2016 IL App (1st) 150170-U

SIXTH DIVISION
Order filed: February 5, 2016

No. 1-15-0170

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NORTH COMMUNITY BANK, Successor by merger with Metro Bank successor by merger with Metropolitan Bank and Trust Company,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 12 CH 21205
ALAN ZAYA and LINDA ZAYA,	)	Honorable Allen P. Walker,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford concurred in the judgment.
Justice Delort dissented.

ORDER

¶ 1 *Held*: The circuit court's order striking the defendant's affirmative defenses is reversed as being procedurally unsound. The summary judgment of foreclosure and sale, the sale held pursuant to that judgment, the order approving sale, and the deficiency judgment entered against one of the defendants are vacated.

¶ 2 The defendants, Alan Zaya and Linda Zaya, appeal from an order of the circuit court of Cook County striking their affirmative defenses to the underlying complaint seeking foreclosure

of a mortgage on property commonly known as 5242 Crain Street, Skokie, Illinois (hereinafter referred to as the Property). For the reasons which follow, we reverse the circuit court's order striking the defendants affirmative defenses; and as a consequence, we vacate the summary judgment of foreclosure and sale entered in favor of the plaintiff, the sale held pursuant to that judgment, the order approving sale, and the deficiency judgment entered against one of the defendants.

¶ 3 The plaintiff, North Community Bank, the successor by merger with Metrobank which was the successor by merger with Metropolitan Bank and Trust Company, filed the instant action seeking to foreclose a mortgage on the Property which secured a loan to the defendant, Alan Zaya. The defendants filed their answer to the plaintiff's complaint and four affirmative defenses. Thereafter, the plaintiff filed a motion seeking an order striking the defendants' affirmative defenses. The motion states that it was brought pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)). The defendants responded to the motion arguing, *inter alia*, that a section 2-619 motion is an improper vehicle with which to attack an affirmative defense. The plaintiff filed a reply memorandum in support of its motion to strike the affirmative defenses, but never addressed the argument that a section 2-619 motion cannot be used to attack an affirmative defense. It appears that the circuit court also ignored the defendants' procedural argument as it entered an order on September 11, 2013, granting the plaintiff's motion and striking the affirmative defenses.

¶ 4 Following the entry of the order striking the defendants' affirmative defenses, the plaintiff filed a motion for summary judgment on its foreclosure complaint which the circuit court granted on July 14, 2014. Pursuant to that judgment, the Property was sold at a judicial sale on October 15, 2014; and on December 15, 2014, the circuit court entered both an order approving the sale

and a deficiency judgment against Alan Zaya in the sum of $304,040.51. On January 13, 2015, the defendants filed their notice of appeal.

¶ 5 For their sole assignment of error, the defendants argue that the circuit court erred in striking two of their four affirmative defenses which alleged fraud in the inducement and equitable estoppel. Their argument is substantive in nature, addressing the allegations necessary to plead the two defenses. However, we are unable to address the issues raised by the defendants on appeal as the procedure leading up to the order striking their affirmative defenses is so infirmed that a meaningful review is impossible. In their brief before this court, the defendants never raised the improper use of a section 2-619 motion which led to the order striking their affirmative defenses, and as a consequence, it might be argued that the defendants have forfeited the issue. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). However, forfeiture is a limitation on the parties, not on this court. *C.Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶ 23. Since the improper motion practice employed by the plaintiff and the circuit court, which led to the order striking the defendants' affirmative defenses, has an adverse effect upon the subsequent orders entered in this case, we decline to apply forfeiture and choose to address the issue.

¶ 6 As stated, the defendants' affirmative defenses were stricken in response to a motion brought by the plaintiff pursuant to section 2-619(a)(9) of the Code. However, section 2-619(a), by its very terms, is a motion pursuant to which a *defendant* is able to move for an involuntary dismissal of a plaintiff's complaint based upon certain enumerated grounds. 735 ILCS 5/2-619(a) (West 2012). A section 2-619 motion is not the appropriate means by which a plaintiff seeks relief of any kind, including an order striking a defendant's affirmative defenses.

¶ 7 If a plaintiff contends that an affirmative defense is substantially insufficient at law, the proper motion to be employed is a motion to strike brought pursuant to section 2-615 of the Code

(735 ILCS 5/2-615 (West 2012)). If a plaintiff contends that an affirmative defense pled by a defendant is lacking in factual support due to the absence of a genuine issue as to any material fact alleged in an affirmative defense, the appropriate motion is one for a summary determination of a major issue pursuant to section 2-1005(d) of the Code (735 ILCS 5/2-1005(d) (West 2012)), properly supported by affidavit or other evidentiary material.

