2019 IL App (2d) 170648-U
No. 2-17-0648
Order filed June 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBIN ZAHRAN and KAREN ZAHRAN,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 15-L-401
	)	
REPUBLIC BANK OF CHICAGO, ELAINE ZANNIS, AND @ PROPERTIES,	)	
	)	
Defendants	)	
	)	Honorable
(Republic Bank of Chicago, Defendant-Appellee).	)	Robert G. Kleeman, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiffs' complaint. Affirmed.

¶ 2 Plaintiffs, Robin and Karen Zahran, *pro se*, sued defendant, Republic Bank of Chicago, Elaine Zannis, and @ Properties,[1] raising numerous claims concerning the servicing of a note

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[1] Pursuant to a settlement, the trial court, on December 22, 2015, discharged Zannis and @ Properties. They are not parties to this appeal.

that was secured by a mortgage on their residence. The trial court dismissed plaintiffs' 13-count, fourth amended complaint. 735 ILCS 5/2-615 (West 2018). Plaintiffs, *pro se*, appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2015, plaintiffs sued Republic, alleging claims related to a $960,000 credit facility National Bank of Commerce (NBC) extended to plaintiffs in 2005 (the Note). The Note, dated June 17, 2005, was secured by a mortgage on real property at 721 Acorn Hill Lane in Oak Brook.[2] It had a 10-year term, maturing on June 17, 2015. The Note states that it is a "Variable Rate Disclosable Open-end Line of Credit Loan"; that its primary purpose was (and a box to reflect this was checked) for "Personal, Family, or Household Purposes or Personal Investment" (the box labeled "Business" was not checked); and that its specific purpose is as a "HOME EQUITY LINE OF CREDIT." In a section addressing billing-error rights under the Fair Credit Billing Act, the Note states that plaintiffs must notify NBC in writing of any alleged billing errors. "We must hear from you no later than sixty (60) days after we sent you the first bill on which the error or problem appeared." The Note accrued interest at an initial discounted rate of 2.95% for six months and thereafter at a variable rate of the Wall Street Journal Prime less 1.00%. Finally, in a section addressing charges to the credit line, the Note states that:

> "We [*i.e.*, NBC] may charge your Credit Line to pay other fees and costs that you are obligated to pay under this Agreement, the Mortgage or any other document related to your Credit Line. *** *If you do not pay your property taxes, we may charge your Credit Line and pay the delinquent taxes*. Any amount so charged to your Credit Line will be a

[2] This was the second note between the parties. The first note, executed in 2004, is not at issue in this appeal.

credit advance and will decrease the funds available, if any, under the Credit Line." (Emphasis added.)

¶ 5 On January 16, 2009, the loan was sold to Republic Bank by the FDIC, which was appointed as receiver after the Office of the Comptroller of the Currency had closed NBC.

¶ 6 On February 4, 2011, Republic notified plaintiffs, in writing, about a substantial default under the Note and mortgage. Specifically, it asserted that plaintiffs had failed to pay real estate taxes on the property for the years 2006 through 2009 and that Republic had been forced to advance $58,426.72 to redeem the taxes that were sold. The amount paid was added to the principal amount due and owing on the Note.

¶ 7 As a result of the default in payment of the real estate taxes, Republic initiated mortgage foreclosure proceedings (Du Page County case No. 2011 CH 1083) and recorded a *lis pendens* notice of the pending proceeding. However, on June 17, 2013, Republic voluntarily dismissed the proceedings. 735 ILCS 5/2-1009 (West 2018).

¶ 8 The parties exchanged correspondence concerning Republic's reporting to credit-reporting agencies. On December 21, 2012, plaintiffs wrote to Republic, asserting that Republic had inaccurately reported its loan to one or more credit-reporting agencies:

> "The reporting agencies have been reporting it as a line-of-credit and not as a real estate secured loan first mortgage which is resulting in a devastating effect on our credit reports and credit score.
>
> We don't, nor do we intend to file claims against Republic Bank but please either delete the loan from being reported to all the credit bureaus or report it as a secured first mortgage real estate loan as it has always been."

On January 16, 2013, Republic responded, in relevant part: "According to our records the loan in question is being reported accurately by Republic *** as a Home Equity product which is a revolving line of credit, requiring monthly interest[-]only payments, and secured by real estate."

¶ 9 On June 2, 2015, about two weeks before the note matured, plaintiffs sold the premises. The settlement statement did not reflect any attorney fees or costs sought by Republic and assessed against plaintiffs.

