2019 IL App (1st) 181918-U

SIXTH DIVISION
August 2, 2019

No. 1-18-1918

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

URBAN PARTNERSHIP BANK, as assignee of the Federal Deposit Insurance Corporation, as receiver for Shore Bank, Plaintiff/Counterdefendant-Appellee, v. DKY DEVELOPERS a/k/a DKY DEVELOPERS, RLLP, CITY OF CHICAGO, DOROTHY APPIAH, UNKNOWN OWNERS and NON-RECORD CLAIMANTS, Defendants (DKY Developers a/k/a DKY Developers, RLLP and Dorothy Appiah, Defendants/Counterplaintiffs-Appellants).	)	Appeal from the Circuit Court of Cook County. No. 15 CH 12400 Honorable Bridgid Mary McGrath Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the bank's section 2-619 motion to dismiss defendants' counterclaims where such claims were explicitly barred by a waiver and release provision contained in a loan modification that defendants signed and the trial court properly granted summary judgment in the bank's favor on its breach of note and breach of guarantee claims where no genuine issue of material fact existed; affirmed.

¶ 2 Defendants/counterplaintiffs, DKY Developers a/k/a DKY Developers, RLLP (DKY) and Dorothy Appiah, appeal from the trial court's orders that dismissed their amended counterclaim and granted summary judgment in favor of plaintiff/counterdefendant, Urban Partnership Bank (UPB). Defendants argue that the court below erred when it dismissed their amended counterclaim pursuant to a waiver and release provision because their claims alleged fraud in the inducement. Further, defendants argue that summary judgment should not have been entered in UPB's favor because significant questions of material fact remained regarding UPB's right to bring such claims. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This case stems from a commercial breach of contract action filed by UPB, as successor in interest to the Federal Deposit Insurance Corporation (FDIC) as receiver for ShoreBank, against defendants.

¶ 5 For a number of years, Appiah provided tutoring services to children in Chicago Public Schools. Appiah created DKY to provide tutoring and education services at a facility purchased for that purpose. On May 15, 2009, DKY bought the real estate located at 6803 South Throop in Chicago (property). Appiah then sought a small business loan from ShoreBank for working capital, purchase of furniture and fixtures, and rehabilitation of the property so that she could conduct her tutoring business at the property.

¶ 6 On July 28, 2010, ShoreBank made a $120,000 revolving line of credit loan to DKY. The loan was evidenced by a U.S. Small Business Administration Note (note) executed by DKY in favor of ShoreBank. Additionally, Appiah executed a U.S. Small Business Administration Unconditional Guarantee (guarantee) in favor of ShoreBank. The note was secured by a July 28, 2010, mortgage on the property. The loan required interest-only payments on disbursed

principal amounts for six months and monthly principal and interest payments thereafter, with all remaining principal and accrued interest due and payable 13 years from the date of the note.

¶ 7 On August 20, 2010, ShoreBank was closed by the Illinois Department of Financial and Professional Regulation, Division of Banking, and the FDIC was appointed as receiver thereof. ShoreBank's assets, including the $120,000 loan to DKY, were transferred from the FDIC to UPB pursuant to a Purchase and Assumption Agreement (PAA) dated August 20, 2010.

¶ 8 Defendants subsequently encountered construction issues. As a result, UPB and defendants entered into five loan modification agreements. The initial Modification to Loan Documents was entered into in May 2013, and required that DKY provide UPB with a certificate of occupancy from the City of Chicago no later than October 28, 2013, and provide evidence to UPB that DKY was operating its business in the property as of that date. The First Amended and Restated Modification to Loan Documents was entered into on October 18, 2013, and required that DKY provide UPB with a certificate of occupancy from the City of Chicago no later than January 31, 2014, and provide evidence to UPB that DKY was operating its business in the property as of that date. The Second Amended and Restated Modification to Loan Documents was entered into on January 31, 2014, and required that DKY provide UPB with a certificate of occupancy from the City of Chicago no later than April 30, 2014, and provide evidence to UPB that DKY was operating its business in the property as of that date. The Third Amended and Restated Modification to Loan Documents was entered into on April 30, 2014, and required that DKY provide UPB with a certificate of occupancy from the City of Chicago no later than July 31, 2014, and provide evidence to UPB that DKY was operating its business in the property as of that date. Most relevant to this appeal, on July 31, 2014, UPB and defendant entered into the Fourth Amended and Restated Modification to Loan Documents (fourth loan modification). The

fourth loan modification required DKY to provide UPB with a certificate of occupancy from the City of Chicago no later than October 31, 2014, and provide evidence to UPB that DKY was operating its business in the property as of that date.

¶ 9 All five of the loan modification agreements contained a provision titled "Waiver and Release" that stated:

> "Borrower [(DKY)] and Guarantor [(Appiah)] do hereby certify, represent and warrant to Lender that Borrower and Guarantor have no defenses, setoffs, claims or counterclaims of any kind or nature whatsoever against Lender in connection with the Loan Documents or any extensions, amendments, or modifications thereof or any action taken or not taken by Lender with respect thereto or which would otherwise have the effect of diminishing the amount of the indebtedness owing to Lender or impairing in any way Lender's rights with respect to the repayment of the Loan or the collateral security for the Loan. Without limiting the generality of the foregoing, and in consideration of Lender's agreements hereunder, Borrower and Guarantor hereby release and forever discharge Lender, its affiliates and each of their officers, agents, employees, attorneys, insurers, successors and assigns (collectively, the "**Released Parties**"), from and against any and all liabilities, rights, potential claims, losses, expenses or causes of action, known or unknown, for which Borrower and Guarantor had, now have, or may hereinafter acquire, arising in conjunction therewith. Borrower and Guarantor also waive, release and forever discharge the Released Parties and each of them from and against any and all known or unknown rights to setoff, defenses, potential claims, counterclaims, causes of action and any other bar to enforcement of this Agreement or the other Loan Documents." (Emphasis in original.)

