2012 IL App (2d) 100590-U
No. 2-10-0590
Order filed February 2, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MIDWEST BANK & TRUST CO.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CH-1347
	)	
PAUL H. SCHWENDENER, INC., MICHAEL S. SCHWENDENER, CHICAGO TITLE LAND TRUST CO., successor trustee to American National Bank & Trust Co. u/t/a No. 56372 dated November 18, 1992, CHICAGO TITLE AND TRUST CO., as trustee of Trust Deed dated December 30, 1991, UNKNOWN OWNERS and NON-RECORD CLAIMANTS,	)	Honorable
	)	Bonnie M. Wheaton,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: (1) Defendant's affirmative defense of unclean hands was properly dismissed, as the alleged misconduct that formed the basis of the defense was unconnected with the matter in litigation; (2) counterclaims of fraud can be, and were, waived; (3) counterclaim of fraud under Consumer Fraud and Deceptive Business Practices Act cannot be waived; however, defendant counterplaintiff failed to properly plead a cause of action under the Act, and dismissal on that ground was appropriate; (4) issue

of leave to file an amended defense and counterclaim is forfeited by failure to seek leave in the trial court.

¶ 1 Defendant, Michael Schwendener[1], appeals from the trial court's order dismissing with prejudice his affirmative defense of unclean hands and his various counterclaims. We affirm.

¶ 2 I. BACKGROUND

¶ 3 In 2000, defendant, Paul H. Schwendener, Inc. (PHS), borrowed $10,000,000 from plaintiff, Midwest Bank & Trust Company.[2] The loan was evidenced by a promissory note dated December 27, 2000. In addition, Michael, president of PHS executed a guaranty, which stated in relevant part:

> "CONTINUING UNLIMITED GUARANTY. For good and valuable consideration, Michael S. Schwendener ('Guarantor') absolutely and unconditionally guarantees and promises to pay to Midwest Bank ('Lender') or its order, in legal tender *** the indebtedness of Paul H. Schwendener, Inc., ('Borrower') to Lender on the terms and conditions set forth in the guaranty. Under this Guaranty, the liability of Guarantor is unlimited and the obligations of Guarantor are continuing."

Further, Michael agreed to waive "any and all rights or defenses" and "any defenses given to guarantors at law or in equity other than the actual payment and performance of the Indebtedness." The waiver was made "with Guarantor's full knowledge of its significance and consequences," and Michael agreed that, under the circumstances, the waiver was "reasonable and not contrary to public policy or law."

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[1] Michael Schwendener is the only appellant in this case; no other defendant is party to this appeal.

[2] Firstmerit Bank, N.A. is now the successor-in-interest to Midwest Bank; however, we will continue to refer to plaintiff as Midwest.

¶ 4 Over the next several years, both PHS and Michael entered into a series of transactions with Midwest, including a 2002 mortgage, a 2004 line of credit, a 2006 loan, and a 2006 mortgage, which involved promissory notes totaling approximately $13,750,000. Other than the 2006 mortgage, all transactions were accompanied by a guaranty from Michael.

¶ 5 In the summer of 2006, PHS defaulted on its obligations under the 2000 note and the line of credit. In addition, Michael defaulted on his guaranties and his own notes. On June 26, 2006, Midwest, PHS and Michael entered into a Forbearance Agreement under which Midwest agreed to forbear the exercise of its rights under those credit agreements, and the indebtedness of PHS and Michael was restructured, consolidated, and cross-collateralized as part of the winding-up of PHS's operations. The Forbearance Agreement contained a clause that read in relevant part that Michael, as guarantor:

> "knowingly and voluntarily, unconditionally, irrevocably, absolutely, finally, and forever releases, acquits, and discharges the Lender *** from any claim relating in any manner whatsoever to any of the Loan Documents and/or the Borrower's credit relationship with the Lender. For this purpose, 'Claim' shall mean any and all claims, counterclaims, action or actions, cause or causes of action ***."

Michael also executed an Amended Credit Agreement regarding the 2000 and 2005 notes on June 26. Within this agreement, Michael acknowledged that "he has no defenses, claims or set-offs" to the enforcement of his guaranty, as amended by the amended credit agreement, and that "[a]ny claims, defenses or setoffs [*sic*] that exist despite the foregoing acknowledgement [*sic*] are irrevocably waived and released." Michael also executed, on behalf of PHS, an Amended and Restated note that amended and modified the 2004 note associated with the line of credit. Finally,

Michael executed an "Amendment to Loan Documents" that reaffirmed the guaranties of PHS's indebtedness to Midwest and the agreement that the 2002 and 2006 mortgages secured the guaranties. Both the Amended and Restated note and the Amendment to Loan Documents contained either an acknowledgment of a lack of defenses or an irrevocable waiver of claims, defenses, and setoffs.