¶ 10 A. Fourth Amended Complaint

¶ 11 In a fourth amended, 13-count, 36-page complaint, filed on April 19, 2017, plaintiffs alleged: (1) breach of contract/note provisions; (2) breach of contract/settlement agreement by Republic; (3) failure to release the *lis pendens* by Republic; (4) conspiracy by Republic and others; (5) fraud in the inducement; (6) common-law fraud (as an alternative to fraud in the inducement); (7) conversion/civil theft; (8) unjust enrichment; (9) violation of Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 *et seq.* (2018)) against Republic for willful and intentional, or, alternatively, negligent conduct (15 U.S.C. § 1681s-2(b) (2018)); (10) slander/cloud on title; (11) accounting; (12) defamation, slander, and libel; and (13) judicial, equitable, and promissory estoppel.

¶ 12 Plaintiffs' allegations addressed three general claims: (1) interpretation of the Note; (2) a purported settlement agreement; and (3) Republic's alleged liability for NBC's acts or omissions.

¶ 13 1. Allegations Concerning the Note

¶ 14 As to the note, plaintiffs alleged that they never increased the amount of the loan, which they claimed was for their personal purpose of refinancing their mortgage on their personal residence; they also alleged that they did not borrow additional funds. According to plaintiffs, NBC and Republic reported the loan to the FDIC and credit-reporting agencies as a consumer loan for personal purposes. They also charged higher unauthorized and annualized interest rates on the note than was agreed upon, and Republic refused to correct the errors. Plaintiffs also claimed that Republic collected monies by charging plaintiffs interest "by adding the mon[ies] paid toward taxes to the amount of the note," without proper disclosures, without plaintiffs' agreement, and in breach of the note. Also, Republic erroneously and falsely reported the incorrect amount due on the note by reporting to credit-reporting agencies that the loan was delinquent on several occasions. Plaintiffs further alleged that they never signed an amendment to the note or "agreed to the amount of a single note of approximately $1,015,660 as Republic" reported to the agencies. Republic, according to plaintiffs, effectively unilaterally modified the note's provisions and in the absence of new disclosures under federal law, which rendered the note void. They claimed that they protested Republic's erroneous interest and other charges and reporting, but to no avail.

¶ 15 Plaintiffs also alleged that Republic published a *lis pendens* on the premises and filed a foreclosure action in breach of the parties' alleged agreement that no foreclosure action would be filed during negotiations relating to the payment of the real estate taxes or other disputes. Plaintiffs also claimed that they were never served with summons, the complaint, and the *lis pendens* and that these actions by Republic prevented them from selling their residence, as the *lis pendens* reduced the market value of their property. The foreclosure action was subsequently dismissed, and, they asserted, Republic represented that it would dismiss the *lis pendens* if plaintiffs refrained from filing suit for the overcharges and other causes of action. On or about June 2012, after the parties' alleged agreement for the dismissal of the foreclosure action, Republic represented that the *lis pendens* had been removed and that the dismissal of the foreclosure action was without costs to plaintiffs.

¶ 16 In April 2015, plaintiffs sold the premises for $1.539 million after spending about $250,000 to remodel the property. They had listed the property for $2.4 million. Plaintiffs alleged that Republic calculated the payoff amount to be $1,035,619.56, which, they claimed, consisted of expenses for costs and legal fees related to the foreclosure action. They further claimed that Republic refused to release its lien on the property and that this forced plaintiffs to "allow the deduction of the demanded amounts" from the sale proceeds to mitigate damages. Plaintiffs also alleged that Republic refused to release the Note and consider it paid in full.

¶ 17 As to the breach-of-contract count (count I), plaintiffs alleged that Republic breached the note by increasing the amount of the note without their approval or consent; reporting the higher amount to credit-reporting agencies; charging a higher interest rate than was agreed-upon; filing a foreclosure action and *lis pendens* (and failing to dismiss/remove them) in violation of the parties' agreement; charging unauthorized fees and late charges; and collecting legal fees in violation of the parties' agreement. In count II, the breach-of-settlement agreement count, plaintiffs made the same allegations as in count I, but couched them in terms of the breach of a purported settlement agreement. Count III alleged the failure to release the *lis pendens*, where the purported settlement agreement provided for such.

