FOURTH DIVISION
September 30, 2015

No. 1-15-1150

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
	)	Circuit Court
BANK OF AMERICA,	)	Cook County.
	)	
Plaintiff-Appellee,	)	
v.	)	No. 12 CH 08337
	)	
MARTHA SOLOMON,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Michael Mullen and
(Unknown Owners and Nonrecord claiminants,	)	Pamela Meyerson,
	)	Judges Presiding.
Defendants).	)	

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Where defendant failed to plead sufficient facts supporting her equitable estoppel and standing affirmative defenses to plaintiff's foreclosure complaint, the trial court properly struck those affirmative defenses.

¶ 2 The record shows that plaintiff, Bank of America, filed a mortgage foreclosure complaint against defendant on March 8, 2012. In its complaint, plaintiff alleged that defendant executed a mortgage on April 18, 2003, in the amount of $227,650, for the property located at 6015 North

Claremont Avenue in Chicago, and that the mortgage was modified in September 2010, in the amount of $199,409.69. Plaintiff alleged that the loan had been paid through June 1, 2011, but that she had since "failed to make payments when due and the subject loan has been accelerated."

¶ 3 Defendant answered the complaint, and raised the affirmative defenses of equitable estoppel and lack of standing. In claiming equitable estoppel, defendant alleged that she "made all loan payments on time, from May, 2003 to April, 2010" and that she entered into a loan modification with defendant in April 2010[1] which required her to make monthly payments of $1,147.18 beginning May 1, 2010. She further alleged that she was involved in a car accident in July 2010, which left her unable to work. As a result, her "resources were drained" and in the fall of 2010, "her payments increased from $1,147.18 to $3,000." "Around that time," defendant spoke to plaintiff on the phone regarding the increased payments, and plaintiff "agreed to accept a $2,000 payment ***, with the excess money going an [*sic*] escrow account, and promised her an extension." Defendant alleged that she would "be prejudiced if the Plaintiff [was] allowed to deny the truth of these promises as [defendant] relied on these promises when entering into the loan modifications [*sic*]."

¶ 4 As to her second affirmative defense, lack of standing, defendant asserted that the original mortgagee is "ABN AMRO Mortgage Group, Inc." and that the mortgage was assigned to LaSalle Bank Midwest, N.A. (LaSalle). Defendant alleged that "[a]t no place on the Assignment is their [*sic*] evidence to demonstrate how [plaintiff] is within the chain of custody of Defendant's mortgage and note. Nor are there any attached and incorporated documents

[1] The attached "Loan Modification Agreement" to which defendant refers indicates that it was prepared on September 3, 2010, and signed and notarized on September 15, 2010.

proving [plaintiff] is within the chain of custody of Defendant's mortgage and note. Therefore, Plaintiff does not have the capacity to proceed with this foreclosure."

¶ 5 Thereafter, plaintiff filed motions for summary judgment, and to dismiss defendant's affirmative defenses pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure. In those motions, plaintiff contended that defendant had not sufficiently pleaded her estoppel argument, and nonetheless, the alleged phone call would be irrelevant because it occurred about a year before her default. Additionally, plaintiff stated that as a result of a merger with LaSalle on October 17, 2008, plaintiff acquired and took possession of the property and assets of LaSalle, including the subject loan. It maintained that its possession of the subject original mortgage and note, indorsed in blank, defeated defendant's standing challenge.

¶ 6 On July 10, 2013, the trial court entered an order stating in relevant part: "2) Plaintiff's Motion 2-619.1 to Strike and Dismiss is granted on the grounds that Defendant's Affirmative Defenses fail to plead sufficient facts under both §§ 2-615 and 2-619. 3) Defendant's oral request for leave to [re]plead affirmative defenses is denied." Thereafter, on May 20, 2014, the court entered summary judgment and a judgment of foreclosure against defendant, and the order approving sale was entered on March 23, 2015.

¶ 7 Defendant filed a notice of appeal from that order, and in this court, she claims that the trial court erred in striking her two affirmative defenses. Defendants' affirmative defenses were struck pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2012)). A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face (*Bell v. Hutsell*, 2011 IL 110724, ¶ 9), whereas a section 2-619 motion "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside

the complaint bars or defeats the cause of action" (*Reynolds v. Jimmy John's Enterprises, LLC,* 2013 IL App (4th) 120139, ¶ 31). We review dismissals under these sections of the Code *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 8 We will first address defendant's first affirmative defense under equitable estoppel. Defendant contends that the court erred in dismissing this affirmative defense, because she "relied upon the Bank's promise to give her an extension based upon her short-term inability to pay. The Bank cannot extend a promise for an extension, then file suit and pretend that the promise never took place."