¶ 8 Meticulous practice dictates that parties properly designate the section of the Code pursuant to which their pre-trial motions are brought. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). Although misdesignation of a motion is not always fatal to a movant's right to prevail (see *Scott Wetzel Services v. Regard*, 271 Ill. App. 3d 478, 481 (1995)), reversal will follow in circumstances where there is prejudice to the non-moving party (see *Illinois Graphics Co.*, 159 Ill. 2d at 484). In this case, we cannot ignore the plaintiff's use of a section 2-619 motion for a purpose for which it is not intended, nor can we address the propriety of the circuit court having granted the plaintiff's motion to strike the defendants' affirmative defenses by recasting the motion as one pursuant to either section 2-615 or section 2-1005 of the Code.

¶ 9 We cannot resolve this appeal by reviewing the circuit court's order of September 11, 2013, as if the plaintiff's motion had been brought pursuant to section 2-615 of the Code, as the motion was supported by, and relied upon, the affidavit of the former president of Metropolitan Bank and Trust Company, the original mortgagee, contesting factual allegations contained within the affirmative defenses. However, section 2-615 motions cannot be supported by affidavit. *Kahn v. Deutsche Bank AG*, 2012 IL 112219, ¶ 54. Neither can we review the circuit court's order as if the plaintiff's motion was in actuality a motion for summary determination of major issues pursuant to section 2-1005(d) of the Code, as the prejudice to the defendant if we were to do so is apparent. If the plaintiff's motion were to be viewed as having been brought pursuant to

section 2-1005 of the Code, the factual assertions contained in the affidavit attached to the motion would have to be taken as true in the absence of counter affidavits submitted by the defendants. See *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 171 (2004). In contrast, by labeling its motion as one to "Strike and Dismiss Defendants' Affirmative Defenses," the plaintiff conceded the truth of the factual allegations contained within the affirmative defenses (see *Jane Doe-3 v. McLean County Unit District No. 5*, 2012 IL 112479, ¶ 16), and as a consequence, the defendants were not required to file counter affidavits.

¶ 10 Simply put, the circuit court erred as a matter of law in striking the defendants' affirmative defenses in response to the plaintiff's motion which was improperly brought pursuant to section 2-619 of the Code, and as a consequence, the order of September 11, 2013, must be reversed. In so doing, we express no opinion as to whether the defendants' affirmative defenses are either sufficient at law or supported by evidence.

¶ 11 By reversing the order striking the defendants' affirmative defenses, we must also address the effect that such a reversal has upon the summary judgment of foreclosure and sale entered by the circuit court on July 14, 2014, the judicial sale conducted pursuant to that judgment, the order approving the judicial sale, and the deficiency judgment entered against Alan Zaya. We find that, unless and until the defendants' affirmative defenses are disposed of, the plaintiff is not entitled to judgment as a matter of law, the necessary predicate to any summary judgment. 735 ILCS 5/2-1005(c) (West 2012). Consequently, we vacate: (1) the summary judgment of foreclosure and sale entered in favor of the plaintiff on July 14, 2014, (2) the sale of the Property held October 15, 2014, (3) the order approving sale entered on December 15, 2014, and (4) the deficiency judgment against Alan Zaya in the sum of $304,040.51. And, we remand the cause for further proceedings.

¶ 12 Reversed in part, vacated in part and remanded.

¶ 13 JUSTICE DELORT, dissenting:

¶ 14 The majority's holding–that plaintiff cannot dispose of affirmative defenses, even those which are utterly lacking in merit, through a section 2-619 motion–is eminently correct. See, *e.g.*, *Federated Equipment & Supply Co. v. Miro Mold & Duplicating Corp.*, 166 Ill. App. 3d 670, 677 (1988). However, I respectfully disagree with my colleagues' analysis regarding whether that error requires reversal of the judgment below.

¶ 15 First, I believe that defendants forfeited any claim that the dismissal of their affirmative defenses was improper under section 2-619. They were granted leave to amend those defenses, and never did so. When forced to defend against plaintiff's summary judgment motion, they said nothing about their "business loan" defense but merely attacked the plaintiff's standard prove-up affidavit as being insufficiently detailed. On appeal, they never mention section 2-619 as a basis for reversal. Instead, they devote the entirety of their two-page argument before us to whether the defenses were sufficiently pled. Points not argued or supported by citation to relevant authority fail to satisfy the requirements of Supreme Court Rule 341 (see Ill. S.Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013); *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) ("Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.")). Failure to comply with the rule's requirements results in forfeiture. *Id.* at 369-70.