¶ 10 On October 31, 2014, the loan went into default because DKY failed to provide a certificate of occupancy or proof that DKY was operating its business at the property. As a result, the loan was accelerated and declared immediately due and payable.

¶ 11 Thereafter, the FDIC executed an Assignment of Mortgage and Other Loan Documents (assignment) that assigned defendants' note and guarantee to UPB and provided as follows:

> "For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto, the [FDIC], a corporation organized and existing under an Act of Congress, as receiver of ShoreBank, a former Illinois banking corporation ('Assignor'), as holder, hereby assigns, without recourse, to [UPB], an Illinois banking corporation ('Assignee') pursuant to that certain [PAA] dated August 20, 2010, by an between Assignee and Assignor, all of its right, title and interest to:
>
> a. That certain Mortgage executed by [DKY] in favor of ShoreBank, dated July 28, 2010 and recorded in the County Recorder's Office, Cook County, Illinois on January 6, 2011 as document number 1100633109, regards real estate described in Exhibit A[1] attached hereto;
>
> b. That certain Assignment of Rents executed by [DKY] in favor of ShoreBank, dated July 28, 2010 and recorded in the County Recorder's Office, Cook County, Illinois on January 6, 2011 as document number 1100633110, regards real estate described in Exhibit A attached hereto;
>
> c. That certain Commercial Security Agreement dated July 28, 2010, executed by [DKY] and in favor of ShoreBank, as Lender;

[1] Exhibit A to the assignment contained the legal description of the property, its common address, and its property index number.

d. That certain Unconditional Guarantee dated July 28, 2010, executed [by] [Appiah] to and in favor of ShoreBank, as Lender;

This Assignment is made without recourse, representation or warranty, express or implied, by the [FDIC] in its corporate capacity or as Receiver.

Dated this 11th day of August, 2015 and effective as of August 20, 2010."

¶ 12 The assignment was executed by Gregory A. Paulus, the attorney-in-fact for the FDIC. Additionally, the FDIC executed an Endorsement and Allonge to Note (allonge) that endorsed and assigned the note executed by DKY and all modifications thereto to UPB. The allonge was also dated August 11, 2015, and effective as of August 20, 2010.

¶ 13 On August 18, 2015, UPB filed a complaint to foreclose commercial mortgage and for other relief in the circuit court of Cook County. Defendants filed their answer and counterclaim on October 5, 2015. Defendants' counterclaim contained counts for common law fraud and violation of the Consumer Fraud Act, and in the alternative, breach of contract.

¶ 14 On December 21, 2015, UPB filed an amended complaint. The amended complaint contained the following three, respectively-numbered counts: (1) breach of mortgage against defendants; (2) breach of promissory note against DKY; and (3) breach of unconditional guarantee against Appiah. For the breach of note and breach of guarantee counts, UPB alleged that after applying all credits to the loan obligation, the balance due to UPB by defendants as of July 22, 2015, was $133,984.16, not including fees and costs.

¶ 15 On January 19, 2016, defendants filed their answer to the amended complaint and did not raise any affirmative defenses.

¶ 16 On March 24, 2016, UPB filed a motion to voluntarily dismiss the breach of mortgage count in its amended complaint, which was granted on April 12, 2016.

¶ 17 UPB subsequently filed a motion to dismiss defendants' counterclaim, which was granted on September 19, 2016, with defendants given leave to re-plead.

¶ 18 On October 28, 2016, defendant filed an amended counterclaim containing the same three counts as the original counterclaim (common law fraud, violation of the Consumer Fraud Act, and in the alternative, breach of contract), and did not raise any affirmative defenses. Defendants' count for common law fraud alleged that UPB made multiple false statements in order to induce defendants to act, including:

> "a. Falsely claiming that it was the owner and proper administrator of the Appiah loan by its affirmative statements and actions between August 20, 2010 and August 11, 2015;
>
> b. Falsely claiming that it was authorized to enter into contracts with Defendants to 'modify' the Appiah Loan on multiple occasions in 2012, 2013, and 2014, all before it was even granted the power of attorney necessary to grant itself any interest in the Appiah Loan;
>
> c. Falsely claiming that it was authorized to accept payments on the Appiah Loan between August 20, 2010 and the present, when it had never actually been assigned any interest in the Appiah Loan during those times;
>
> d. Falsely claiming that it had the authority to foreclose on the mortgage on the Property when it had no appropriate interest in that mortgage in 2012, 2013, and 2014, in order to coerce Defendants into signing illusory 'modification agreements' with UPB;
>
> e. Falsely claiming that it had purchased insurance or intended to continue paying for insurance on the Property in order to take a payment from Defendants, intending to cancel the insurance never intending to return the funds;

f. Falsely claiming that it had rights and responsibilities under the original Appiah Loan documents in order to induce Defendants to believe that UPB could and would be required to disburse sufficient funds in a timely manner in order to complete construction, knowing that UPB would not disburse funds quickly enough to allow completion of construction under the short timelines it created in its void 'modifications;' and,

g. Falsely claiming that it would timely make payments of funds from the loan while intentionally acting in a dilatory fashion that prevented the completion of the rehabilitation of the Property."

