2016 IL App (1st) 151338-U
No. 1-15-1338
May 17, 2016
Modified Upon Denial of Rehearing October 25, 2016

SECOND DIVISION

**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 DISTRICT

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| BMO HARRIS BANK, N.A., as successor To Amcore Bank, N.A., and THE FOREST PRESERVE DISTRICT OF COOK COUNTY, | ) | Appeal from the Circuit Court Of Cook County. |
| Plaintiff-Appellee, | ) | No. 09 CH 18291 |
| v. | ) | The Honorable Daniel Patrick Brennan, |
| ROYALTY PROPERTIES, LLC, CANNON SQUIRES PROPERTIES, LLC, RICHARD KIRK CANNON, MERYL SQUIRES CANNON, MERIX PHARMACEUTICAL CORP., UNKNOWN OWNERS AND NON-CLAIMANTS, | ) | Judge Presiding. |
| Defendants-Appellants. | ) | |

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Allegations that a bank allowed defendants less than one day to review 50 documents to complete a loan, when the defendants would lose a down payment of almost $2 million if they did not get the loan, sufficed to state a claim for economic duress that would invalidate the loan contract. Defendant also sufficiently alleged that they intended to use the

loan to purchase a home, and not for commercial purposes, so that the Truth in Lending Act applied to the loan.

¶ 2 Amcore Bank filed a complaint to foreclose a mortgage on property owned by Richard Cannon and Meryl Squires Cannon. The Cannons filed affirmative defenses, alleging that they signed the documents for a consumer loan without an opportunity to review the documents, when they would lose almost $2 million without the loan, and Amcore's unclean hands and oral promises should prohibit Amcore from foreclosing. After the Cannons filed their defenses, the Federal Deposit Insurance Corporation (FDIC) took control of Amcore's assets and sold them to BMO Harris Bank. BMO Harris sold the loan and mortgage on the Cannons' property to the Forest Preserve District of Cook County (FPD), who substituted as plaintiff in the action for foreclosure. The circuit court dismissed all of the affirmative defenses with prejudice and granted FPD's motion for summary judgment.

¶ 3 In this appeal, we hold that the Cannons adequately alleged facts that could support judgment in their favor on theories of economic duress, violation of the Truth in Lending Act, unclean hands and promissory estoppel. Accordingly, we reverse the judgment entered in favor of FPD and the dismissal of the Cannons' affirmative defenses. We remand for further proceedings in accord with this order.

¶ 4 BACKGROUND

¶ 5 Because this case arises from the dismissal of the Cannons' affirmative defenses for failure to state grounds for relief, we base most of the statement of facts on the Cannons' assertions. See *Triangle Sign Co. v. Weber, Cohn & Riley*, 149 Ill. App. 3d 839, 843 (1986).

¶ 6 Meryl, who served as president and chief executive officer of Merix Pharmaceutical Corporation, owned several patents for pharmaceuticals. Meryl's husband, Richard, worked as an attorney. The Cannons owned a home in Barrington Hills and 43 horses. The horses stayed on a farm owned by Horizon Farms, also in Barrington Hills.

¶ 7 In 2006, Horizon solicited bids in an effort to sell the farm. The sales brochure distributed to potential purchasers described the property as a "400-acre horse farm" subject to "a skillfully designed conservation easement that guarantees the property will forever be maintained in its natural, open state." Horizon advertised that "division of the property is limited to no more than eight estates" ranging in size from 12 acres to 92 acres.

¶ 8 The Cannons decided to try to bid on the property. An appraiser valued the property at $20,000,000. Amcore Bank tentatively approved the Cannons' application for the loan they needed for the purchase. On October 25, 2006, the Cannons submitted their bid of $19,350,000 for the property. Horizon accepted the bid. The Cannons placed in escrow an earnest money deposit of $1,935,000, which the Cannons would lose if they failed to close on the purchase by December 21, 2006.

¶ 9 When Amcore failed to respond to the Cannons' repeated requests for copies of the loan documents, the Cannons sought to use the appraisal to apply to other banks for the necessary loan. Amcore refused to give the Cannons a copy of the appraisal. Amcore also refused to loan the money directly to the Cannons. Amcore would complete the loan only if the Cannons created a limited liability corporation to sign for the loan. In December 2006, the Cannons created Royalty Properties, LLC, not to conduct any business, but to sign for Amcore's loan.

¶ 10 Amcore finally sent the Cannons all of the loan documents on December 20, 2006, the day before closing. The 50 separate documents totalled more than 500 pages. Despite the inadequate time for review, Richard noted several respects in which the terms of the loan documents differed materially from the promises Amcore made before the Cannons bid on the property. Richard confronted Steve Terborg of Amcore, who had worked with the Cannons on the loan. Terborg refused to make any significant changes or make the loan documents conform to Amcore's promises. Because they did not want to forfeit their deposit of almost $2 million, on December 21, 2006, the Cannons, for themselves and as officers of Royalty, Merix and Cannon Squires Properties (another company that conducted no business operations), signed the documents and bought the farm.

