FIFTH DIVISION
December 21, 2012

No. 1-11-3562

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PNC BANK, NATIONAL ASSOCIATION, successor to National City Bank,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 11 L 50087
MATT WILBUR and BRETT WALROD,	)	Honorable James C. Murray, Jr.,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

HELD: Defendants' affirmative defenses and counterclaims were properly dismissed and stricken by the trial court with prejudice.

¶ 1 This interlocutory appeal arises as the result of an order of the circuit court which struck

and dismissed defendants Matt Wilbur and Brett Walrod's affirmative defenses on plaintiff PNC Bank, National Association's (PNC) motion to dismiss. On appeal, defendants contend that the circuit court erred in striking and dismissing their affirmative defenses and counterclaims: 1) as a matter of law and 2) with prejudice on plaintiff's first motion. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Briefly stated, the record reveals that on September 7, 2006, defendants executed two guaranty agreements, securing a promissory note for $1,125,250 by Macon Commercial Partners, LLC in favor of National City Bank. PNC is the successor in interest to National City. After the parties defaulted on the note, PNC filed an amended complaint against defendants based on their failure to perform under the terms of their respective guaranty agreements, requesting contract damages of the balance due under the loan, interests, fees and costs on March 23, 2011.

¶ 4 Defendants filed an answer alleging the affirmative defenses of breach of contract and fraudulent inducement, and counterclaims of common law fraud, violation of the Consumer Fraud Act, and violation of the Illinois Interest Act on April 8, 2011. On June 22, 2011, PNC filed a combined motion to strike defendants' affirmative defenses and dismiss their counterclaims. At the hearing on PNC's motion, the trial court granted the motion based on defendants' failure to specifically admit or deny the allegations in the complaint. The trial court granted them leave to re-plead, and on August 3, 2011, defendants filed an amended answer, affirmative defenses and counterclaims. Plaintiff filed a section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) motion on August 16, 2011, to strike defendants' amended affirmative defenses and

dismiss defendants' amended counterclaims.

¶ 5 At the hearing on PNC's motion, the trial court determined that each of defendants' defenses and counterclaims rested on the allegation that the promissory note between defendants and PNC was ambiguous or called for the interest rate to be calculated on a 360/360 basis, but PNC unlawfully charged interest on a 365/360 basis instead. The trial court found that the note unambiguously provided for interest to be calculated using a 365/360 method and struck defendants' affirmative defenses with prejudice and dismissed defendants' counterclaims with prejudice.

¶ 6 Defendants filed a motion to add 304(a) language to the order, which was granted. This timely interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) followed.

¶ 7 ANALYSIS

¶ 8 Defendants contend that the trial court erred in striking and dismissing their affirmative defenses and counterclaims pursuant to section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)) on the "very first" motion by PNC and without allowing them an opportunity to replead.

¶ 9 We initially note that the record does not support defendants' characterization of the procedural history of this case. The record indicates that PNC first filed a combined motion to strike defendants' affirmative defenses and dismiss defendants' counterclaims on June 22, 2011, at which time the motion was granted and defendants were allowed to file new pleadings. PNC filed a section 2-619.1 combined motion to strike defendants' affirmative defenses and dismiss their counterclaims on August 16, 2011, which was granted with prejudice and is the subject of

the instant appeal.

¶ 10 We now turn to a discussion of the merits of this appeal.

¶ 11 Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2010)) motion to dismiss based on certain defects or defenses. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,]to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998)). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Edelman*, 338 Ill. App. 3d at 164.

¶ 12 A motion to dismiss under section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint. *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 203 (2011). A motion to dismiss under section 2-619, on the other hand, admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *RBS*, 407 Ill. App. 3d at 203. We review an order granting a motion to dismiss pursuant to section 2-615 or 2-619 *de novo. Shaker and Associates, Inc. v. Medical Technologies Group, Ltd.*, 315 Ill. App. 3d 126, 131 (2000).

¶ 13 A. Dismissal of Defendants' Counterclaims and Affirmative Defenses under Section 2-619

¶ 14 Defendants first contend that the trial court erroneously found that the Note disclosed the

method of interest calculation that PNC chose to utilize. Specifically, defendants argue that the Note unambiguously requires a fixed *per annum* interest rate under the 360/360 method of interest calculation. Alternatively, defendants contend that the contradiction between the specifically stated *per annum* rate and the additional terms render the Note ambiguous, precluding resolution on a motion to dismiss.