¶ 9 Equitable estoppel is typically invoked "where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). In order to establish equitable estoppel, the party claiming it must demonstrate: (1) that the other party misrepresented or concealed material facts; (2) that the other party knew at the time that he or she made the representations that they were untrue; (3) that the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) that the other person intended the party claiming estoppel would act upon the representations; (5) that the party claiming estoppel reasonably relied on the representations to his or her detriment; and (6) that the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person were allowed to deny the truth thereof. *Id.* at 313-14. A party claiming estoppel has the burden of proving it by clear and unequivocal evidence. *Id.* at 314. Whether estoppel has been established is dependent on the facts of each case. *Id*.

¶ 10 We initially find, under section 2-615 of the Code, that defendant's equitable estoppel defense was not sufficiently pled. In order to set forth a sufficient claim or defense, a pleading

must allege ultimate facts sufficient to satisfy each element of the cause of action or affirmative defense pled. See 735 ILCS 5/2–613(d) (West 2012) ("[t]he *facts* constituting any affirmative defense * * * must be plainly set forth in the [defendant's] answer". (Emphasis added.)). In determining the sufficiency of any claim or defense, the court will disregard any conclusions of fact or law that are not supported by allegations of specific fact. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426 (1981).

¶ 11 In this case, the facts provided by defendant about plaintiff's alleged representations were insufficient as a matter of law. Defendant alleged that she got into some financial difficulty, and spoke to plaintiff on the phone sometime "[a]round" the fall of 2010. During that conversation, plaintiff "agreed to accept a $2,000 payment ***, with the excess money going an [*sic*] escrow account, and promised her an extension." Defendant, however, provides no facts to specifically plead any of the elements of equitable estoppel. *Geddes*, 196 Ill. 2d at 313-14. She does not allege any specific misrepresentation of material fact by plaintiff, that plaintiff knew to be untrue and that defendant did not know to be untrue, nor does she provide any specific facts on the terms of the promise to accept "a $2000 payment," or give her some type of "extension." Defendant also does not plead any facts showing that plaintiff intended her to act on the misrepresentation, or that she actually did so by, for example, making the $2,000 payment, or reasonably relying on the "extension" to her detriment. Finally, defendant provides nothing other than mere conclusions to show she would be prejudiced by her reliance on the misrepresentation, if plaintiff was "allowed to deny the truth thereof." *Id.* at 313-14. Under these circumstances, defendant's claim of equitable estoppel was insufficiently pled, and the trial court was authorized to strike it pursuant to section 2-615 of the Code.

¶ 12 Nonetheless, even assuming arguendo that the facts alleged were sufficient to state a claim of equitable estoppel, her claim also fails under section 2-619 of the Code. In defendant's pleading, she asserted that equitable estoppel applied because she would "be prejudiced if the Plaintiff [was] allowed to deny the truth of these promises as [she] relied on these promises when entering into the loan modifications [*sic*]." Although we acknowledge that there appears to be some confusion as to when the alleged telephone call took place in relation to the loan modification,[2] defendant's claim that she relied on the promises when entering into the loan modification defeats her claim of equitable estoppel. The loan modification, which was attached as an exhibit to plaintiff's original complaint, contained an integration clause, stating that:

> "THE WRITTEN LOAN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES.
>
> THERE ARE NO UNWRITTEN (ORAL) AGREEMENTS BETWEEN THE PARTIES."

Defendant signed the loan modification on September 15, 2010, directly below the integration clause, and that signature is notarized.

[2] Defendant inartfully pleaded that the telephone call occurred "[a]round that time." Plaintiff interprets that phrase to refer back to a reference to July 2010, and claims that the phone call in defendant's pleading allegedly occurred in that month. We note however that after the reference to July 2010, defendant stated that her payments increased in "the fall of 2010," and "[a]round that time" she spoke with plaintiff on the phone regarding the increased payments. We therefore read the phrase to mean around "the fall of 2010."

¶ 13 Where parties formally include an integration clause in their contract, they are explicitly manifesting their intention to protect themselves against misinterpretations which might arise from extrinsic evidence. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464 (1999). An integration clause, like the one quoted above, "is a clear indication that the parties desire the contract be interpreted solely according to the language used in the final agreement." *Id*. at 465. As such, defendant cannot maintain that she relied on conversations outside the written agreement when entering into the loan modification, and her equitable estoppel claim must fail. *Id.* at 466 (holding that "that the four corners rule precludes the consideration of extrinsic evidence where a contract contains an integration clause and is facially unambiguous").