¶ 16 The majority declines to find forfeiture, explaining that it is a limitation on the parties and not the courts. That is so, but I do not agree that this is a case in which it is appropriate to invoke that doctrine. The doctrine has its roots in Supreme Court Rule 366(a)(5) (see Ill. S.Ct. R. 366(a)(5) (eff. Feb. 1, 1998), which provides that a reviewing court may, in its discretion, and on

such terms as it deems just, "enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require." Our supreme court has strongly cautioned against overuse of this principle, explaining:

> "This rule is frequently cited to support the familiar proposition that waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and that courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent. [Citations.] The rule does not, however, nullify standard waiver and forfeiture principles. *** [T]hat principle is not and should not be a catchall that confers upon reviewing courts unfettered authority to consider forfeited issues at will. [Citation.]
>
> We repeat a point we recently reiterated in our unanimous opinion in *People v. Givens,* 237 Ill. 2d 311, [323–24] (2010):
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> > In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. * * * [A]s a general rule, [o]ur adversary system is designed around the premise that the parties know what is best for them, and are

> responsible for advancing the facts and arguments entitling them to relief. [Citation.]
>
> Accordingly, when cases come to us, [w]e normally decide only questions presented by the parties. And
>
> > [w]hile a reviewing court has the power to raise unbriefed issues pursuant to Supreme Court Rule 366(a)(5), we must refrain from doing so when it would have the effect of transforming this court's role from that of jurist to advocate. Were we to address these unbriefed issues, we would be forced to speculate as to the arguments that the parties might have presented had these issues been properly raised before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues *sua sponte*."

(Internal quotation marks omitted.) *Jackson v. Board of Election Commissioners of City of Chicago*, 2012 IL 111928, ¶¶ 33-34.

¶ 17 The majority characterizes the affirmative defenses as sounding in "fraud in the inducement" and "equitable estoppel." Despite those labels, the defenses in question are little more than a few sentences of disjointed jargon claiming that the defendants should win the case outright because they thought they were signing a standard mortgage but actually signed a "business loan." The defenses offer nothing to explain why that fact somehow renders the mortgage so completely unenforceable that the defendants should prevail. The appropriate remedies for a contracting party who mistakenly comprehends the terms of a written contract are

to file a counterclaim for reformation or rescission. Tellingly, defendants never filed such a counterclaim, nor have they ever suggested that they should be required to return the loan principal, something equity would certainly require. Both the mortgage and note are attached to and incorporated into the complaint, and they are clearly a standard mortgage and a renewable one-year term note. The general rule in Illinois is that one is bound to the contracts one signs, even if one fails to read them. *State Bank of Geneva v. Sorenson*, 167 Ill. App. 3d 674, 681 (1988). A party who has had an opportunity to read a contract before signing, but signs before reading, cannot later plead lack of understanding or that the contract misled him. *In re Marriage of Kloster*, 127 Ill. App. 3d 583, 585 (1984). Further illustrating that arguments such as those in the affirmative defenses are doomed to failure, our supreme court rejected an argument that an elderly person in poor health was incapable of understanding a trust agreement which was several pages long and "couched in precise and formal legal phraseology." *Pernod v. American National Bank & Trust Co.*, 8 Ill. 2d 16, 21 (1956). The court also stated that "[i]f such a contention had merit very few modern legal instruments could withstand attacks of the kind made in this case." *Id.*

¶ 18 Since the affirmative defenses were clearly faulty, we should simply affirm the judgment below but clarify that we do so on grounds different than those expressed by the trial court. Again, this is a scenario on which our supreme court has spoken clearly:

> "[T]he reasons given for a judgment or order are not material if the judgment or order itself is correct. [Citation.] It is the judgment and not what else may have been said by the lower court that is on appeal to a court of review. [Citations.] The reviewing court is not bound to accept the reasons given by the trial court for its

> judgment * * *. [Citation.] Rather, a reviewing court can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." (Internal quotation marks omitted.) *Rodriguez v. Sheriff's Merit Comm'n of Kane County*, 218 Ill. 2d 342, 357 (2006).

¶ 19 I agree with my colleagues that proper methods to dispose of badly-pled affirmative defenses are motions brought under section 2-615 or section 2-1005(d) of the Illinois Code of Civil Procedure (735 ILCS 5/2-615, 1005(d) (West 2012)). See *supra* ¶ 7. While my colleagues acknowledge that a mislabelled motion is "not always fatal to a movant's right to prevail," they decline to view this case under section 2-615 because the motion to strike was supported by the affidavit of a representative of plaintiff, which purportedly brought it outside the scope of that section. *Supra* ¶ 9. The one-page affidavit at issue is signed by an employee of the lender who offers an irrelevant legal conclusion that the loan was not a "business loan," and which presents copies of various forms signed at the loan closing which indicate that the loan was not, in fact, issued for business purposes. The loan documents attached to the complaint speak for themselves and the affidavit itself is, therefore, utterly superfluous.

¶ 20 For these reasons, I would either find the issue forfeited or simply affirm on a basis other than that used below. There is nothing to be gained by reviving affirmative defenses which are destined for certain doom on remand.