THIRD DIVISION
June 20, 2012

No. 1-11-3563

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RAVENSWOOD INDUSTRIAL BUILDING, LLC, Plaintiff-Appellant, v. U.S. BANK NATIONAL ASSOCIATION, Successor to Wells Fargo Bank, Minnesota, N.A., as Trustee for the Registered Holders First Union National Bank- Bank of America, N.A., Commercial Mortgage Pass-Through Certificate, Series 2001-C1, Successor to First Union National Bank, Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY No. 10 L 13977 HONORABLE SANJAY T. TAILOR, JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not err in dismissing plaintiff's amended complaint with prejudice after ruling the language of the note evidencing a loan transaction with the lender was unambiguous. In addition, the circuit court did not abuse its discretion in denying plaintiff's motion for reconsideration. The judgment of the circuit court of Cook County is affirmed.

¶ 2 Plaintiff, Ravenswood Industrial Building, LLC (Ravenswood), appeals an order of the circuit court of Cook County dismissing its amended complaint against defendant, U.S. Bank

National Association, successor to Wells Fargo Bank Minnesota, N.A., as trustee for the registered holders First Union National Bank-Bank of America, N.A., commercial mortgage pass-through certificate, series 2001-C1, successor to First Union National Bank (Bank). Ravenswood alleged that the Bank charged interest in excess of that agreed to by the parties in a commercial loan transaction. For the following reasons, we affirm the dismissal entered by the circuit court.

¶ 3 BACKGROUND

¶ 4 Ravenswood initially filed suit against the Bank on December 9, 2010. Ravenswood's amended complaint, which was filed March 28, 2011, contains the following allegations.

¶ 5 On or about December 13, 2000, Ravenswood entered into a loan transaction with the First Union National Bank in the principal amount of $9.5 million, as evidenced by a promissory note (Note), a copy of which was attached to the complaint as an exhibit. Ravenswood also executed a mortgage and security agreement related to the property commonly known as 1575 North State Route 50 in Bradley, Illinois.

¶ 6 The opening paragraph of the Note provides interest shall accrue "at the rate of eight and one tenth of one percent (8.10%) per annum (the 'Note Rate') ***." The Note also provides in part as follows:

> "1.1 Computation of Interest. Interest shall be computed hereunder based on a 360-day year and based on the actual number of days elapsed for any month in which interest is being calculated ***."

Further, section 2.3 of the Note provides that in the event of a default, interest shall accrue "at a rate per annum equal to four percent (4%) in excess of the Note Rate," or the maximum rate which may be legally collected, if the stated rate cannot be collected under applicable law.

¶ 7 Ravenswood generally alleged the Bank intentionally, deceptively and unlawfully concealed the true annual rate of interest it intended to charge by consciously quoting and negotiating a *per annum* interest rate while concealing it intended to use an undisclosed method – the 365/360 method – to calculate and thereby artificially increase the amount of annual interest that would be charged to Ravenswood. Ravenswood alleged claims for: (1) a breach of the Note; (2) a violation of section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2010)); (3) common law fraud; (4) fraudulent inducement; and (5) a violation of section 5 of the Illinois Interest Act (815 ILCS 205/5 (West 2010)).

¶ 8 On May 5, 2011, the Bank moved to dismiss the amended complaint, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). The Bank argued Ravenswood's claims that the Bank charged excessive interest are preempted by sections 85 and 86 of the National Bank Act (12 U.S.C. §§85, 86 (2010)). The Bank also argued that even if not preempted, Ravenswood's claims would fail as a matter of law, primarily asserting the Note unambiguously disclosed how interest was to be calculated.

¶ 9 On September 16, 2011, following briefing and oral argument, the circuit court granted the Bank's motion to dismiss. Ravenswood filed a motion to reconsider. On November 3, 2011,

denied the motion to reconsider. On December 1, 2011, Ravenswood filed a timely notice of appeal to this court.