¶ 6 About one week later, Midwest loaned PHS and Michael, as co-makers, approximately $3,000,000 (the "Wind Down Loan"), which was secured by the 2002 and 2006 mortgages. This was evidenced by a promissory note that stated, in part, that "EACH BORROWER HEREBY IRREVOCABLY WAIVES EVERY PRESENT DEFENSE, CAUSE OF ACTION, COUNTERCLAIM OR SETOFF WHICH BORROWER MAY NOW HAVE TO ANY ACTION BY LENDER IN ENFORCING THIS NOTE." Later, in November 2006, the parties cancelled the amended 2004 note associated with the line of credit and issued a new promissory note, in the amount of $1,000,000, corresponding to a letter of credit to CNA. This note, and defendant's guaranty, were secured by the 2002 and 2006 mortgages. At the same time, another promissory note corresponding to a letter of credit to Arch Insurance Company, in the amount of $150,000 and secured by the same mortgages, was issued.

¶ 7 The Amended Credit Agreement of June 26, 2006 and the "Wind Down" Loan matured on January 15, 2007, and neither PHS nor Michael paid the amounts due. The parties entered into another forbearance agreement dated February 27, 2007, which was to last until March 31, 2007. Neither PHS nor Michael made full payment by that date. Midwest filed a foreclosure case on May 30.[3]

[3]PHS subsequently filed for Chapter 11 bankruptcy on July 8, 2007.

¶ 8 In its fourth-amended complaint, Midwest sought to foreclose on the 2002 and 2006 mortgages and also alleged Michael breached the "Wind Down" note as well as 2000, 2004 and 2006 guaranties. In response, Michael filed his amended answer, amended affirmative defense of unclean hands, and a five-count counterclaim alleging: (1) violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*. (West 2006); (2) fraud; (3) fraudulent misrepresentation; (4) accounting; and (5) rescission. The affirmative defense and counterclaims involved allegations that Midwest required Michael and PHS to enter into a series of 15 short-term maturity "Round Trip" loans, some of which were executed contemporaneously with the subject loans of the fourth-amended complaint. These loans, executed between December 21, 1999, and March 30, 2006, were "to provide PHS, Inc. [with] working capital." However, according to Michael, Midwest "prohibited and prevented" PHS from using the funds from these "Round Trip" loans while still requiring repayment of the loans with interest and related costs that totaled approximately $283,000 for the 15 loans. Midwest required that he and PHS take out these loans "to fool its and other Board of Directors [*sic*], inside and outside auditors, prospective stock purchasers and Federal and State regulatory agencies of material facts," namely that the financial conditions of Midwest, Michael, and PHS "were better than they actually were," thereby violating various federal laws and regulations.

¶ 9 Midwest filed motions to dismiss the affirmative defense, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2006)) and the counterclaims, pursuant to a combined motion under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2006)). On May 13, 2010, the trial court granted Midwest's motion to dismiss the affirmative defense with prejudice. The court also dismissed the counterclaims with prejudice pursuant to section 2-619 of

the Code. In granting the motions to dismiss, the court stated that "it's the Court's duty to grant the motion to strike the affirmative defense and to dismiss the counterclaims since these are—have been released and they are not the subject of anything that is brought in the plaintiff's complaint." This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Michael first contends that the trial court erred in dismissing his defense of unclean hands. PHS's motion to dismiss was brought pursuant to section 2-615 of the Code, which admits all well-pleaded facts and challenges the legal sufficiency of a pleading. See *RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 186 (2011). We review an order granting such a motion *de novo*. *RBS Citizens, National Ass'n*, 407 Ill. App. 3d at 186.

¶ 12 Michael's amended affirmative defense of unclean hands was based on the 15 short-term maturity "Round Trip" loans that he and PHS had entered into with Midwest. These loans were executed between December 21, 1999, and March 30, 2006, and some were executed contemporaneously with loans that were the subject of Midwest's suit. However, none of the allegedly fraudulent "Round Trip" loans was the subject of Midwest's fourth-amended complaint.