¶ 11 The loan documents show that Amcore Bank loaned Royalty and Cannon Squires $14,500,000 in exchange for a mortgage on the entire 400-acre property and the personal guarantees of Richard and Meryl, with the guarantees secured by mortgages on other properties the Cannons owned. The note established a maturity date of December 21, 2007. That is, the Cannons had exactly one year to either pay back the entire principal sum of $14,500,000 or find themselves subject to all the remedies for default written into the note and mortgage. The note also said, "The Loan is a business loan ***. [Royalty and Cannon Squires] agree[] that the Loan evidenced by this Note is an exempted transaction under the Truth In Lending Act." The mortgage separately provided that the personal property on the farm "is to be used by the Mortgagor solely for business purposes."

¶ 12 Amcore also purportedly loaned to Merix $1,300,000, but the entire amount of the purported loan went directly to Horizon. Merix received no ownership interest in the farm or

other benefit from the loan. Horizon loaned Royalty an additional $1,500,000, and that loan matured on December 31, 2007. Horizon's mortgage limited Royalty's use of the farm to "[a]gricultural purposes with the existing buildings."

¶ 13 The Cannons tried to refinance the main loan through Amcore, seeking a long-term loan with the terms Amcore originally promised. Amcore provided two further short-term loans, at high cost, during negotiations.

¶ 14 On June 8, 2009, Amcore filed a complaint to foreclose the mortgage and for other relief. Amcore listed as defendants Royalty, Cannon Squires, Richard, Meryl, and Merix (collectively, the Cannon parties) and others with interests in the property. The Cannon parties filed their answer, affirmative defenses and counterclaim on October 15, 2009. In the affirmative defenses and counterclaim, the Cannon parties argued that (1) Amcore acted in bad faith, particularly by failing to send the loan documents to the Cannon parties until late on December 20, 2006, knowing that the Cannon parties would lose $2 million if they did not obtain the loan on December 21, 2006, and the acts in bad faith barred all of Amcore's claims; (2) the loan violated the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*); (3) Amcore's unclean hands barred it from foreclosing; (4) Amcore's promises estop it from foreclosing; and (5) Amcore miscalculated the amount due. Merix advanced the separate argument that it received no consideration for its promise to pay to Amcore the amount Amcore gave to Horizon.

¶ 15 The circuit court dismissed the affirmative defenses, but gave the Cannon parties leave to replead them. The circuit court granted Amcore's motion to appoint a receiver to manage the farm.

¶ 16 In April 2010, the federal Office of the Comptroller of the Currency determined that Amcore's "unsafe or unsound practices or conditions [were] likely to cause insolvency or substantial dissipation of assets or earnings." The comptroller appointed the FDIC as receiver for Amcore's assets. As receiver, the FDIC sold substantially all of Amcore's assets, including its interest in the loan to the Cannon parties, to BMO Harris.

¶ 17 BMO Harris filed a motion for summary judgment on the complaint. Joseph Majer, the asset manager who oversaw servicing of the Cannon parties' note after BMO Harris acquired the note, signed an affidavit in support of the motion for summary judgment. Majer reviewed the loan history and said that the Cannon parties owed a total of $20,550,233.45 on the note for $14,500,000. Merix owed an additional $1,756,096.01 on its note for $1,300,000.

¶ 18 The circuit court permitted the Cannon parties to take Majer's deposition. Majer said, "I don't know how Amcore's system worked. I've never seen it. I don't really know the people that used it." Nonetheless, he adopted without question or recalculation all of Amcore's statements about amounts the Cannon parties owed on the notes. Majer admitted that he did not compare Amcore's entries with the loan agreements as modified by the two extensions. He had no personal knowledge as to whether Amcore had accurately calculated the late fees it charged to the Cannon parties. He admitted that Amcore also charged various expenses to the Cannon parties, and he did "not know what they are."

¶ 19 The Cannon parties answered the motion for summary judgment in May 2013. In June 2013, before the court heard the motion for summary judgment, BMO Harris sold to FPD its interest in the $14,500,000 loan. The circuit court granted FPD leave to substitute as

plaintiff. The Cannon parties filed a motion to file amended affirmative defenses, with the proposed defenses restating the initial defenses and adding new defenses applicable only to FPD. The Cannon parties contended that FPD lacked authority to purchase the note and to sue for foreclosure and a deficiency judgment. The Cannon parties also moved to strike Majer's affidavit, because Majer admitted he did not know how Amcore arrived at the numbers Majer used as the basis for his calculation of the Cannon parties' debt.

¶ 20 In an order dated August 30, 2013, the circuit court granted FPD's motion for summary judgment and found that the Cannon parties owed FPD $20,449,561.08 on the note for $14,500,000. The court ordered a foreclosure of the mortgage and sale of the farm. The court denied the motion to strike Majer's affidavit and the motion for leave to file the affirmative defenses.