¶ 10 DISCUSSION

¶ 11 On appeal, Ravenswood contends the circuit court erred in dismissing the amended complaint. A motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts and we construe the allegations in the complaint in the light most favorable to the plaintiff. *Id.* However, an exhibit appended or attached to a complaint trumps the allegations in the complaint where the exhibit is an instrument upon which the claim is founded. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 580 (2011). A cause of action should not be dismissed pursuant to section 2-615 of the Code unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004). "Illinois is a fact-pleading jurisdiction. [Citation.] While the plaintiff is not required to set forth evidence in the complaint [citation], the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action [citation], not simply conclusions [citation.]" *Marshall*, 222 Ill. 2d at 429-30. Our standard of review is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006).

¶ 12 We first turn to address Ravenswood's argument that the circuit court dismissed its claims for breach of contract, fraud, fraudulent inducement, and violation of the Consumer Fraud Act by

erroneously ruling the Note unambiguously disclosed that interest would be computed using the 365/360 method. If the language in a contract is ambiguous, then the determination of its meaning is a question of fact not resolved by a section 2-615 motion to dismiss. *IK Corp. v. One Financial Place Partnership*, 200 Ill. App. 3d 802, 810 (1990). Conversely, if the language in the contract is unambiguous, then the construction of the alleged contract is a question of law subject to a section 2-615 motion to dismiss. *Id.* This court has previously addressed the various methods of computing interest in commercial loans:

> "[B]anks generally use three different methods of computing interest, which are the 365/365 method (exact-day interest), the 360/360 method (ordinary interest), and the 365/360 method (bank interest). *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 20 (quoting *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)). [Footnote omitted.] The exact-day method is calculated by taking an interest rate, dividing it by 365, and then applying it to each day of the year. The ordinary interest rate method is calculated the same way, only using 360 as the number of days instead of 365. The 365/360 bank method, which was used in the Note in the instant case, is slightly different. It is calculated by first dividing the interest rate by 360, and then applying it to each day in a 365- or 366-day year. This effectively allows the banks to charge an extra five or six days of interest each year." *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, ¶ 4.

Ravenswood argues that the Note's references to a *per annum* rate creates an inherent conflict with the 365/360 language in section 1.1 of the Note, rendering the Note ambiguous.

¶ 13 The Bank correctly notes Ravenswood's argument has been rejected by this court in three recent decisions. *Id*. ¶ 20; *Asset Exchange II*, 2011 IL App (1st) 103718, ¶¶ 33-34; *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 187 (2011). The argument was also rejected in *Bank of America, N.A. v. Shelbourne Development Group, Inc.*, 732 F. Supp. 2d 809, 824 (N.D. Ill., 2010).[1] In *RBS Citizens*, as in this case, the *per annum* language does not appear in the provision of the Note providing for the 365/360 method of calculation. *RBS Citizens*, 407 Ill. App. 3d at 189. Moreover, as this court noted in *Asset Exchange II*, reading the Note in its entirety, it is clear that "*per annum*" refers to a 360-day year. *Asset Exchange II*, 2011 IL App (1st) 103718, ¶ 31; see also *Hubbard Street Lofts*, 2011 IL App (1st) 102640, ¶¶ 19-20.

¶ 14 Ravenswood argues the language of the Note here is materially different from the language of the notes in other cases. The Note provides that interest shall be computed "based on a 360-day year and based on the actual number of days elapsed for any month in which interest is being calculated." In *RBS Citizens*, the note provided that "[i]nterest shall be computed on the principal balance outstanding from time to time, on the basis of a three hundred sixty (360) day year, but shall be charged for the actual number of days within the period for which interest is

[1] We note in passing that the law firm representing Ravenswood in this case also represented the appellants in *RBS Citizens* and *Shelbourne*.

being charged." *RBS Citizens*, 407 Ill. App. 3d at 189. In *Shelbourne*, the note provided that "all interest and fees, if any, will 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 text of the Note here is not identical to the language of the notes in *RBS Citizens* and *Shelbourne*, but it is the same in substance and not ambiguous. We observe that the language of the notes at issue in *Hubbard Street Lofts* and *Asset Exchange II* both expressly use the "365/360" terminology. See *Hubbard Street Lofts*, 2011 IL App (1st) 102640, ¶ 3; *Asset Exchange II*, 2011 IL App (1st) 103718, ¶ 28. However, the failure to use the "365/360" terminology does not render the language of the notes in *RBS Citizens*, *Shelbourne*, and this case ambiguous.