¶ 19 On January 17, 2017, UPB filed a combined motion to dismiss defendants' amended counterclaim pursuant to section 2-619.1of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). Pursuant to section 2-619 of the Code, UPB argued that an affirmative matter defeated the amended counterclaim because defendants waived and released any and all claims against UPB in the five modification agreements that defendants entered. The motion also noted that although the crux of defendants' fraud claims was that UPB did not have the right to administer the loan, the assignment showed that the FDIC assigned the loan to UPB on August 20, 2010, even though the contract was not executed until August 11, 2015. UPB's motion to dismiss further contended that defendants' counterclaims for fraud and breach of contract were barred by the Illinois Credit Agreements Act because there were no written agreements between the parties that required UPB to take the actions that defendants claimed they were required to take. Pursuant to section 2-615 of the Code, UPB argued that defendants' counterclaims failed to plead sufficient facts for a common law fraud claim, that defendants' Consumer Fraud Act claim was not plead with the requisite specificity, and that defendants failed to state a claim for breach of contract.

¶ 20 On March 2, 2017, defendants filed their response to the motion to dismiss, asserting that the language of the waiver and release provision was not sufficient to require dismissal because defendants' claim that they were fraudulently induced into entering the modification raises genuine questions of fact. Defendants also asserted that the assignment did not definitively defeat their fraud claims because it had a back-dated effective date, which raised more questions. Further, defendants argued that their claims were not definitively barred by the Illinois Credit Agreements Act. Defendants also contended that they sufficiently pled claims for common law fraud, a violation of the Consumer Fraud Act, and breach of contract.

¶ 21 On April 3, 2017, UPB filed its reply, emphasizing that defendants can neither refute that the loan was assigned on August 20, 2010, nor avoid the effect of the waiver and release in the five separate modifications. UPB also reiterated that even if the waiver and release was not applied, other affirmative matter defeated the amended counterclaim.

¶ 22 On March 10, 2017, while its motion to dismiss defendants' amended counterclaim was still being briefed, UPB filed a motion for summary judgment, arguing that defendants failed to raise a genuine issue of material fact. Specifically, UPB pointed to defendants' answer, which contained general denials regarding the amounts disbursed under the loan, the amounts due, and their default. UPB argued that defendants failed to submit any evidence in support of these general denials that would defeat UPB's claims. UPB's motion sought judgment in the amount of $147,520.46 plus attorney fees and costs, itemized as follows:

"Principal Outstanding	$10,048.47
Interest to February 15, 2017	$6,339.12
SBA Funds	$105,263.39
Other Charges and Fees	$25,691.08

Escrow C/O	$50.00
Projected Escrow Reserves	$128.40
Total Payoff	$147,520.46" (Emphasis in original.)

The motion also stated that a $1.72 *per diem* interest rate applied per the loan contract.

¶ 23 To support its contentions, UPB attached a "prove-up affidavit" from James McCartney, UPB's director of credit policy and risk management. McCartney's affidavit stated that the loan at issue had been in default since October 31, 2014, due to defendants' failure to provide UPB with a certificate of occupancy and evidence that they were operating a business at the property. McCartney also attested that he had personally examined the records and files related to this loan and that the report of the loan's payment history that was attached to his affidavit was true and correct. Further, McCartney's affidavit stated that the amounts due and owing that were reflected in the motion for summary judgment were accurate as of February 15, 2017.

¶ 24 Also attached to UPB's motion for summary judgment was UPB's petition for attorney fees and court costs, which stated that from March 21, 2011, through March 2, 2017, UPB had incurred $59,530 in attorney fees and $2,377.34 in costs.

¶ 25 On May 23, 2017, defendants responded that the motion for summary judgment was premature and asked for further discovery. In the alternative, defendants argued that in light of the back-dated assignment, a question of fact regarding UPB's standing existed.

¶ 26 On June 7, 2017, the court entered an order that granted UPB's motion to dismiss defendants' amended counterclaim pursuant to section 2-619, finding that "waivers in modification were valid and enforceable."

¶ 27 On July 7, 2017, UPB filed its reply in support of its motion for summary judgment, asserting that no issues of fact remained regarding UPB's standing because the court had already

dismissed defendants' counterclaims. Further, UPB reiterated that any supposed oral agreement between the parties was barred by the Illinois Credit Agreements Act.

¶ 28 On September 19, 2017, the court ordered that all outstanding written discovery must be completed by October 17, 2017, and allowed the parties to conduct further briefing thereafter.

¶ 29 Defendants filed an additional response to UPB's motion for summary judgment on December 18, 2017, arguing that UPB's actions rendered it impossible to provide a certificate of occupancy by October 31, 2014, and contending that UPB's complaint was based on claims that were not its to assert and the doctrine of subrogation should apply. Namely, defendants argued that UPB made clear that the U.S. Small Business Administration (SBA) had purchased its guaranteed share of the loan and UPB had received $105,263.39 from the SBA, leaving only $10,048.47 as claimed principal. Defendants pointed out that UPB's amended complaint did not mention the SBA or the amount it received from the SBA, and did not assert that UPB was attempting to recover funds on behalf of the SBA. Defendants argued that UPB had not shown that it was authorized to litigate on behalf of the SBA and had not set forth any right to seek damages on behalf of the SBA. Further, defendants attacked the affidavit that was attached to UPB's motion for summary judgment as conclusory.

¶ 30 On February 20, 2018, UPB filed its sur-reply in support of its motion for summary judgment, contending that the affirmative defense of impossibility was not properly raised in response to its motion, and would not apply even it was properly raised because "delayed disbursements, assessment of fees and principal payments, and cancellation of a force-placed insurance policy would not render completion of construction at the property objectively impossible." Further, UPB asserted that the doctrine of subrogation is not an affirmative defense that can be raised by a party accused of wrongdoing, but is instead a right that may be asserted

by a party that has paid its debt in full. UPB argued that defendants provided no support for their contention that an injured party cannot bring a claim on their own behalf after they have been reimbursed for their damages by a third party. UPB was still owed money on the note and Illinois law is clear that no right of subrogation exists unless the debt to be subrogated has been paid in full. Further, UPB again argued that it may enforce the note as its holder, and that its affidavit was sufficient.