¶ 13 The doctrine of unclean hands bars equitable relief where the party seeking relief is guilty of misconduct in connection with the subject matter of the litigation. *Thompson Learning, Inc. v. Olympia Properties, LLC*, 365 Ill. App. 3d 621, 634 (2006). This doctrine is intended to prevent a party from taking advantage of its own wrong. *Thompson Learning, Inc.*, 365 Ill. App. 3d at 634. It does not extend to any misconduct that is unconnected with the matter in litigation; even if a plaintiff's hands are dirty, its hands are "*as clean as the court can require*" if it is not guilty of

inequitable conduct in the transaction at issue. (Emphasis in original.) *Stein v. Bieber*, 342 Ill. App. 583, 591 (1951) quoting *Mills v. Susanka*, 394 Ill. 439, 445-46 (1946).

¶ 14 Michael argues that the "Round Trip" loans were "intertwined" and "inexorably interrelated" with the loans that are the subject of this case, such that the doctrine would apply to the transactions at issue here. We disagree. Each of the "Round Trip" loans was a discreet agreement, entered into and paid off according to its own terms. While the parties may have entered into these loans during the same period in which they entered into some of the guarantees and mortgages at issue here, the last of the "Round Trip" loans was paid off in April 2006, before Michael and PHS defaulted on their obligations and entered into the forbearance agreement with Midwest. The first forbearance agreement restructured, consolidated, and cross-collateralized the indebtedness of PHS and Michael. The Amended Credit Agreement, the "Wind Down" Loan, and the second forbearance agreement all followed later. We do not conclude that the "Round Trip" loans were so intertwined with the loans at issue that any alleged misconduct in those transactions can be considered as unclean hands here. Therefore, we find no error in the trial court's dismissal of the affirmative defense of unclean hands.

¶ 15 Michael next contends that the trial court erred in dismissing with prejudice his counterclaims. While Midwest brought a combined motion to dismiss the counterclaims under section 2-619.1 of the Act, the trial court only addressed the section 2-619 aspect of the motion. Midwest argued that the counterclaims should be dismissed pursuant to section 2-619(a)(6) of the Act, which provides for involuntary dismissal where "the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy." 735 ILCS 5/2-619(a)(6) (West 2006).

¶ 16 A section 2-619 motion admits the legal sufficiency of the complaint along with all well-pleaded facts and reasonable inferences that can be drawn from those facts. *Mutual Management Services, Inc. v. Swalve*, 2011 IL App (2d) 100778, ¶ 4. If the grounds for dismissal do not appear on the face of the pleading being attacked, an affidavit shall support the motion. *Mutual Management Services, Inc*., 2011 IL App (2d) 100778, ¶ 4. However, the trial court is not limited to consideration of only the pleading being attacked; the court may consider all the pleadings, affidavits, and deposition evidence. *Sharpenter v. Lynch*, 233 Ill. App. 3d 319, 323 (1992). In deciding a section 2-619 motion, a court is to interpret all pleadings in the light most favorable to the nonmoving party. *Mutual Management Services, Inc.*, 2011 IL App (2d) 100778, ¶ 4. This court reviews *de novo* a trial court's decision regarding a section 2-619 motion. *Mutual Management Services, Inc.*, 2011 IL App (2d) 100778, ¶ 4.

¶ 17 Michael first argues that the trial court should have denied the section 2-619 motion to dismiss because Midwest failed to attach to the motion an affidavit pursuant to Illinois Supreme Court Rule 191 (eff. July 1, 2002)) or certified documents supported by such an affidavit. We disagree. Michael has never disputed the existence of the releases contained in the various notes, credit agreements, guaranties, loan documents and agreements, in the trial court or here on appeal. In light of this, the filing of an affidavit attesting to the existence of the releases contained in those documents (all of which were attached to Midwest's verified fourth-amended complaint) would have been cumulative. See *Goldberg v. Michael*, 328 Ill. App. 3d 593, 598 (2002). We find no error in the lack of an attached affidavit.

¶ 18 Michael next argues that Midwest's motion to dismiss the counterclaims relies on "broad, general, boilerplate waiver provisions from the loan documents at issue"; citing to *Whalen v. K-Mart*

Corp., 166 Ill. App. 3d 339 (1988), Michael posits that Illinois law "does not favor" such provisions such that the waivers should not overcome his counterclaims. Michael's reliance on *Whalen* is misplaced and unconvincing. *Whalen* made no reference to favor or disfavor of "boilerplate" waiver provisions; it merely determined that, based on the facts of that case, a party's "silent acquiescence ripened into an intentional relinquishment of its right to enforce the specific contractual provisions" such that "broad, general boilerplate provisions" did not negate the party's waiver. *Whalen,* 166 Ill. App. 3d at 346. Michael's argument here is not supported by his cited case law and is unavailing.