¶ 18 In count IV, plaintiffs alleged conspiracy by Republic and others. Specifically, they alleged that Republic, by disclosing its decision to not renew plaintiffs' note, shared plaintiffs' private information with @ Properties and Zannis without their knowledge or consent and in violation of privacy laws. Republic, they further alleged, intentionally participated in a scheme to cancel and not renew the loan, depress the property's value, and to effect a foreclosure sale. Republic, plaintiffs also alleged, maintained the *lis pendens* on the property for the purpose of inhibiting plaintiffs' freedom of action, including their ability to borrow funds to remodel the premises or to remortgage the property with other lenders.

¶ 19 In count V, plaintiffs alleged fraud in the inducement against Republic, asserting that Republic made certain representations to them as an inducement to not file a complaint against Republic. The representations included that Republic (represented by Justin Kennedy, its vice president of operations, during certain negotiations at its Oakbrook headquarters between 2010 and 2013) would not foreclose or file a *lis pendens*, would dismiss the foreclosure action and vacatw/lift the *lis pendens*, promise (but later refuse) to enter into a separate note for the real estate taxes paid, and would report accurate information to the credit-reporting agencies (which it did not). Plaintiffs also asserted that, on June 17, 2005, at NBC's offices in Berkeley, at 3:30 p.m., NBC offered plaintiffs a personal loan to purchase their residence and the parties agreed that the loan was never to be used for business purposes. Plaintiffs, in reliance on these representations, signed the note and mortgage. However, Republic classified the loan as a business loan. Republic induced plaintiffs to enter into the loan, intending to create and design a scheme of a future defense based on the Illinois Credit Agreement Act. In count VI, which they pleaded as an alternative to count V, plaintiffs alleged common-law fraud.

¶ 20 In count VII, plaintiffs alleged conversion, arguing that Republic dismissed, with prejudice, its complaint in June 2012 without costs to either party and represented to the court that it waived its right to legal fees and costs incurred as a result of the foreclosure and *lis pendens* filings. However, Republic's act of claiming and exercising a lien right on plaintiffs' residence for legal fees and costs and its refusal to release its frivolous and fraudulent claim and lien was unlawful. Plaintiffs further alleged that, as a result, they were forced to deduct the amounts Republic claimed from the proceeds of the sale in order to mitigate their damages and effectuate the sale.

¶ 21 In count VIII, plaintiffs asserted unjust enrichment against Republic, arguing that Republic breached the parties' alleged agreement for non-assessment of costs allegedly incurred as a result of the filing of the foreclosure and *lis pendens* actions.

¶ 22 In count IX, alleging violation of the FCRA, plaintiffs claimed that Republic intentionally and willfully reported erroneous information to the credit-reporting agencies and was grossly negligent in reporting information to them. According to plaintiffs, the parties agreed that Republic would pay real estate taxes through a separate note after certain monies were credited to plaintiffs and plaintiffs never agreed to a change in the note/mortgage amounts reflecting payment of taxes. Republic, they further alleged, inaccurately reported to the agencies that plaintiffs were late on their payment up to 90 days. Republic's delay in posting the payments was a result of its own negligence. The bank knew the information concerning the late payments (and classifying the loan as a business loan but reporting it as a personal/consumer loan) it provided the credit agencies was erroneous.

¶ 23 Count X alleged slander/cloud on title, wherein plaintiffs asserted that Republic continued the *lis pendens* without justification and that, absent a pending complaint for foreclosure, the continuation violated the law. Count XI sought an accounting, arguing that Republic failed to accurately account for plaintiff's payments. Count XII asserted defamation, slander and libel, alleging that Republic knowingly made false statements against plaintiffs from 2008 to the present, including reporting erroneous information to credit-reporting agencies and the real estate community that plaintiffs' property was subject to a foreclosure action and concerning the recorded *lis pendens* despite informing plaintiffs that the *lis pendens* was removed. Finally, in count XIII, plaintiffs asserted judicial, equitable, and promissory estoppel, arguing that Republic was precluded from asserting any defenses because it never advised plaintiffs that the loan was for business purposes and that the credit statute, which precluded actions against defendants concerning business loans, required certain disclosures.