¶ 21 FPD, the highest bidder at the foreclosure sale, bid $14,500,000 for the farm. The circuit court approved the sale and entered against the Cannon parties a deficiency judgment, finding that they owed FPD $6,197,811.60 on the note for $14,500,000. The court also entered a judgment in favor of FPD and BMO Harris on the Cannon parties' counterclaims. The Cannon parties now appeal.

¶ 22 ANALYSIS

¶ 23 The Cannon parties argue on appeal that the trial court erred (1) by entering a summary judgment in favor of FPD; (2) by dismissing the affirmative defenses; (3) by denying the motion to strike Majer's affidavit; and (4) by dismissing the counterclaims instead of entering a default judgment in favor of the Cannon parties on the counterclaims. We review the circuit court's rulings on the issues *de novo*. *Northbrook Bank & Trust Co. v. 2120 Division*

*LLC*, 2015 IL App (1st) 133426, ¶ 15; *Varela v. St. Elizabeth's Hospital*, 372 Ill. App. 3d 714, 722 (2006); *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001); *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 18.

¶ 24 FPD raises as grounds for affirmance three arguments that do not directly respond to the Cannon parties' arguments. In its initial brief on appeal, FPD made two arguments based on federal banking statutes in two pages of the brief, without including any citation to the record to show that it had raised the arguments in the circuit court. FPD's initial argument amounted to little more than "[We get our rights from] the FDIC and we always win." Chris Atkinson, *Defensing the Indefensible: Exceptions to D'Oench and 12 U.S.C. S 1823(E)*, 63 Fordham L. Rev. 1337, 1342 (1995) (hereinafter, Atkinson). In a petition for rehearing, FPD provides citations to the record showing that it raised the arguments in the circuit court, and it very substantially expands the argument it made in the initial brief on appeal. We substantially revise our treatment of the issues to address the arguments raised in FPD's petition for rehearing.

¶ 25 FDIC Act

¶ 26 FPD contends first that the FDIC Act (12 U.S.C. § 1823(e)) precludes any defense based on oral discussions between the Cannon parties and Amcore. See *FDIC v. O'Malley*, 163 Ill. 2d 130, 146 (1994). We initially analyzed this issue in accord with the law concerning holders in due course because federal cases applying the FDIC Act have noted that the FDIC Act makes the FDIC a holder in due course of notes the FDIC obtains from a failed bank. See *FDIC v. Newhart*, 892 F.2d 47, 50-51 (8th Cir. 1989); *Bell & Murphy & Assocs., Inc. v. Interfirst Bank Gateway, N.A.*, 894 F.2d 750, 754 (5th Cir. 1990); *Gilman v. FDIC*, 660 F.2d

688 (6th Cir. 1981) (holding that when FDIC acquired a note in good faith, for value, and without actual knowledge that the note was executed in violation of the securities laws, the FDIC took the note free from securities law fraud claims).

¶ 27 A party qualifies as a holder in due course of a note only if he acquires the note "for value in good faith, and without notice of any defense against or claim to it on the part of any person." *Douglass v. Wones*, 120 Ill. App. 3d 36, 45 (1983). FPD had notice of all of the Cannon parties' defenses, including economic duress and violation of the Truth in Lending Act, before it purchased the note. Therefore, its purchase of the note should not destroy the affirmative defenses. See *Schranz v. I.L. Grossman, Inc.*, 90 Ill. App. 3d 507, 512 (1980).

¶ 28 In the petition for rehearing, FPD argues that, under section 1823(e), the rights the FDIC acquired when it took control of Amcore far exceed the rights of holders in due course. See *FDIC v. Fonseca*, 795 F.2d 1102, 1106-07 (1st Cir. 1986). One commentator said that section 1823(e), as interpreted by several federal courts, gives the FDIC "Overgrown Superpower[s]." Fred Galves, *Might Does Not Make Right: The Call for Reform of the Federal Government's D'oench, Duhme and 12 U.S.C. § 1823(E) Superpowers in Failed Bank Litigation*, 80 Minn. L. Rev. 1323, 1344 (1996) (hereinafter, Galves). Congress originally designed section 1823(e) to adopt the principles stated in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), which the Supreme Court designed to prevent certain kinds of fraud against a failing bank's creditors. Galves, 80 Minn. L. Rev. at 1346. However, the interpretation of the section "has become divorced from its original equitable underpinning" (Galves, 80 Minn. L. Rev. at 1348), and now allows the FDIC, and those who purchase notes from the FDIC, to use section 1823(e) "to benefit from *** fraud that a bank perpetrated

against an innocent borrower" (Galves, 80 Minn. L. Rev. at 1350), so that courts interpreting section 1823(e) "now work injustice upon thousands of individuals who simply have had the misfortune of dealing with financial institutions that eventually failed." Galves, 80 Minn. L. Rev. at 1345.