¶ 15 The relevant terms of the promissory note at issue are as follows (in pertinent part):

> "***1. Interest.*** The unpaid principal balance of this Note shall at all times bear interest at a rate equal to the Contract Rate, *provided*, that so long as any principal of or accrued interest on this Note is overdue, all unpaid principal of this Note shall bear interest at a fluctuating rate equal to four percent (4%) per annum above the rate that would otherwise be applicable, but in no case less than four percent (4%) per annum above the Prime Rate; * * * The ***"Contract Rate"*** shall at all times be a fluctuating rate equal to Two and one half of one percent (2.50%) per annum plus One Month LIBOR * * *."
>
> "***4. Definitions.*** * * * ***"One Month LIBOR"*** means, with respect to a loan, the rate per annum (rounded upwards, if necessary, to the next higher 1/16 of 1%) determined by the bank and equal to the average rate per annum at which deposits (denominated in United States dollars) in an amount similar to the principal amount of that

> loan and with a maturity of one (1) month are offered to Bank * * *."
>
> "***12. Other Provisions.*** * * * All fees, interest, and premiums for any given period shall accrue on the first day thereof but not on the last day thereof (unless the last day is the first day) and in each case shall be computed on the basis of a 360-day year and the actual number of days number of days in the period. * * *"

¶ 16 This court has previously reviewed and rejected similar arguments to those raised by defendants in the instant case and provide a framework for our analysis. See *RBS*, 407 Ill. App. 3d 183 (2011); *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718.

¶ 17 There are generally three different methods that lenders use to compute interest: the 365/365 method, 360/360 method, and 365/360 method. *RBS*, 407 Ill. App. 3d at 188; *Asset Exchange*, 2011 IL App (1st) 103718, ¶20. Under the 365/365 method, an interest rate is divided by 365 to determine a daily interest factor, which is applied to the number of days in which a loan is outstanding. *RBS*, 407 Ill. App. 3d at 188. The 360/360 method assumes that each month consists of 30 days, with each month therefore carrying an identical interest rate and charge (incomplete months divide the number of days by 360). *RBS*, 407 Ill. App. 3d at 188. The 365/360 method is a hybrid and although not universal, is the prevailing method in commercial loans. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 20, (citing *In re Oil Spill by the "Amoco Cadiz" off the Coast of France on March 16, 1978, No. 92-3282, 1993 WL 360955, *1-2 (7th Cir. Sept. 14, 1993))*. The 365/360 method assumes that each month consists of 30 days and

determines a daily interest factor by dividing the interest rate by 360. *RBS*, 407 Ill. App. 3d at 188. It then multiplies this computed rate by the number of days a loan is outstanding. *RBS*, 407 Ill. App. 3d at 188.

¶ 18 In the instant case, defendants believe that the Note calls for the interest rate to be calculated on a "*per annum"* basis, which they explain is defined as "by the year." Based on this belief, defendants argue, as did the defendants in *RBS* and *Asset Exchange*, that the Interest Act prohibits the collection of interest in an amount greater than that statutorily authorized under the statutory definition of *per annum* and the literal meaning of a "year." See 815 ILCS 205/5 (West 2010); *RBS*, 407 Ill. App. 3d at 188; *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 21. However, the Illinois Interest Act does not apply to transactions involving corporations as the usury defense is a personal one. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 21. Thus the provisions of the Illinois Interest Act do not apply to the loan agreement that defendants' personally guaranteed on behalf of Macon Commercial Partners, LLC.

¶ 19 Additionally, section 4(5) of the Interest Act was recently amended to clarify that the 365/360 method is lawful: "[f]or purposes of item [ ](a)* * * of subsection (1) of this Section, a rate or amount of interest may be lawfully computed when applying the ratio of the annual interest rate over a year based on 360 days." 815 ILCS 205/4(5) (West 2010) (added by Pub. Act. 96-1421 (eff. Aug. 3, 2010)).

¶ 20 The language used in the Note at issue was recently considered by the United States Circuit Court for the Northern District of Illinois in *Bank of America, N.A. v. Shelbourne Development Group, Inc.*, 732 F. Supp. 2d 809 (N.D.Ill., 2010). In *Shelbourne*, the loan

agreement between the bank and a commercial borrower stated that all interest and fees were to be computed on the basis of "a 360-day year and the actual number of days elapsed." *Shelbourne*, 732 F. Supp. 2d at 816. The court concluded that even if the Interest Act applied to corporations, it would still not apply in such a case because the loan documents clearly provided that interest was to be calculated on a 360-day year. *Shelbourne*, 732 F. Supp. 2d at 822.