¶ 31 On April 17, 2018, the court heard argument on UPB's motion for summary judgment and entered an order that stated:

> "[T]he [d]efendants have not raised a genuine issue of material fact except possibly in their assertion that the SBA will also have the ability to collect any amounts due on the loan in this case from defendants. Therefore, the court is entering and continuing the motion for judgment to allow for [UPB] to file information concerning the agreement between UPB and the SBA regarding enforcement of the loan ***."

¶ 32 On June 8, 2018, UPB filed a supplemental memorandum of law in further support of its motion for summary judgment, stating that "[a]t the hearing on the fully-briefed Motion for Summary Judgment, [d]efendants twisted their argument regarding subrogation into a fear that the SBA will attempt to double collect the [n]ote." UPB pointed out, again, that as the holder of the note, it had the authority to enforce it. UPB refuted defendants' contention that the SBA was a necessary party by pointing out that UPB had a duty to the SBA to pursue recovery of the amounts due on the loan. Further, UPB provided evidence that the SBA was aware of this litigation and could not double collect amounts due under the note and guarantee because only the holder of a note may enforce it and a note may only be held by one person at a time.

¶ 33 Defendants responded to UPB's supplemental memorandum on July 6, 2018, asserting that UPB had been paid most of the money it claimed it was owed, and that "it has utterly failed to show by admissible evidence that it is authorized to pursue this litigation, and it cannot be entitled to payment of the sums it claims."

¶ 34 On August 9, 2018, the court granted UPB's motion for summary judgment and entered judgment in favor of UPB and against DKY and Appiah in the amount of $234,077.76. The court's order also stated, "[S]hould the SBA attempt to collect more than the judgment amount herein relative to the note and guarantee at issue in this case, [UPB] will hold the defendants harmless."

¶ 35 On September 6, 2018, defendants filed their timely notice of appeal from the court's June 7, 2017, order dismissing their counterclaims and the court's August 9, 2018, order granting summary judgment in UPB's favor.

¶ 36 ANALYSIS

¶ 37 On appeal, defendants argue that the trial court erred when it granted UPB's motion to dismiss their counterclaims and granted summary judgment in favor of UPB. We find that the trial court's decisions on those motions were proper. We address each motion in turn.

¶ 38 Dismissal of Defendants' Amended Counterclaim

¶ 39 Defendants argue that the trial court erred in dismissing their counterclaims pursuant to section 2-619 of the Code because the court was required to take the allegations of the amended counterclaim in a light most favorable to defendants and the issue of a waiver and release of claims is not appropriately determined on a motion to dismiss.

¶ 40 The purpose of a section 2-619 motion to dismiss is to resolve issues of law and issues of fact that are easy to prove at the outset of litigation. *Van Meter v. Darian Park District*, 207 Ill.

2d 359, 367 (2003). "A motion to dismiss under section 2-619 *** admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim." *RBS Citizens National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 186 (2011). We review *de novo* an order granting a section 2-619 motion to dismiss. *Id.* "*De novo* consideration means we perform the same analysis that a trial judge would perform." *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 57.

¶ 41 In its June 7, 2017, order, the trial court dismissed defendants' amended counterclaim because the "waivers in modification were valid and enforceable." Defendants argue that dismissal was not proper because their amended counterclaim alleged fraud in the inducement and genuine issues of fact concerning fraud in the inducement exist. UPB ultimately asserts that dismissal was appropriate because the release in the fourth loan modification was not procured by fraud in the inducement. UPB explains that no fraud occurred because at all times relevant it owned the loan and had authority to administer it. Specifically, UPB points out that the transaction between the FDIC and UPB was governed by the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) (12 U.S.C. § 1821(d)(2)(G)(i)(II)), which allowed the FDIC to transfer the loan to UPB without an assignment or additional documentation. UPB also asserts that Illinois law requires that the effective date of the assignment contract controls over the execution date. We agree with all of the foregoing assertions by UPB and affirm the trial court's decision to dismiss defendants' amended counterclaim.

¶ 42 Our supreme court has recognized that "FIRREA is far from being a straightforward and simplistic statute," and has instead labeled it "a veritable Escher print set to words, complete with waterfalls that flow backwards." *Armstrong v. Resolution Trust Corp.*, 157 Ill. 2d 49, 56-57

(1993). Section 1821(d)(2)(G)(ii)(II) of FIRREA provides that the FDIC, as receiver, may "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II).

¶ 43 In this case, ShoreBank originally made the loan at issue to DKY, secured by a note signed by DKY and an unconditional guarantee signed by Appiah. ShoreBank was subsequently closed by the FDIC on August 20, 2010, and the FDIC was appointed as receiver thereof, which allowed it to succeed to all rights, titles, powers, and privileges of ShoreBank. 12 U.S.C. § 1821 (c)(3)(A). The FDIC then transferred ShoreBank's assets, including the loan at issue, to UPB. This transfer was memorialized in the PAA between the FDIC and UPB.

¶ 44 As a brief aside, we note that in its response brief, UPB provided the link[2] at which the PAA may be accessed. We may take judicial notice of the PAA because it is a public record. See *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 31. Further, it is well-settled that this court may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy. *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726 (2009). In defendants' reply brief, they assert that "neither the trial court nor [d]efendants were even privy to the [PAA] ***" because the link presented to the trial court in UPB's motion to dismiss contained underscores when it should have contained dashes. We find defendants' argument to be of little consequence because the appellate court may take judicial notice of public records regardless of whether the records were before the trial court. *Country Cos. v. Universal Underwriters Insurance Co.*, 343 Ill. App. 3d 224, 229 (2003). Further, defendants' suggestion

[2] The PAA between the FDIC and UPB, dated August 20, 2010, may be accessed at: https://www.fdic.gov/bank/individual/failed/shorebank-p-and-a.pdf (last visited July 23, 2019) [https://perma.cc/5Z28-76U5].

that the trial court was unable to access the PAA is based on pure speculation. As such, we take judicial notice of the PAA.