¶ 15 Ravenswood argues that Illinois courts construing similar language to that used in the Note here may authorize the calculation of interest under the 360/360 method. However, Ravenswood relies on circuit court decisions, which have no precedential effect on Illinois appellate courts and no bearing on our decision. *Hubbard Street Lofts*, 2011 IL App (1st) 102640, ¶ 11 (quoting *Asset Exchange II*, 2011 IL App (1st) 103718, ¶ 19 n. 2). Ravenswood also cites unpublished decisions from Ohio. *E.g.*, *JNT Properties, LLC v. Keybank, N.A.*, 2011 Ohio 3260 (June 30, 2011); *Ely Enterprises, Inc. v. FirstMerit Bank*, 2010 Ohio 80 (Jan. 10, 2010). Such decisions are not controlling authority in Ohio. Ohio S. Ct. R. Rep. Op. 2(G)(1)). Decisions from other jurisdictions may be considered as persuasive authority, but are not binding on this court. *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381, 395 (2005). In this context, this court already has established case law on point and we find it more persuasive than the unpublished Ohio decisions.

¶ 16 Ravenswood also argues the circuit court erred in dismissing its Interest Act claim as preempted by federal law. However, this court has noted the Interest Act does not apply to any loan made to a corporation. *Asset Exchange II*, 2011 IL App (1st) 103718, ¶ 21 (quoting 815 ILCS 205/4(1)(a) (West 2010)). Moreover, this court has rejected Interest Act claims in this context for the reasons already stated. *Asset Exchange II*, 2011 IL App (1st) 103718, ¶¶ 22-35; *RBS Citizens*, 407 Ill. App. 3d at 187-90. Accordingly, we need not address the preemption issue to conclude the circuit court did not err in dismissing Ravenswood's amended complaint in its entirety.

¶ 17 Ravenswood further argues the circuit court erred in dismissing its complaint with prejudice, without leave to amend. However, in *RBS Citizens*, this court affirmed a similar ruling, reasoning:

> "The allegations of an Interest Act violation, breach of the duty of good faith and fair dealing, and fraud all require that the interest provision in the Note was not adhered to or, at the least, was ambiguous. Even a cursory reading of the Note, however, indicates that it is not ambiguous. We agree with the circuit court's observation that no amendment to defendants' allegations could hope to cure this defect, and accordingly, we find that the circuit court did not err in dismissing with prejudice." *RBS Citizens*, 407 Ill. App. 3d at 193.

Ravenswood's amended complaint contains the same defect. Ravenswood also fails to address this court's similar ruling affirming a dismissal with prejudice involving an unambiguous interest

provision. Accordingly, we conclude the circuit court did not err in dismissing the amended complaint with prejudice.

¶ 18 Lastly, Ravenswood argues the circuit court erred in denying its motion for reconsideration without briefing or oral argument. Orders denying a motion for reconsideration are reviewed under the abuse of discretion standard. *Id.* Motions for reconsideration are meant to bring to a court's attention: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law. *Id.* In the case at bar, Ravenswood asserts that its motion identified case law interpreting different note language and stated the precise language of the note that must guide the court's interpretation. However, Ravenswood's brief does not identify this case law. A citation to the record on appeal in Ravenswood's brief suggests Ravenswood refers to an Ohio case and a circuit court decision, neither of which would justify reconsideration in light of this court's decision in *RBS Citizens*, for the reasons already stated in this order.

¶ 19 CONCLUSION

¶ 20 In short, we conclude the circuit court did not err in dismissing Ravenswood's amended complaint with prejudice after ruling the language of the Note was unambiguous. In addition, the circuit court did not abuse its discretion in denying the motion for reconsideration. For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 21 Affirmed.