¶ 29 But even under the most expansive view of section 1823(e), some defenses can still prevail against the FDIC and holders who acquire notes of failed banks from the FDIC. See Galves, 80 Minn. L. Rev. at 1362-75; Atkinson, 63 Fordham L. Rev. at 1362-81. In *Langley v. FDIC*, 484 U.S. 86, 93 (1987), the United States Supreme Court observed that "fraud in the factum — that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents [citation] — would take the instrument out of § 1823(e), because it would render the instrument entirely void." Fraud in the factum, also called fraud in the execution, "arises when a party executes an agreement with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms." *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 774 (9th Cir. 1986); see also *Desmond v. FDIC*, 798 F. Supp. 829, 836-39 (D. Mass. 1992).

¶ 30 The bankruptcy court that decided *In re Settlers' Housing Service, Inc.*, 514 B.R. 258, 274 (Bankr. N.D. Ill. 2014), applied *Langley* and *Southwest Administrators* to a case in which the Bank of Commerce made a loan to KJ Lodico, and KJ Lodico argued that the court should not hold it liable under the terms of the signed documents. The bankruptcy court held:

> "[T]he facts and circumstances as alleged in the Complaint could demonstrate that one alleged act of fraud amounted to fraud in the execution, rather than fraud in

> the inducement. As alleged in the Complaint, the Bank of Commerce gave KJ Lodico a stack of documents to sign at a closing for multiple properties. ***
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> *** [T]he allegations of the time crunch circumstance can support an inference that KJ did not have a reasonable opportunity to read the writing at the time of closing. KJ was only in the Chicagoland area on layover for an international flight. The facts as alleged can support an inference that the Bank of Commerce arranged for a fast closing that did not permit close reading of the documents, or at least knew of it, and took advantage by assuring KJ that all the documents were the same. The consequence here is that *D'Oench* and § 1823(e) do not apply to the mortgage cross-collateralizing the Washington-Taylor Properties because Settlers' has plausibly alleged that the Bank of Commerce obtained that mortgage by fraud in the execution." *Settlers' Housing*, 514 B.R. at 274.

¶ 31 The Cannon parties' allegations here – that Amcore left them so little time to review the 500 pages of loan documents that they had no opportunity to find out what they were signing, when they would lose about $2 million if they chose not to sign the loan documents before the closing on December 21, 2006 – similarly suffice to support a finding of fraud in the factum that renders the purported contract void, not voidable. Accordingly, we find that the Cannon parties have adequately pled a viable defense to counter FPD's claim that section 1823(e) requires a judgment in its favor.

¶ 32 Because the circuit court granted FPD's motion for summary judgment, we must also address the question of whether the pleadings, depositions, admissions and affidavits in the record justify the decision to grant FPD's motion for summary judgment. We review the

issue de novo, looking at all of the evidence and pleadings in the record. We find that the evidence and the pleadings leave unresolved questions of material fact concerning the application of the FDIC Act to this case. Accordingly, we hold that the FDIC Act does not justify the decision to grant FPD's motion for summary judgment on its complaint.

¶ 33 FIRREA

¶ 34 FPD also claims that the Financial Institutions, Reform, Recovery & Enforcement Act (FIRREA) (12 U.S.C. § 1821(d)(13)(D)) bars all affirmative defenses arising from Amcore's conduct. FIRREA provides that claims filed against a failed bank, like Amcore, must go through an administrative process, and the failure to exhaust administrative remedies bars the claims. *Perik v. JPMorgan Chase Bank*, 2015 IL App (1st) 132245, ¶ 18. However, claims filed before the appointment of a receiver for the failed bank remain viable and need not go through the administrative process. *Perik*, 2015 IL App (1st) 132245, ¶ 18 n. 4; *In re Lewis*, 398 F.3d 735, 742-43 (6th Cir. 2005). Because the Cannon parties filed their affirmative defenses against Amcore before the FDIC became the receiver for Amcore, FIRREA does not justify dismissal of the affirmative defenses.

¶ 35 In its petition for rehearing, FPD contends that this court improperly adopted the reasoning of *Perik* and *Lewis* without sufficiently discussing conflicting federal cases that hold that FIRREA requires exhaustion of administrative remedies even for claims filed before the appointment of a receiver. See *Demelo v. U.S. Bank National Ass'n*, 727 F.3d 117, 122-24 (1st Cir. 2013). The United States Court of Appeals for the Eleventh Circuit extensively analyzed the conflicting cases and held, "subject matter jurisdiction is tested as of the time of the filing of the complaint, therefore district courts presiding over actions

properly filed prior to the appointment of a receiver continue to be vested with jurisdiction." *FDIC v. LaCentra Trucking, Inc.*, 157 F.3d 1292, 1301 (11th Cir. 1998). We adopt the reasoning of the *LaCentra* court, and accordingly we reassert that because the Cannon parties filed their affirmative defenses against Amcore before the FDIC became the receiver for Amcore, FIRREA does not justify dismissal of the affirmative defenses.