¶ 21 Likewise, similar language was reviewed by this court in *RBS* and *Asset Exchange*. In both instances, this court concluded that there was no ambiguity between the Note indicating that interest would be computed or compounded based on a 360-day year and then multiplied by the actual number of days in a calendar year (365). See *RBS*, 407 Ill. App. 3d at 189; *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 35. The same conclusion is warranted here. We therefore find that the Note in the instant case calculates interest based on the 365/360 method, that it is not ambiguous, and that there was no violation of the Interest Act.

¶ 22 Although defendants contest the dismissal of each of their affirmative defenses and counterclaims based on breach of contract, fraudulent inducement, common law fraud and violations of the Consumer Fraud Act and the Interest Act, their brief only argued violations of the Interest Act. Thus we find that defendants have waived or forfeited appellate review of their other arguments with regard to the trial court's dismissal of their other counterclaims. See *Canel and Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 910 (1999).

¶ 23 B. Dismissal for Insufficiency of the Pleadings under Section 2-615

¶ 24 Defendants further contend that their affirmative defenses for breach of contract and fraudulent inducement were sufficiently pleaded and should not have been stricken. They

contend that both are recognized affirmative defenses under Illinois law, and as such, there was no basis for the trial court's holding that their affirmative defenses were not legally sufficient. We note however, that defendants failed to argue before this court how their affirmative defenses were legally sufficient to withstand dismissal under section 2-615.

¶ 25 Defendants raised an affirmative defense of breach of contract based on the allegation of PNC's miscalculation of the Note's interest rate. Conclusory allegations of fact or law are not admitted in a section 2-615 motion. *Shaker*, 315 Ill. App. 3d at 134. If after deleting such, there are not sufficient facts alleged to support a claim, the pleading is properly stricken. *Shaker*, 315 Ill. App. 3d at 134. Our inquiry is determining whether the facts alleged in the answer constitute a legally sufficient defense to the petitioner's claim. *Elane v. St. Bernard Hospital*, 284 Ill. App. 3d 865, 870 (1996). They are not. Defendants' affirmative defense did not allege specific facts related to the breach of contract; instead it only made general allegations regarding the calculation of the interest rate. We find that defendants' affirmative defense of breach of contract was not legally sufficient as it was unsupported by specific factual allegations.

¶ 26 Defendants' also raised an affirmative defense based on fraudulent inducement. *Fraud in the inducement* exists where the party fully understands what he is signing and is aware of the nature and character of the instrument executed by him, but is deceived by fraudulent representations as to the facts outside the instrument itself. *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 59 (1983). Here, the affirmative defense of fraudulent inducement was based on defendants' allegation of the miscalculation of the Note's interest rate. However, the defense of fraud is unavailable as a matter of law to avoid the effect of a written agreement where the

complaining party could have discovered the fraud by reading the instrument and was in fact afforded a full opportunity to do so. *Rose*, 119 Ill. App. 3d at 59. Thus, we conclude that the defense of fraud is unavailable in the instant case, and the mere admission of facts set forth in defendants' answer does not bar dismissal under section 2-615. We conclude that defendants' affirmative defense of fraudulent inducement was properly stricken as legally insufficient as a matter of law.

¶ 27 Accordingly, we conclude that defendants' affirmative defenses of fraudulent inducement and breach of contract were properly stricken as legally insufficient.

¶ 28 C. Dismissal with Prejudice

¶ 29 Finally, defendants contend that the trial court improperly dismissed their counterclaims and struck their affirmative defenses with prejudice on PNC's first motion. As indicated previously, the record does not support defendants' argument as PNC filed two combined motions to strike defendants' affirmative defenses and dismiss their counterclaims. Further, we conclude that dismissal with prejudice was proper in this case.

¶ 30 While it is true that Illinois has a liberal policy of allowing the amendment of pleadings, the right is not unlimited. *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009). For example, a request to amend may be properly denied in instances where, even after amendment, no cause of action could be stated. See *RBS*, 407 Ill. App. 3d at 193. A trial court's order dismissing a case with prejudice will only be reversed if there has been an abuse of discretion. *Terry v. Metropolitan Pier and Exposition Authority*, 271 Ill. App. 3d 445, 456 (1995).

¶ 31 In the instant case, all of defendants' affirmative defenses and counterclaims are based on the ambiguity and miscalculation of the interest provisions of the Note. We have already determined that the interest provisions were not ambiguous nor was the interest miscalculated based on the 365/360 method. As such, we agree that no amendment to defendants' allegations could cure this defect, thus we find that the trial court did not abuse its discretion in dismissing defendants' counterclaims and affirmative defenses with prejudice.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.