¶ 45 Defendants contend that the PAA is merely evidence of an agreement to purchase and that it was the assignment executed on August 11, 2015, that actually transferred ownership of defendants' loan to UPB on that date. In its response brief, UPB points to the explicit language of FIRREA that allows the FDIC to transfer a bank's assets "without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. § 1821(d)(2)(G)(i)(II). In their reply, defendants contend that FIRREA merely grants the FDIC the "power" to transfer assets and that "something must evidence the use of that power." However, defendants provide no citation to relevant authority supporting such a contention and merely provide a citation to *Alabama Department of Revenue v. FDIC*, 840 F. Supp. 2d 1305 (M.D. Ala. 2012), a federal case from Alabama that supports the generic proposition that the express terms of a purchase and assumption agreement govern what assets and liabilities a purchasing bank has taken from the FDIC. Defendants fail to fully address FIRREA's impact on this case and have not advanced any persuasive reason why FIRREA would not apply here. Ultimately, we find UPB's position on this point convincing and hold that FIRREA governs. As a result, the FDIC, as receiver for ShoreBank, effectively transferred all assets of ShoreBank, including defendants' loan, to UPB on August 20, 2010, through the PAA and UPB became the owner of the loan on August 20, 2010, as a matter of law.

¶ 46 Even if defendants could avoid application of FIRREA, their argument that ownership of their loan was not transferred until execution of the assignment on August 11, 2015, lacks merit because Illinois law recognizes that the effective date of a contract may control over the date of execution. In *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL

App (1st) 101226, ¶ 62, this court held that the trial court's finding that the date of a contract's execution was the effective date was "incorrect." The court relied on "the long-standing observation of our courts that the date of execution of a contract is not necessarily the date of the contract." *Id.* The court also acknowledged the "elementary" principle that "ordinarily a contract speaks from the day of its date, regardless when it was executed and delivered." (Internal quotation marks omitted.) *Id.* (quoting *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1009 (2010)); see also *C.O.A.L., Inc. v. Dana Hotel, LLC*, 2017 IL App (1st) 161048, ¶ 59. Of particular relevance to the instant case, the court in *Asset Recovery* also noted, "Illinois courts have permitted the 'relation back' theory of contract effectiveness: 'that is, contractual terms may be effective for a period before the contract is executed, so long as such coverage is clear from the face of the contract.' " *Id.* (quoting *Grubb & Ellis Co. v. Bradley Real Estate Trust*, 909 F. 2d 1050, 1054 (7th Cir. 1990)).

¶ 47 In this case, the assignment clearly provided that the terms therein were to be effective as of August 20, 2010. The assignment stated that pursuant to the PAA dated August 20, 2010, the FDIC assigned to UPB all of its right, title, and interest to the July 28, 2010, mortgage executed by DKY in favor of ShoreBank; the July 28, 2010, assignment of rents executed by DKY in favor of ShoreBank; the July 28, 2010, note executed by DKY in favor of ShoreBank; and the July 28, 2010, unconditional guarantee executed by Appiah in favor of ShoreBank. The assignment was signed by the attorney-in-fact for the FDIC and stated that it was, "Dated this 11th day of August, 2015 and effective as of August 20, 2010." Because the assignment explicitly stated that its effective date was earlier than its date of execution, and thus UPB was the owner of the note and guarantee as of August 20, 2010, we find that there is no question of

fact about whether UPB had the authority to service and administer the loan during the time period at issue.

¶ 48 Having found that ownership of defendants' loan, *i.e.* DKY's note and Appiah's guarantee, was transferred to UPB on August 20, 2010, we turn to defendants' primary contention regarding dismissal of their counterclaims—that the waiver and release provision contained in the loan modifications, specifically, the fourth loan modification, should not bar their claims because genuine issues of fact concerning potential fraud in the inducement exist. Namely, defendants argue that they have raised issues surrounding fraudulent statements and inaccurate representations.

¶ 49 In *C.O.A.L., Inc.*, this court set forth the general law regarding releases as follows:

> "A release is the abandonment of a claim to the person against whom the claim exists. [Citation.] It is a contract and is therefore governed by contract law. [Citation.] The rights of the parties are limited to terms expressed in the agreement. [Citation.] Where a release is clear and explicit, the court must enforce it as written. [Citation.] However, releases are strictly construed against the benefitting party and must spell out the intention of the parties with great particularity. [Citation.]" (Internal quotation marks omitted.) 2017 IL App (1st) 161048, ¶ 67.

¶ 50 In this case, the fourth loan modification, which was in effect at the time defendants defaulted on the loan, contained a waiver and release provision that stated that DKY and Appiah "have no defenses, setoffs, claims or counterclaims of any kind or nature whatsoever against Lender in connection with the Loan Documents or any extensions, amendments, or modifications thereof or any action taken or not taken by Lender with respect thereto." We find this language to be clear and explicit. Construing this provision against UPB, as we are required to do, we

further find that the parties' intentions were spelled out with sufficient particularity. The waiver and release provision at issue was clearly labeled as such. It also contained a list of exactly what defendants were releasing by signing the fourth loan modification—*i.e.* defenses, setoffs, claims, or counterclaims of any kind. Further, there is no question that both DKY and Appiah signed the fourth loan modification containing the release. By signing the fourth loan modification, defendants explicitly agreed that they did not have any counterclaims against defendant. Additionally, another clause in the waiver and release provision stated that DKY and Appiah "hereby release and forever discharge [UPB], its affiliates and each of their officers, agents, employees, attorneys, insurers, successors and assigns *** from and against any and all liabilities, rights, potential claims, losses, expenses or causes of action, known or unknown, for which [DKY and Appiah] had, now have, or may hereinafter acquire." This language could not be clearer. Thus, we find that defendants released UPB from any potential liability when they signed the fourth loan modification.