¶ 36 FPD in its petition for rehearing claims that the Cannon parties did not raise the affirmative defense of duress before FDIC assumed control of Amcore's assets in 2010. In the affirmative defenses the Cannon parties filed in October 2009, the Cannon parties alleged that Amcore delivered the loan documents on the evening of December 20, 2006, knowing that the Cannon parties needed to obtain a loan before the closing scheduled for December 21, 2006, or else the Cannon parties would lose $2 million. The Cannon parties contended that the facts alleged showed that Amcore had unclean hands and did not act in good faith; only later did the Cannon parties label their defense as one of "economic duress." But "[i]n analyzing a pleading, a court of review will look to the content of the pleading rather than its label." *Padilla v. Vazquez*, 223 Ill. App. 3d 1018, 1023 (1991). We find that the October 2009 pleading raised the Cannon parties' defenses by alleging facts that could support a finding of fraud in the execution of the documents, before FDIC assumed control of Amcore.

¶ 37 Moreover, FIRREA applies on its face only to claims against the failed bank, and not to defenses against claims made based on rights derived from the failed bank. *American First Federal, Inc. v. Lake Forest Park, Inc.*, 198 F.3d 1259, 1264 (11th Cir. 1999); *Resolution Trust Corp. v. Midwest Federal Savings Bank of Minot*, 36 F.3d 785, 792-93 (9th Cir. 1993). The Cannon parties have raised affirmative defenses to which FIRREA does not apply, and

therefore FIRREA did not give the circuit court grounds to strike the affirmative defenses. Again, we note that the pleadings, depositions and affidavits in the record leave unresolved genuine issues of material fact, so that FIRREA does not justify the circuit court's decision granting FPD's motion for summary judgment.

¶ 38 Credit Agreements Act

¶ 39 FPD claims that the Credit Agreements Act bars the affirmative defenses because the Cannons based the defenses on oral discussions between the Cannon parties and Amcore. See 815 ILCS 160/2, 160/3 (West 2012); *Westinghouse Electric Corp. v. McLean*, 938 F. Supp. 487, 490 (N.D. Ill. 1996). But the Credit Agreements Act does not validate a contract obtained through fraud in the execution. *Settlers' Housing*, 514 B.R. at 283. We have already held that the Cannon parties adequately alleged facts showing fraud in the execution, and the pleadings, affidavits and depositions in the record leave unresolved issues of material fact concerning the alleged fraud.

¶ 40 Also, the Credit Agreements Act does not apply to loans made primarily for "personal, family or household purposes." 815 ILCS 160/1(1) (West 2006). The Cannons alleged and presented evidence that they sought to use the loan for the purpose of making the farm their home, and not for commercial purposes. FPD presented conflicting evidence, mostly in the loan documents themselves, to show that Amcore intended to make the Cannons' loan a commercial loan subject to the Credit Agreements Act. FPD's evidence does not affect the sufficiency of the Cannon parties' allegations incorporated in their affirmative defenses. Moreover, the Credit Agreements Act does not bar economic duress claims based on the lender's alleged violation of its duties of good faith and fair dealing. *Westinghouse*, 938 F.

Supp. at 493-94; *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1057 (2000). Thus, the Credit Agreements Act does not mandate dismissal of the affirmative defenses alleged here, and the evidence in the record does not justify the award of summary judgment in favor of FPD based on the Credit Agreements Act.

¶ 41 Duress

¶ 42 The Cannon parties contend that the circuit court should not have granted FPD's motion for summary judgment because the Cannon parties have raised a genuine issue of material fact as to whether economic duress makes the loan void. One appellate court found that:

> "Economic duress occurs where 'undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement.' [Citation.] These dire circumstances must be such as to overbear the will of the plaintiff. [Citation.] Whether the circumstances did in fact overbear the plaintiff's will is ordinarily a question of fact." *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982, 992 (1998), *quoting* 12 Ill. L. & P. Contracts § 142 (1983).

¶ 43 Another appellate court found that:

> "Economic duress occurs where 'undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement.' [Citation.] These dire circumstances must be such as to overbear the will of the plaintiff. [Citation.] Whether the circumstances did in fact overbear the plaintiff's will is ordinarily a question of fact." *Golden v. McDermott, Will &*

> *Emery*, 299 Ill. App. 3d 982, 992 (1998), *quoting* 12 Ill. L. & P. Contracts § 142 (1983).
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> *** Fraud, even in the inducement, may justify consideration of prior understandings which would be otherwise excluded under the parol evidence rule." *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833, 840-41 (1995).

¶ 44 Courts have found economic duress adequately alleged when the party seeking to void the contract had far less at stake than the Cannon parties stood to lose here if they walked away from the deal with Amcore. In *Laemmar v. J. Walter Thompson Co.*, 435 F.2d 680 (7th Cir. 1970), the plaintiffs alleged that the defendant, the plaintiffs' employer, told them they would lose their jobs if they did not sell to the defendant their shares of the defendant's stock. The court said, "We agree that, as a matter of law, the threat of discharge from one's employment may constitute duress which would make voidable a contract executed while a party was under such a threat. Whether the threat did constitute duress in this instance, however, is a question of fact which must be resolved by the trier of fact upon remand." *Laemmar*, 435 F.2d at 682. *Oglesby v. Coca-Cola Bottling Co.*, 620 F. Supp. 1336 (N.D.Ill.1985), involved an employer who told an employee that if he refused to sign a resignation letter the employer prepared, the employer would fire him. The letter included a release of the employee's claims against his employer. The *Oglesby* court found a triable issue as to whether contractual principles of economic duress invalidated the release. *Oglesby*, 620 F. Supp. at 1342-43.