¶ 14 We also observe that the foreclosure complaint alleges, and defendant does not contest, that her loan was paid through June 1, 2011. It thus appears that defendant continued to make payments, as agreed, until her eventual default almost a year later. Defendant has provided nothing to show that the alleged promises to accept "*a* $2,000 payment" (emphasis added), or to provide some type of "extension," related in any way to her subsequent default, and we thus conclude that the trial court did not err in striking this affirmative defense.

¶ 15 Defendant next contends that the court erred in striking her second affirmative defense—that plaintiff lacked standing to pursue a foreclosure claim against her. She claims that "the documents attached to the Complaint implied that Plaintiff *** was not in the chain of custody [and] *** seem to bear out the fact that a different party held the mortgage when the complaint was filed."

¶ 16 The doctrine of standing requires that a party have real interest in the action and its outcome. *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004). A party's standing to sue must be determined as of the time the suit if filed. *Deutsche Bank National Trust Co. v. Gilbert*, 2012 IL

App (2d) 120164, ¶ 24. An action to foreclose upon a mortgage may be filed by a mortgagee, or by an agent or successor of a mortgagee. *Id.* ¶ 15. The attachment of a copy of the note to a foreclosure complaint is *prima facie* evidence that the plaintiff owns the note. *Rosestone Investments, LLC v. Garner,* 2013 IL App (1st) 123422, ¶ 24 (citing *Parkway Bank & Trust Co. v. Korzen,* 2013 IL App (1st) 130380, ¶ 24). Lack of standing to bring an action is an affirmative defense, and the burden of pleading and proving the defense is on the party asserting it. *Lebron v. Gottlieb Memorial Hospital,* 237 Ill. 2d 217, 252 (2010).

¶ 17 In this case, plaintiff attached the note attached to its original foreclosure complaint, which provides *prima facie* evidence that it owned the note. Defendant, however, relies on *Gilbert,* 2012 IL App (2d) 120164, to argue that plaintiff was "not in the chain of custody." In litigating cross-motions for summary judgment, the defendant-mortgagor in *Gilbert* produced evidence showing that the mortgage was assigned to the plaintiff, Deutsche Bank, after the bank had filed the foreclosure suit. *Id.* ¶ 23-24. The Second District found that the defendant had made a *prima facie* showing that Deutsche Bank lacked standing, and thus found the burden was shifted to Deutsche Bank to show that it had the requisite possessory interest prior to the suit. *Id.* We initially note that this district has declined to follow *Gilbert*, finding that the shifting of the burden to the plaintiff to prove standing is contrary to the decisions of our supreme court. See *Rosestone Investments, LLC v. Garner,* 2013 IL App (1st) 123422, ¶ 28. However, even assuming the correctness of *Gilbert*, defendant has presented no evidence in this case showing that the assignment actually took place after the complaint was filed. We thus find *Gilbert* distinguishable from the case at bar. See *CitiMortgage, Inc. v. Sconyers,* 2014 IL App (1st) 130023, ¶ 12 ("If defendants meant to contend that a party other than [the plaintiff] was the 'rightful' holder of the note, it was their obligation to present evidence that would support their

contention.”). Thus, the trial court did not err in granting plaintiff's motion on this basis. *Bayview Loan Servicing, LLC v. Cornejo*, 2015 IL App (3d) 140412, ¶¶ 12-14.

¶ 18 Finally, we observe that defendant interjects a bare allegation that "it was *** error" to deny her leave to replead her affirmative defenses. Defendant provides no argument or authority for this proposition, and we find that she has forfeited it on appeal pursuant to Supreme Court Rule 341(h)(7). Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008). Nevertheless, we note that the record shows only that defendant made an "oral request" to replead. There is nothing in the record to show that defendant presented a proposed amended pleading, or in any other way indicated how she intended to, or could, cure the defects of her original pleading. See *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 24 (" 'Where the party seeking to amend does not attach a proposed amended pleading to its motion or otherwise specify the new allegations that it would include, a trial court has no basis on which to consider whether the amendment would cure the defects in the current pleading,' which is always a 'primary' factor to consider." (Citing *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 128)). It is defendant's burden, as the appellant, to provide a sufficient record to support her claims of error. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008). She has not done so, and we therefore conclude that the trial court did not abuse its discretion in denying her leave to replead.

¶ 19 For the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 20 Affirmed.