¶ 51 Once it has been established that a release exists, the party opposing its use bears the burden of attacking its validity. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110, 116 (2010). "A release or exculpatory agreement can be set aside if there is *** fraud in the inducement." *Id.* at 117. "[F]raud in the inducement occurs when the party is induced to enter into the release by false representations by the other party." *Id.*

¶ 52 Defendants only point to one case, *Janowiak*, 402 Ill. App. 3d 997, to support their position that their amended counterclaim should not have been dismissed because it contained numerous allegations of fraudulent statements and inaccurate representations by UPB in obtaining the loan modifications. In *Janowiak*, the plaintiff alleged that the defendant breached his fiduciary duty to the plaintiff as trustee of an irrevocable family trust when he failed to

disclose material information regarding the true value of shares owned in the family business and when he secured the plaintiff's release of his fiduciary duties. *Id.* at 999. The defendant was the plaintiff's father's attorney for estate planning and was the trustee of an irrevocable trust of which the plaintiff was a beneficiary. *Id.* The plaintiff alleged that his father and brother were involved in a scheme to defraud the plaintiff of his interest in the company and when the plaintiff contacted the defendant to ascertain the value of his shares, the defendant refused to provide such information. *Id.* at 999-1000. Additionally, the defendant resigned as trustee and requested that the plaintiff sign a document that appointed the plaintiff as successor trustee and released the defendant from any liability. *Id.* at 1000. The plaintiff's complaint alleged that the defendant resigned in a letter dated December 8, 2004, and that the defendant sought the release on January 17, 2005. The plaintiff also alleged that although he signed the release after this date, the defendant inserted an effective date of December 31, 2004. *Id.* at 1001. The trial court granted the defendant's motion to dismiss, finding that because the defendant had resigned, he did not owe the plaintiff any fiduciary duty regarding the release on the date it was signed. *Id.*

¶ 53 On appeal, this court reversed the trial court's dismissal, finding that "the precise date the release was drafted and/or negotiated remains in dispute" and that issue was neither resolved nor forfeited in the circuit court. *Id.* at 1002. This court further determined that the remaining concerns in the case were replete with genuine issues of material fact, such as the identity of the party who inserted the date on the release. *Id.* at 1003. As to the issue of fraud in the inducement, the court acknowledged that "[i]n order to constitute fraud in the inducement, the defendant must have made a false representation of a material fact knowing or believing it to be false and doing it for the purpose of inducing the plaintiff to act." *Id.* at 1006. The court also recognized that "[i]n order to prove fraud by the intentional concealment of a material fact, it is

necessary to show the existence of a special or fiduciary relationship." (Internal quotation marks omitted.) *Id.* The defendant argued that because he had already resigned at the time he presented the plaintiff with the release, he did not have a fiduciary duty. *Id.* at 1007. The plaintiff responded that where material information is withheld, and a transaction begins prior to the fiduciary's resignation but concludes after the resignation, the fiduciary may still be liable. *Id.* The court ultimately determined that the plaintiff's complaint and his affidavits created genuine questions of material fact and that "because of all the disputed fact issues concerning the release and defendant's alleged commission of fraud and breach of his fiduciary duties in obtaining the release, dismissal on the basis of the release was improper." *Id.* at 1013.

¶ 54 The court summarized its holding as follows:

> "In sum, we hold that there are numerous genuine issues of material fact concerning the drafting and negotiation of the release and its effective date which should have prevented dismissal on the basis of the release. Further, plaintiff has sufficiently stated genuine issues of material fact that may serve to vitiate the release in this case, including fraudulent concealment, fraud in the inducement, and failure to give a full and frank disclosure by a fiduciary. We additionally determine that because the language of the release is broad and general, it may not contemplate release of breach of fiduciary and fraud claims. Even if the release was not a general release, plaintiff has alleged he did not intend to release breach of fiduciary duties and fraud claims thereby creating an additional factual issue. Thus, plaintiff's claims may not be barred by the release given the genuine issues of material fact we have discussed. ***" *Id.* at 1017.

¶ 55 This case differs from *Janowiak* in numerous ways. The genuine issues of material fact that existed in that case are simply not present here. There is no question regarding when the

parties entered the fourth loan modification containing the waiver and release provision. Additionally, defendants' amended counterclaim reflected that from January through April 2013, they had encountered numerous issues or disputes with UPB and that "Appiah hired counsel, who negotiated with UPB's counsel to attempt to clear up the numerous problems with the loan." The amended counterclaim also alleged that in April 2013, "the parties exchanged edited modifications." Thus, Appiah had consulted with counsel prior to entering into the first modification in May 2013. She also had ample time to consider the provisions of the fourth loan modification (and the numerous preceding modifications) prior to signing it in July 2014. See *Colagrossi v. Royal Bank of Scotland*, 2016 IL App (1st) 142216, ¶ 46 (finding that the defense of fraud in the inducement was not available to the plaintiff who "had ample opportunity to consider the terms set forth in the employment letter sent in July and consulted with an attorney before he signed it in October").