¶ 45 In distinguishing *Golden* from *Oglesby*, the *Golden* court observed that "a condition of resignation was the signing of a release that the employee was not given an adequate opportunity to read, much less negotiate. *** He was forced to choose on the spot between termination or resignation coupled with a mysterious agreement." *Golden*, 299 Ill. App. 3d at 992; see also *Raintree Homes, Inc. v. Village of Long Grove*, 389 Ill. App. 3d 836, 859-64 (2009) (finding that economic duress of requiring payment of several thousand dollars for building permits made voluntary payment doctrine inapplicable).

¶ 46 In *Carlile*, Carlile asked the court to find that economic duress rendered invalid a release he signed when he terminated his role as a dealer for Snap-On Tools. Carlile alleged that when he returned his inventory to Snap-On Tools, Snap-On Tools refused to reimburse him for the inventory unless he signed the release. The *Carlile* court said:

> "Snap-on had no right to refuse to pay Carlile for his inventory, and accordingly, no right to threaten not to make that payment.
>
> ***
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> Professors White and Summers describe an individual who refuses to perform his contract duties unless he receives a concession as an extortionist. [J. White & R. Summers, Uniform Commercial Code § 1-5, at 47 (2d ed. 1980)] ***
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> ***
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> When a party has had ample time for inquiry, examination and reflection, it is less likely that his will has been overcome by economic duress. ***

> *** Seelman [from Snap-On] instructed Carlile to complete and sign the termination record, noting that Carlile would be quickly reimbursed only if he completed the form as Seelman had suggested, and then handed over the termination agreement to be signed. Carlile was experiencing severe marital difficulties and was facing 'personal financial ruin.' Given these facts, we hold the trial court erred as a matter of law in granting defendants' motion for summary judgment on the basis that the release was binding." *Carlile*, 271 Ill. App. 3d at 840-42.

¶ 47 Here, the Cannon parties alleged that they would lose almost $2 million which they had placed in escrow if they did not close on the farm purchased on December 21, 2006. Amcore promised, in October 2006, to make the loan needed for the purchase, and promised terms very different from the terms included in the extensive loan documents first presented to the Cannons on December 20, 2006. Without signatures on all 50 documents, covering more than 500 pages, Amcore would not make the necessary loan.

¶ 48 FPD asserts that the Cannons "might not have wanted to walk away, but they could have done just that. *** [The Cannons] cannot *** claim that they were under duress." We disagree. The allegation that the Cannon parties would lose their entire deposit of almost $2 million if they walked away from the deal, when they had an inadequate opportunity to review the loan documents or arrange alternate financing, suffices to state a claim for economic duress that violated Amcore's duties of negotiating in good faith and dealing fairly with the Cannons. We reverse the circuit court's decision to grant FPD's motions for summary judgment and for dismissal of the affirmative defense of economic duress.

¶ 49 Truth in Lending Act

¶ 50 Next, the Cannon parties assert that they stated a viable defense based on Amcore's violation of the Truth in Lending Act (TILA) (15 U.S.C. §§ 1601 *et seq.*). In light of FPD's petition for rehearing, we reprint in its entirety FPD's argument in its initial brief on appeal concerning TILA:

> "TILA and fraudulent inducement claims were barred by FIRREA, the FDIC Act, and the Credit Agreements Act, and by the actual terms of the loan documents, which establish the loan was for commercial purposes."

¶ 51 TILA applies only to consumer loans, not to loans for commercial purposes. *People's Bank of Arlington Heights v. Atlas*, 2015 IL App (1st) 133775, ¶ 24. The circuit court held that TILA did not apply to the transaction because the loan documents prove that Amcore made a commercial loan. "[I]n deciding whether a loan was made for consumer or business purposes, no single factor is dispositive, and no bright-line rule applies. Rather, we consider the transaction as a whole." *People's Bank*, 2015 IL App (1st) 133775, ¶ 26. The label placed on the loan in the loan documents " 'is not dispositive' in making our determination. [Citations.] To the contrary, the form of the transaction is far less important than 'the substance of the transaction and the borrower's purpose in obtaining the loan.' " *People's Bank*, 2015 IL App (1st) 133775, ¶ 28, *quoting Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 462 (5th Cir.1999).