¶ 19 Michael next argues that his fraud claims "cannot be obviated or waived even by express stipulation of the parties as a matter of public policy."[4] This broad allegation is not true. Illinois permits a party to contractually waive all defenses (and, by implication, claims and causes of action), and courts are not precluded from upholding such a waiver. See *RBS Citizens, National Ass'n,* 407 Ill. App. 3d at 186-87. Here, Michael signed multiple instruments containing clear waivers of defenses, claims, setoffs, defenses, counterclaims, actions, and causes of action; several of these waivers were signed after the last of the "Round Trip" loans was already paid back. In general, these waivers are not against public policy.

¶ 20 However, certain exceptions apply to this general rule; the duty of good faith and fair dealing (argued by Michael on appeal but not raised in his counterclaims) cannot be waived absent an express disavowal. *RBS Citizens, National Assn.*, 407 Ill. App. 3d at 187. Relevant here, a waiver of rights or remedies arising under the Consumer Fraud and Deceptive Business Practices Act (Act)

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[4] Michael also raised this argument as to the affirmative defense of unclean hands. However, as we have already affirmed the dismissal of that defense on other grounds, we need not address that argument here.

(815 ILCS 505/1 *et seq.* (West 2006)) is void and unenforceable. 815 ILCS 505/10(c) (West 2006); *RBS Citizens, National Ass'n*, 407 Ill. App. 3d at 187. In count I of his counterclaim, Michael sought damages under the Act arising from the 15 "Round Trip" loans that he had entered into with Midwest. Michael could not waive his claims under the Act; therefore, the trial court erred in granting the section 2-619 motion to dismiss count I of Michael's counterclaims.

¶ 21 We also note that the Act provides that any action for damages under the Act "shall be forever barred unless commenced within three years after the cause of action accrued." 815 ILCS 505/10a(e) (West 2006). A cause of action under the Act accrues when a person knows or reasonably should know of his injury and knows or reasonably should know that it was wrongfully caused; at that point, the burden is on the injured party to inquire further as to the existence of a cause of action. *Gamboa v. Alvarado*, 407 Ill. App. 3d 70, 78 (2011). Here, Michael repaid the last of the "Round Trip" loans on April 3, 2006 and filed his counterclaims on December 8, 2009. However, the bar of a statute of limitations does not go to a court's jurisdiction to hear a case; instead, it is an affirmative defense that a party may, in its sole discretion, waive. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 413-14 (2009). Our review of the record does not reveal that Midwest raised this defense; thus, while Michael clearly was late in bringing his counterclaim under the Act, the limitations period is no bar to the court's consideration of the claim.

¶ 22 Midwest also moved, in its combined motion, to dismiss the counterclaims pursuant to section 2-615 of the Act. Although the trial court did not rule on the section 2-615 aspects of the motion to dismiss, we may still determine if Michael has pleaded a cause of action under the Act. We first note that, on appeal, Michael fully briefed and argued, with citations to statutory and case law, why he sufficiently pleaded a claim under the Act. On the other hand, Midwest informs us that,

like the trial court, we need not reach the pleading issue. However, should we "wish to consider the issue," Midwest directs us to six pages of the trial court record that contain its arguments below, which it now "incorporates."

¶ 23 According to Supreme Court Rule 341(h)(7) (eff. July 1, 2008), the Argument portion of a brief "shall contain the contentions *** and the reasons therefor, with citation of the authorities ***." One sentence in a brief indicating that a party incorporates its claims made in earlier proceedings is not sufficient to satisfy Rule 341, resulting in forfeiture of the claim. See *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010); *People v. Guest*, 166 Ill. 2d 381, 413-14 (1995). While Rule 347(h)(7) applies on its face to appellants' briefs, it also applies to appellees' briefs through Rule 341(i). *Vancura*, 238 Ill. 2d at 372-73. While we can address Michael's argument even in the absence of a brief by Midwest (see *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976)), we wish to point out to Midwest and its counsel, for future reference, that such briefing is in violation of Supreme Court Rules and is inadequate for briefs submitted to this court.