¶ 56 Also unlike *Janowiak*, the waiver and release provision before us is explicit and specifically stated that defendants were releasing their right to bring any counterclaims against UPB. There is also no factual question regarding a possible breach of fiduciary duty as there was in *Janowiak*. Significantly, there was no affidavit presented in response to the motion to dismiss from either DKY or Appiah that substantiates defendants' allegations and creates a material issue of fact. Defendants assert that they have sufficiently raised an issue of material fact through their amended counterclaim's allegations that UPB made fraudulent statements and inaccurate representations. However, a closer look reveals that those allegations all stem from the presumption that UPB was not the proper party to service and administer the loan, which we have already found to be inaccurate. Defendants make blanket assertions—*i.e.*, UPB took no action related to the loan other than to demand payment for almost a year, UPB withheld

payment on the loan that it should have made if it were truly administering the loan, UPB acted in myriad ways to create the appearance the loan was in default and required modification—and fail to explain how any of these allegations amount to a false representation of a material fact that UPB knew or believed to be false that was made to induce the plaintiff to act. The crux of defendants' fraud allegations is that UPB "acted" as if it were the owner and appropriate party to administer the loan. Having already determined that UPB was, in fact, the owner of the loan as of August 20, 2010, and was able to administer it as of that date, no genuine issue of material fact exists and defendants' fraud allegations fail to vitiate the release.

¶ 57 Defendants similarly rely on a single case, *Carlile v. Snap-On Tools*, 271 Ill. App. 3d 833 (1995), to support their argument that their economic duress raised additional issues of fact that should have prevented dismissal based on a release. In *Carlile*, the plaintiff sought to become a dealer of the defendant's tools. *Id.* at 834. The plaintiff alleged a fraudulent scheme that included the defendant's policy to recruit new auto parts dealers by misrepresenting income potential, anticipated size of the sales territory, and that any investment was risk-free. *Id.* at 837. The plaintiff also alleged the defendant concealed information regarding other dealers' failures, that defendant's managers were instructed to overstate profits and tell failing dealers that they were isolated and must not have been cut out for the business, and that managers were instructed to tell dealers that if they did not sign a termination agreement that included a release, they would not be paid for returned inventory, even though a specific buy-back clause applied. *Id.* at 837-38.

¶ 58 On appeal from a grant of summary judgment, this court found that a genuine issue of material fact existed regarding whether the plaintiff was subjected to economic duress when he

signed the release. The court explained the law applicable to claims of economic duress as follows:

> "Economic duress is present where one is induced by a wrongful act of another to make a contract under circumstances depriving him of the exercise of free will. [Citation.] Acts or threats cannot constitute duress unless they are wrongful, but the term 'wrongful' extends to acts that are wrongful in a moral sense, as well as acts which are criminal, tortious, or in violation of contract duty. [Citation.] Duress cannot be predicated upon a demand which is lawful or upon one's doing or threatening to do that which one has a legal right to do, such as filing a justifiable statutory lien. [Citation.] Nor does the defense of duress exist where consent to an agreement is secured because of mere hard bargaining or the pressure of financial circumstances. Rather, the conduct of the party obtaining the advantage must be manifestly tainted with some degree of fraud or wrongdoing in order to invalidate an agreement on the basis of duress. [Citation.]" *Id.* at 840.

¶ 59 In this case, defendants have failed to create a material issue of fact regarding economic duress. Defendants' allegations on this point also stem from the idea that UPB did not have the right to service or administer their loan prior to 2015. However, UPB was the owner of the loan and was able to administer it during all relevant time periods after August 20, 2010. The demands made by UPB were pursuant to its lawful right to administer the loan and thus cannot form the basis for duress. *Id.* at 840. Further, as already stated, defendants were able to consult with counsel, and have not alleged that they were unaware that they were signing a release or that they were unaware of any claims they may have had against UPB at the time they signed the fourth loan modification. "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." *Id.* at 842. Similarly, "where a plaintiff is aware of the claims he has waived and has had an opportunity to consult with an attorney, it is easier to rebut claims of economic duress." *Id.* The disputes between the parties were well-known and ongoing at the time. Yet, even with knowledge of then-current and potential future disputes, defendant entered into the fourth loan modification and released any counterclaims against UPB.

¶ 60 Based on the foregoing, we find that the trial court properly granted UPB's motion to dismiss pursuant to section 2-619 based on the valid and enforceable waiver and release provision contained in the fourth loan modification. Because we have found that the trial court's decision to dismiss defendants' amended counterclaim was proper based on the waiver and release provision, we need not address defendants' additional contentions on this issue.

¶ 61 Grant of Summary Judgment in Favor of UBP

¶ 62 Defendants contend that summary judgment was not proper because significant issues of material fact remained. We disagree. "[S]ummary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2014)). The court is required to strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally in favor of the opposing party. *Id.* When examining an appeal from a summary judgment ruling, we conduct a *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 63 The crux of defendants' argument on this issue is that "summary judgment [was] most problematic considering the dismissal of [d]efendants' counterclaims" because if the

counterclaims were allowed to proceed, "they could have established either that UPB had no right to bring its claims or at least the kind of setoff that would have defeated UPB's claims entirely." In their reply brief, defendants acknowledge that if we determine that the amended counterclaim was appropriately dismissed, then "the argument for a setoff or lack of right based on the allegations of the counterclaim would not apply and the argument fails." Because we have already found that dismissal of defendant's amended counterclaim was proper, we need not address defendants' contentions that are based on the success of its amended counterclaim.