¶ 52 Here, FPD showed that the loan documents explicitly labeled the loan commercial and expressly stated that TILA did not apply. Moreover, Horizon boarded horses on the farm for a fee, and advertised that the purchaser could subdivide the 400-acre tract into eight huge

estates. Amcore made the loan to two limited liability companies, not to Richard and Meryl as individuals. The Cannons presented evidence that they signed the loan documents under duress, and they intended to make the farm their home. They also presented zoning regulations and easements that severely limited the use of the land and largely forbade commercial use. The circuit court improperly focused on Amcore's purpose in making the loan, when applicable case law requires the court to consider primarily "the borrower's purpose in obtaining the loan." *People's Bank*, 2015 IL App (1st) 133775, ¶ 28. We find that the Cannon parties have adequately alleged facts that create a material issue as to whether Amcore made a commercial or a consumer loan. Amcore did not claim that it complied with TILA's requirements; instead, it claimed only that the Act did not apply to the commercial loan. Accordingly, we reverse the dismissal of the affirmative defense based on the alleged violation of TILA. Again, we find that the Cannon parties have presented sufficient allegations and evidence to leave unresolved a genuine issue of material fact concerning the applicability of TILA to the transaction.

¶ 53 In its petition for rehearing, FPD argues that TILA can never apply to a loan formally extended to a limited liability corporation, because a corporation is not a natural person. FPD admits that it did not raise this argument in the circuit court and it did not raise this argument in its brief on appeal. Supreme Court Rule 341 establishes that "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Accordingly, we find that FPD waived its argument that TILA cannot apply to the loan to the Cannon parties because the documents indicate that Amcore made loans to limited liability corporations.

¶ 54 Equitable Defenses

¶ 55 The circuit court held that the Credit Agreements Act made irrelevant the allegations the Cannon parties made concerning promises Amcore made to the Cannons, because courts must not consider the oral negotiations that led to commercial loans. See 815 ILCS 160/2 (West 2006). However, the Cannon parties have alleged sufficient facts to create a triable issue as to whether the Cannons intended the loan for consumer or commercial purposes. Moreover, economic duress serves as an affirmative defense even for commercial loans covered by the Credit Agreements Act. See *Bank One*, 309 Ill. App. 3d at 1057; *Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008, ¶ 39 (Lytton, J., specially concurring). Accordingly, we reverse the circuit court's dismissal of the affirmative defenses of unclean hands and promissory estoppel.

¶ 56 FPD's Authority

¶ 57 Next, the Cannon parties argue that the circuit court should not have dismissed their affirmative defenses to the deficiency judgment. The Cannon parties argue that FPD lacks statutory authority to lend money at interest, or to speculate in financial instruments. FPD claims that *res judicata* bars this affirmative defense. The Cannons participated in a lawsuit entitled *Baker v. Forest Preserve District*, 2015 IL App (1st) 141157, in which the plaintiffs argued that FPD lacked authority to acquire the mortgage on the farm at issue in this case. The *Baker* plaintiffs claimed that the Cook County Forest Preserve District Act (70 ILCS 810/1 *et seq.* (West 2012)) only permitted FPD to acquire land in fee simple. The circuit court granted FPD's motion for summary judgment on the complaint. The appellate court

affirmed, finding that FPD had statutory authority to acquire the farm by means of first acquiring the note and the mortgage. *Baker*, 2015 IL App (1st) 141157, ¶¶ 5, 49.

¶ 58 We agree with FPD that the *Baker* decision resolves the issue of whether FPD had authority to purchase the note as a means of acquiring the farm. We agree with the Cannon parties that the *Baker* court did not address the issue of whether FPD had authority to sue for a deficiency judgment. But the *res judicata* effect of the *Baker* decision finally resolves all issues which the Cannons could have raised in *Baker*. "That judgment is an absolute bar to subsequent actions involving the same claims or demands by the same parties or their privies. [Citations.] The doctrine extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit." *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294 (1992). The Cannon parties assert that the "collection of the money judgment in this case is not an issue that *** could have been raised in *Baker*." The Cannon parties cite no authority for the proposition, and we see no reason they could not have litigated this aspect of the scope of FPD's authority when they challenged FPD's authority to purchase the note. The issue here and the issue in *Baker* arise from a single group of operative facts. See *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 311 (1998).

¶ 59 The Cannon parties also argue that *res judicata* does not bar Royalty, Cannon Squires and Merix from challenging FPD's authority, because Royalty, Cannon Squires and Merix did not participate in *Baker*. But the Cannons' ownership of Royalty, Cannon Squires and Merix, and the identity of their interests in this proceeding, place Royalty, Cannon Squires and Merix in privity with the Cannons. See *Progressive Land*, 151 Ill. 2d at 296.

¶ 60 In a petition for rehearing, the Cannon parties argue that the *Baker* court could not resolve the issue of whether FPD had authority to sue to collect a deficiency judgment because the circuit court entered its judgment in *Baker* on April 23, 2014, and the foreclosure court did not enter the deficiency judgment until May 5, 2014. However, the court entered a money judgment in favor of FPD on August 30, 2013. The Cannon parties have not explained how the FPD could have authority to sue for and collect a money judgment, but no authority to sue for or collect a deficiency judgment. The Cannon parties do not explain why they could not have challenged FPD's authority to sue for a money judgment after August 30, 2013. Accordingly, we find that the *res judicata* effect of the *Baker* decision justifies the dismissal with prejudice of the affirmative defenses based on FPD's lack of authority to pursue a deficiency judgment.