¶ 24 A 2-615 motion attacks the legal sufficiency of the complaint based on defects apparent on the face of the complaint. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005). When reviewing the sufficiency of a complaint, a court must accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Guinn*, 361 Ill. App. 3d at 586. The court must determine, after considering the allegations of the complaint in the light most favorable to the plaintiff, whether the allegations are sufficient to state a cause of action upon which relief may be granted. *Guinn*, 361 Ill. App. 3d at 586. The complaint should be dismissed only if it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief. *Guinn*, 361 Ill. App. 3d at 586. Our review is *de novo*, and we may uphold the trial court on any grounds called for

in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Morris ex rel. Morris v. Williams*, 359 Ill. App. 3d 383, 386-87 (2005).

¶ 25 To state a cause of action under the Act, one must allege: (1) a deceptive act or practice; (2) defendant's intent that plaintiff rely on the deception; (3) the deception occurred in the course of conduct involving trade or commerce; and (4) the plaintiff's injury was caused by the complained-of fraud. *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 121 (2006). A plaintiff may recover for unfair as well as deceptive conduct, and a practice may be unfair without being deceptive. *Rockford Memorial Hospital*, 368 Ill. App. 3d at 121. In general, issues involving concealment of facts are treated as deceptive conduct cases. *Rockford Memorial Hospital*, 368 Ill. App. 3d at 121. Factors to consider in determining whether a claim under the Act is viable are whether the practice: (1) offends public policy; (2) is immoral, unethical, oppressive, or unscrupulous; (3) causes substantial injury to consumers. *RBS Citizens, Natl. Assn.*, 407 Ill. App. 3d at 191-92. A violation of the Act must be pleaded with the same particularity and specificity required in a common-law fraud claim. *Rockford Memorial Hospital*, 368 Ill. App. 3d at 122. Pleadings for common-law fraud must include what representations were made, when they were made, who made the representations, and to whom they were made. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 117 (2009). A high standard of specificity is required for pleading claims of fraud. *Hirsch*, 397 Ill. App. 3d at 116.

¶ 26 Here, Michael alleged that he entered into the "Round Trip" loans "contemporaneously" with the loans that were the subject of Midwest's complaint. In November 1999, he was "approached by representatives of Midwest Bank with a proposal that Michael S. Schwendener and PHS, Inc., consider changing their practice of securing loans with long-term maturity dates and enter into short-term maturity loans," about which Michael had no previous knowledge. "Midwest Bank stated" to

Michael "and caused [Michael] to believe" that the funds from these loans "were legitimate loans, and were to be used by [Michael] or PHS, Inc. for business purposes"; however, in December 1999, he learned that the funds from these loans "could not be used by him and he would regardless, be required to repay said loans and pay interest and costs related to said loans." Midwest "required and insisted" that he take out these loans, "suggesting that no future loans would be extended" to him or PHS and "reminding [him] that all then existing loans and mortgage[s] were subject to foreclosure." He would not have entered into either the "Round Trip" loans or the other guaranties and mortgages involved here "but for the insistence, threats and promises" of Midwest. According to Michael, Midwest "intentionally made unfair and false statements of material fact" and "intentionally failed to inform [him] of material facts" regarding the loans "for the purpose of inducting [*sic*] [him] to continue to renew" the "Round Trip" loans and to borrow additional funds from Midwest, which "could collect interest, fees and costs" from him. Because of these intentional misrepresentations and omissions, Michael suffered damages of at least $283,000 in interest, fees and costs paid to Midwest for the "Round Trip" loans.

¶ 27 Viewing these allegations in the light most favorable to Michael, we conclude that Michael failed to state a cause of action under the Act. The counterclaim contains only vague allegations regarding who made any representations to Michael and when they were made. No person is ever identified as making any of the representations, and, other than two statements allegedly made in November and December 1999, no dates are given for alleged representations made over a period of more than six years. More specificity is required to state a cause of action for common-law fraud and, consequently, fraud under the Act. Therefore, dismissal of Michael's counterclaim for fraud under the Act was appropriate, although for reasons other than those stated by the trial court.

¶ 28 Michael next contends that the trial court erred in not allowing him to amend his affirmative defense and counterclaim. However, Michael does not cite to anywhere in the record wherein he sought leave to file such amended pleadings, let alone actually submitted amended pleadings. A party must offer an amendment to the trial court before requesting this court to review a trial court's discretion in not allowing an amendment. See *LaSalle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 791 (2001). We have even less to review where the party fails to ask the trial court for leave to file. We find this issue forfeited.

¶ 29 III. CONCLUSION

¶ 30 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 31 Affirmed.