¶ 64 Instead, we turn to defendants' only remaining contention—that summary judgment was improper because the SBA was a necessary party to this litigation. "A necessary party is 'an individual or entity having a present, substantial interest in the matter being litigated, and in whose absence a complete resolution of a matter in controversy cannot be achieved without affecting that interest.' " *City of Elgin v. Arch Insurance Co.*, 2015 IL App (2d) 150013, ¶ 34. A necessary party's interest must be present and substantial rather than a mere expectance or future contingency. *Id.* "A party is necessary if its participation 'is required to (1) protect its interest in the subject matter of the controversy which would be materially affected by a judgment entered in its absence; (2) reach a decision protecting the interests of the parties already before the court; or (3) allow the court to completely resolve the controversy.' " *Id.*

¶ 65 Defendants contend that the SBA was a necessary party and that no judgment should have issued without it being named a party to this litigation. Defendants point out that an exhibit to McCartney's affidavit, which was attached to UPB's motion for summary judgment, reflected that UPB received $105,263.39 in guarantee funds from the SBA on November 13, 2015, leaving only $10,048.47 as claimed principal. In response to UPB's motion for summary judgment, defendants argued that although they disagreed that payment was due to UPB, "the SBA has

made the payment under its guarantee, and it is the SBA who has had the right, since November of 2015, to press claims for most of the principal claimed in this matter." Defendants further asserted that "[t]he SBA has stepped into the shoes of UPB under the doctrine of subrogation, and UPB had no place in bringing that claim when it filed its amended complaint." However, on appeal, defendants have abandoned use of the term "subrogation" and any argument related thereto, and instead rely on *Klehm v. Grecian Chalet, Ltd.*, 164 Ill. App. 3d 610 (1993), to support their position that the SBA was a necessary party.

¶ 66 *Klehm* involved a counterclaim brought by a bank to foreclose three mortgages that secured commercial loans. *Id.* at 612. After the debtors fell behind on payments for the first two mortgages, the bank agreed to issue a third loan pursuant to a third mortgage contingent upon approval from the SBA. *Id.* at 613. The SBA agreed to guarantee 87% of the loan and issued a loan authorization. *Id.* The trial court denied the bank its right to foreclose on the third mortgage, finding that the SBA authorization was a contract that the bank was required to strictly follow and accepting the debtors' argument that the bank had breached that authorization. *Id.* at 620. On appeal, the debtors argued that the SBA was a necessary party to the action because "a court order satisfying the claims of the [b]ank, without jurisdiction over the SBA, would subject them to a second action brought by the SBA to protect its security interest. *Id.* at 619. Although the court agreed that "the SBA has a protectable interest in this action and is, therefore, a necessary party," it ultimately reversed the trial court's decision denying the bank its right to foreclose on the third mortgage. *Id.* at 619-20. The court's holding was based on its finding that "[t]he documentary evidence provided in the record clearly establishes that the SBA consented to this suit ***." *Id.*

¶ 67 UPB asserts that it is like the bank in *Klehm* because it, too, presented evidence that the SBA consented to this action. Further, UPB argues that the SBA's payment of its guarantee on defendants' loan evidences UPB's satisfactory performance of the contractual terms between it and the SBA. We agree with UPB's position. Here, in UPB's supplemental memorandum in support of its motion for summary judgment, UPB attached documents indicating that the SBA was aware of this litigation and consented thereto. UPB attached a document titled "2-Year Liquidation Rule Extension Request," which apprised the SBA of the current status of this litigation and reflected that UPB was still in the process of obtaining a judgment against defendants. The extension request reflected that UPB was seeking an 11-month extension and expected litigation to be complete by December 31, 2018. Also attached to its supplemental memorandum was an email from an SBA representative to UPB, stating that the extension request was received and that the SBA "concur[red] with your request to extend active liquidation/litigation on this loan until 01/01/19."

¶ 68 We find that this documentation sufficiently supports UPB's contention that the SBA was fully aware of this litigation and consented to it, just as it did in *Klehm*. Also similar to that case, we find that the SBA's payment of its guarantee is evidence of its satisfaction with UPB's performance. Section 120.520(b) of Title 13 of the Code of Federal Regulations states that the "SBA will not purchase its guaranteed portion of a loan from a Lender unless the Lender has submitted to SBA documentation that SBA deems sufficient to allow SBA to determine whether purchase of the guarantee is warranted under § 120.524." 13 C.F.R. § 120.520(b) (2007). Here, it is not disputed that the SBA purchased its guaranteed portion of defendants' loan. As a result, we find that no genuine issue of material fact existed regarding the SBA as a necessary party to this suit.

¶ 69 As a final matter, we note defendants' concern that not having the SBA named as a party to this suit might subject them to collection efforts by the SBA in the future, but reiterate that the trial court's August 9, 2018, order, which we affirm in its entirety, stated that "should the SBA attempt to collect more than the judgment amount herein relative to the note and guarantee at issue in this case, [UPB] will hold the defendants harmless."

¶ 70 In sum, we find that no genuine issues of material fact exist in this case. Defendants have not argued that they did not default on the loan or that they have fully paid the amount owed. It is undisputed that defendants failed to present to UPB either a certificate of occupancy from the City of Chicago by October 31, 2014, or evidence that DKY was operating its business in the property as of that date—both of which were required by the fourth loan modification. Defendants are essentially asking this court to reverse summary judgment based on their contention that the SBA is a necessary party to every action involving a loan it guaranteed, regardless of whether the SBA has consented to the litigation. They have not presented any case law that supports that request and we decline to make such a holding for the first time here. Further, UPB makes the well-received argument that "[a]ny suggestion that an obligor should reap the benefit from a guarantee payment, triggered by the borrower's own admitted default is not logical and not supported by law." As a result, we find that summary judgment was properly granted in favor of UPB and affirm.

¶ 71 CONCLUSION

¶ 72 Based on the foregoing, we affirm the trial court's orders that granted UPB's motion to dismiss defendants' amended counterclaim and granted UPB's motion for summary judgment.

¶ 73 Affirmed.