¶ 61 In response to the Cannon parties' petition for rehearing, FPD filed a motion to strike "factual misstatements" in the Cannon parties' brief. We ignore all factual assertions that lack adequate support in the record. *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 25. We see no need to strike specifically the unsupported assertions here. *Pekin Insurance*, 2012 IL App (2d) 110195, ¶ 25.

¶ 62 Majer's Affidavit

¶ 63 The Cannon parties argue that the circuit court should have stricken Majer's affidavit because he admitted that he did not know how Amcore arrived at its calculation of the amounts the Cannon parties allegedly owed before BMO Harris acquired the notes. FPD asserts that the circuit court correctly denied the motion to strike, in accord with the reasoning of *2120 Division*, 2015 IL App (1st) 133426. In *2120 Division*, Northbrook Bank

acquired a note from Ravenswood Bank and sued the borrower. Northbrook Bank presented the affidavit of its employee, who swore that the borrower owed a specified amount on the loan. The employee said,

> "As part of my job duties, *** I became familiar with Ravenswood Bank's then-regular business practices and procedures, including those related to bookkeeping and the associated accounting and computer systems that maintain borrowers' accounts and loan information, as described herein. As a commercial loan officer and assistant vice president, I have also become familiar with RAVENSWOOD BANK's accounting software by reviewing it regularly in foreclosure cases involving loans made by RAVENSWOOD BANK and by communicating with former RAVENSWOOD BANK employees, including those in operations whom Northbrook Bank retained after it acquired RAVENSWOOD BANK's assets from the FDIC." *2120 Division*, 2015 IL App (1st) 133426, ¶ 44.

¶ 64 Here, Majer admitted that he did not learn Amcore's system, and he did not know how Amcore calculated the late fees it charged to the Cannon parties. We find that Majer's affidavit fails to comply with Supreme Court Rule 191 (eff. Jan. 4, 2013), because the affiant had no personal knowledge of the practices and procedures of the predecessor bank, and therefore could not provide the foundation needed for FPD's assertions concerning the amounts the Cannon parties owe on the mortgage. On remand, the circuit court should take into consideration the severe limitations on Majer's understanding of the basis for the figures he presented to the circuit court as the amount the Cannon parties owed.

¶ 65 Counterclaims

¶ 66 The Cannon parties argue that the circuit court erred when it dismissed their counterclaims pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). The Cannon parties suggest, in passing, without citation to authority, that the circuit court should have entered a default judgment in their favor because FPD did not file a timely answer to the counterclaims. Because of the lack of argument and authority, we find the issue forfeited. *People v. Smith*, 2015 IL 116572, ¶ 22; see Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). We review *de novo* the dismissal of the counterclaims. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

¶ 67 The counterclaims repeat the allegations of the affirmative defenses and assert causes of action for fraud, breach of contract, and violation of the Truth in Lending Act. The circuit court dismissed the counterclaims based on its finding that the commercial nature of the loan made all allegations based on Amcore's promises inadmissible under the Credit Agreements Act. Because we find a triable issue of fact as to whether the Cannons sought a commercial loan, we find that the circuit court had no sound basis for striking the counterclaims.

¶ 68 Waiver

¶ 69 Finally, FPD asserts that the circuit court properly dismissed all of the affirmative defenses and counterclaims and properly granted summary judgment in favor of FPD because, in the mortgage itself, the Cannon parties agreed that they would not "ASSERT ANY CLAIM AGAINST [AMCORE] ON ANY THEORY OF LIABILITY FOR SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES." (Emphasis in original.) But a waiver obtained through economic duress or fraud lacks validity. See

*Carlile*, 271 Ill. App. 3d at 840-42. We have already held that the Cannon parties have adequately alleged facts that could support a finding that the Cannon parties signed the loan documents due to economic duress. Thus, the waiver in the loan documents does not warrant dismissal of the Cannon parties' claims. In its petition for rehearing, FPD claims this court quoted the wrong waiver clause. In its initial brief on appeal, FPD cited to four waiver clauses, without quoting the clauses and without distinguishing between the clauses. We quoted accurately one of the cited clauses. FPD waived its new argument based on a purported distinction between the waiver clauses. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 70 CONCLUSION

¶ 71 The Cannon parties adequately alleged and presented evidence to create a genuine issue of material fact as to whether economic duress invalidates the loan documents they signed on December 21, 2006. They also adequately alleged and presented evidence to create a genuine issue of material fact as to whether they procured consumer loans, and that Amcore violated the Truth in Lending Act. We reverse the circuit court's decision to grant FPD's motion for summary judgment and the decision to strike the Cannon parties' affirmative defenses and counterclaims. We reverse the circuit court's judgment and remand for further proceedings in accord with this order.

¶ 72 Reversed and remanded.