¶ 24 On May 11, 2017, Republic moved to dismiss (735 ILCS 5/2-619.1 (West 2018)) plaintiffs' fourth amended complaint, arguing that all counts of the complaint were legally insufficient, contained dozens of unsubstantiated legal conclusions, including that Republic was liable for the acts and omissions of NBC. As to that latter point, Republic argued that it was not responsible for NBC's actions because plaintiffs never filed a claim under federal law (FIRREA) with the FDIC as receiver. 735 ILCS 5/2-619(a)(9) (West 2018). Second, Republic argued that plaintiffs' fair-credit-reporting claims and truth-in-lending claims were time-barred. 15 U.S.C. § 1681p(1) (West 2018) (claims must be brought within two years of the discovery of the violation); 15 U.S.C. § 1640(e) (West 2018) (claims must be brought within one year of the violation). Third, Republic asserted that plaintiffs had no private right of action for alleged violations of the FCRA and that the statute preempted plaintiffs' state law claims. 15 USC §§ 1681s-2(a), 1681t(b)(1)(F) (West 2018). Finally, Republic argued that, regardless of preemption, plaintiffs failed to state valid state law claims. 735 ILCS 5/2-615 (West 2018).

¶ 25 On August 16, 2017, the trial court dismissed plaintiffs' fourth amended complaint, with prejudice. In announcing its findings, the court found that the two-year statute of limitations for truth-in-lending claims barred the claims concerning the credit agency reporting. The court also found that plaintiffs' state law claims were preempted by federal law. Addressing count I, the court found that the allegations were conclusory. The note, according to the court, was a line of credit and allowed the lender to pay taxes and add such amounts to the credit limit. Counts II, III, and IV, which related to the settlement agreement, the court found, were not specifically pleaded. If it was a written agreement, the court noted, any such agreement was not attached to the complaint. If oral, it was not specifically set forth in the complaint. The conspiracy and slanderous reporting counts, according to the trial court, also lacked specificity. The fraud-in-the-inducement count, likewise, lacked specificity, as did unjust enrichment. Count X, the court found, was redundant to count III and was legally deficient. The court also determined that plaintiffs did not sufficiently demand an accounting. It dismissed the complaint with prejudice and found that its order was final and appealable. Plaintiffs appeal.

¶ 26 II. ANALYSIS

¶ 27 Plaintiffs challenge the trial court's dismissal of their complaint, arguing that they adequately pleaded all of their claims.[3] For the following reasons, we reject plaintiffs' argument.

¶ 28 Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2018)) motion to dismiss, based on a plaintiff's substantially insufficient pleadings, with a section 2-619 (735 ILCS 5/2-619 (West 2018)) motion to dismiss, based on certain defects or defenses. A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint based on defects appearing on the face of the complaint and does not raise affirmative factual defenses. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts defects, defenses, or other affirmative matter that defeat the action. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. When resolving motions to dismiss under either section 2-615 or section 2-619, a trial court is required to accept as true all well-pleaded factual allegations and makes all

[3] Preliminarily, we note that plaintiffs conceded on appeal that Republic is not liable for NBC's acts or omissions.

reasonable inferences therefrom. *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278 (2004). We review *de novo* dismissals under either section. *Chicago Motor Club v. Robinson*, 316 Ill. App. 3d 1163, 1171 (2000).

¶ 29 Illinois is a fact-pleading jurisdiction. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "While the plaintiff is not required to set forth evidence in the complaint, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not simply conclusions." (Citations omitted.) *Id.* at 429-30.

¶ 30 A. Count I – Breach of Contract/Note Provisions

¶ 31 Plaintiffs argue first that they adequately pleaded breach of contract, where they alleged that Republic breached the note by adding $58,426.72 as an additional amount due on the note absent any amendment to which they had consented.

¶ 32 In order to establish a claim for breach of contract, a plaintiff must allege and prove the following elements: "(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff." *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001).

¶ 33 We conclude that the trial court did not err in dismissing this count. The note explicitly provides that, if the property taxes are not paid, the bank "may charge your Credit Line and pay the delinquent taxes." Plaintiffs ignore this provision.

¶ 34 Plaintiffs additionally argue that Republic failed to issue a new note or disclosures for the additional amount and new effective interest rate, in violation of federal law, and that Republic never provided an accounting. Because they are not relevant to the breach-of-contract count, we need not reach these arguments.

¶ 35 B. Count II – Breach of Settlement Agreement

¶ 36 Next, plaintiffs argue that Republic breached a purported oral settlement agreement. This claim, too, is unavailing. Their complaint failed to specify key elements of any agreement. For example, they never identified any Republic personnel who entered into the alleged settlement agreement, nor did they specify its terms, other than baldly asserting that the parties agreed that Republic would not foreclose on the property during the parties' negotiations on outstanding issues. The trial court properly dismissed count II.

