff responds that under Illinois law, it cannot be affirmatively liable for common law fraud for the purported deceptive and fraudulent acts of the assignor.

¶ 50 We review the circuit court's denial of the motion to reconsider dismissal of the counterclaim under the standard most favorable to the defendants–*de novo* review. *Daniels v. Corrigan*, 382 Ill. App. 3d 66, 71 (2008); *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 838 (2002).

¶ 51 The United States District Court for the Northern District of Illinois addressed a case factually similar to this one. In *Manufacturers & Traders Trust Co.*, No. 99 C 5849, 2003 WL 21780956 at *2, the plaintiff, Manufacturers & Traders Trust Company (MTT), moved for summary judgment on its mortgage foreclosure claim against the defendants, Roy and Lessie Hughes, as well as for the defendants' counterclaims alleging statutory and common law fraud. The defendants refinanced their home with World Wide Financial Services, Inc. (World Wide) to create a 15-year, $70,000 loan that had a $807.30 monthly mortgage payment, a 13.6% interest rate, and a balloon payment of $62,670.24 due after 15 years. On the same day the mortgage was refinanced, World Wide assigned the defendants' mortgage to ContiMortgage. After a few months, ContiMortgage contacted the defendants and asked them if they wanted to refinance their existing mortgage. The representative from ContiMortgage allegedly told the defendants the refinance could reduce their monthly mortgage payments. Based on the representations made

by ContiMortgage, the defendants entered into a 15-year loan agreement with ContiMortgage. Although the loan carried a lower interest rate of 11.17% per year, the monthly mortgage payments were $851.79 with a balloon payment of $75,090.34 due in 15 years. The defendants also paid ContiMortgage a $5,295 fee at closing, which was financed into the loan.

¶ 52 ContiMortgage commenced a foreclosure action against the defendants. The defendants answered, raised affirmative defenses, and filed a counterclaim against ContiMortgage for common law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2006)). ContiMortgage's counsel orally moved to substitute MTT for ContiMortgage as the party plaintiff because the loan had been sold to MTT during the pendency of the foreclosure litigation. Thereafter, the defendants filed amended affirmative defenses and counterclaims alleging that ContiMortgage committed common law fraud. MTT moved for summary judgment on both the foreclosure claim and the defendants' counterclaim.

¶ 53 The *Manufacturers* court held "Neither of the counterclaims [is] viable against MTT, as ContiMortgage's assignee, because they are based solely on ContiMortgage's misconduct, not MTT's." *Id*. The court noted that in order to sustain a claim of common law fraud in Illinois, the defendants (as counterplaintiffs) must establish each of the following elements: "(1) the plaintiff made a false statement of material fact; (2) which the plaintiff knew or believed to be false; (3) with the intent to induce defendants to act; (4) the defendants justifiably relied on the statement; and (5) the defendants suffered damage from such reliance." *Id*. at *3 (citing *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496 (1996)). In addition, the party asserting the common law fraud

claim must show that the other party actually committed the fraud. *Id*. at *3 (citing *Jarvis v. S. Oak Dodge, Inc.*, 201 Ill. 2d 81, 92-93 (2002)). The court concluded the fatal flaw of the defendants' counterclaim was that it was based on ContiMortgage's misconduct and not MTT's misconduct. *Id*. The court rejected the defendants' reliance on *Inland Real Estate Corp. v. Oak Park Trust & Savings Bank*, 127 Ill. App. 3d 535, 542 (1983), the same case relied upon by the instant defendants, because the *Inland* case involved an affirmative defense asserted against the assignee of a second mortgage. Under the original trust deed, the assignor passed on to the assignee the duty "to convey the property free and clear of all liens," which the assignee violated. The federal district court noted the difference in the claim before it: "Just because a party has a right to assert a fraudulent inducement *defense* to a claim against him does not mean he also has the right to assert a fraud *claim* (or counterclaim)." (Emphasis added.) *Id*. The court granted MTT's motion for summary judgment on the defendants' common law fraud counterclaim. *Id.*

¶ 54 Much as the defendants in *Manufacturers*, the defendants in this case do not direct us to an Illinois case where an assignee of a mortgage was held liable for common law fraud based on the deceptive acts of the assignor. The defendants' counterclaim here suffered from the same infirmities as the counterclaim in *Manufacturers.* The defendants did not allege any affirmative facts that the plaintiff, as assignee of the June mortgage and note, engaged in fraudulent misconduct. Absent such properly pled allegations, we conclude the circuit court correctly denied the defendants' motion to reconsider and vacate the order dismissing their counterclaim.

¶ 55 CONCLUSION

¶ 56 The circuit court did not abuse its discretion in striking the defendants' motion to vacate

the order of summary judgment, which it properly treated as a second postjudgment motion not permitted under Illinois Supreme Court Rules and was, in any event, untimely. The defendants' claim that the plaintiff lacked standing to file its mortgage foreclosure complaint is not considered because it was never raised below and contrary to a judicial admission by the defendants. The court properly denied the defendants' motion to reconsider and to vacate the dismissal of the defendants' counterclaim and the order confirming the sale, where the counterclaim failed to make out a common law case of fraud against the plaintiff.

¶ 57 Affirmed.

¶ 58 JUSTICE ROBERT E. GORDON, specially concurring:

¶ 59 The majority correctly observes that "the appropriate standard for reviewing a motion to strike in the context of a summary judgment motion is *de novo*," and cites in support *Filiung v. Adams*, 387 Ill. App. 3d 40, 50-51 (2008), a case that I authored. I still agree with what I wrote there, and I respectfully do not find persuasive the distinction the majority tries to draw with that case. Thus I would find that our standard of review is *de novo.* However, applying a *de novo* standard of review, I would still find that the trial court properly struck as untimely the motion to vacate the summary judgment motion, because the motion was not filed within the 30 days after the entry of judgment, as required by section 2-1203 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1203 (West 2006)). For these reasons, I specially concur in the judgment.

¶ 60 JUSTICE PALMER joins in this special concurrence.