¶ 37 C. Count III – Failure to Release the *Lis Pendens*

¶ 38 Addressing count III, plaintiffs argue that the *lis pendens* was filed in 2011, continued to appear on the title until the home was sold in 2015, and was only released after alleged unauthorized legal fees, other unknown 2011 foreclosure costs, and "other alleged money for taxes were paid." Plaintiffs claim that they had no notice of any such amounts due and that no lien was ever claimed by Republic when the foreclosure was dismissed. Rather, they assert, there was a silent lien on the property, as reflected in the closing statement and that the *lis pendens* was "[c]learly" kept on the residence for the improper purpose of collecting and extorting an illegal debt despite Republic's agreement remove it through the settlement agreement.

¶ 39 Republic responds that there is no obligation for a lender to "release" a recorded *lis pendens*, and it takes issue with plaintiffs' characterization of the *lis pendens* as a silent lien on the property. It is merely, it notes, constructive notice to anyone subsequently acquiring an interest in or lien on the property and does not restrain the sale or transfer of the property. Furthermore, Republic contends that the record reflects that the foreclosure proceeding was dismissed in June 2013 and, therefore, the *lis pendens* terminated by operation of law on that date, long before plaintiffs allege they placed the premises for sale (in February 2014).

¶ 40 We conclude that the trial court properly dismissed this count, because it is based on an alleged settlement agreement that was itself not properly pleaded. Furthermore, as Republic notes, a *lis pendens* notice does not restrain the sale or transfer of property and, critically, the notice lifted when the pending suit was dismissed in 2013. See *E & E Hauling, Inc. v. County of Du Page*, 77 Ill. App. 3d 1017, 1023 (1979) (under the doctrine of *lis pendens*, one who obtains an interest in property during the pendency of a suit affecting it is bound to the result of that litigation as if he or she had been a party from the outset; further, "[a] *lis pendens* is not an injunction as it does not formally restrain sale, conveyance, or purchase").

¶ 41 D. Count IV – Conspiracy

¶ 42 Next, plaintiffs argue that they properly pleaded their conspiracy count. In their complaint, they alleged that Republic (no specific person was identified) and Zannis conspired to depress plaintiffs' home value to achieve a fast sale through Zannis and that Republic maintained the *lis pendens* recording on the property to inhibit plaintiffs' ability to borrow funds to remodel the premises or to remortgage the property.

¶ 43 "The elements of a civil conspiracy are: (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004). The function of a conspiracy claim is to extend tort liability from the active wrongdoer to wrongdoers who may have only planned, assisted, or encouraged the active wrongdoer. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994). However, "[t]he mere characterization of a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss." *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998). In order to connect a defendant to an alleged civil conspiracy, the complaint must allege the " 'necessary and important element' " of the existence of an agreement. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). The complaint must allege that the defendant knowingly and voluntarily participated in the common scheme at the heart of the alleged civil conspiracy. *Id.*

¶ 44 Plaintiffs' argument fails. Their allegations are conclusory or rebutted by the record. No specific actions, most notably an agreement, are alleged that constitute part of the alleged conspiracy. Nor do they identify which Republic employee conspired with Zannis. Further, as discussed above, the *lis pendens*, which, again, does not restrain a conveyance, terminated with the voluntary dismissal of the foreclosure action in June 2013, whereas plaintiffs did not commence their efforts to sell the property until February 2014.

¶ 45 E. Count V – Fraud in the Inducement

¶ 46 Next, plaintiffs assert that they properly pleaded fraud in the inducement. Fraud in the inducement exists where the party fully understands what he or she is signing and is aware of the nature and character of the instrument he or she has executed, but is deceived by fraudulent representations as to the facts outside the instrument itself. *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 59 (1983). The elements of fraud in the inducement are: (1) a false representation of material fact; (2) made with knowledge or belief of that representation's falsity; and (3) made with the purpose of inducing another party to act or to refrain from acting, where the other party reasonably relies upon the representation to its detriment. *Phil Dressler & Associates, Inc. v. Old Oak Brook Investment Corp.*, 192 Ill. App. 3d 577, 584 (1989). "Fraud in the inducement must, ordinarily, be founded upon a misrepresentation of fact, and the mere breaking of a promise or an act contrary to an expression of intention does not constitute fraud or warrant the rescission of a contract." *McDonald v. McDonald*, 408 Ill. 388, 394-95 (1951).

¶ 47 In count V, plaintiffs asserted that Republic made certain representations to them as an inducement to not file a complaint against Republic. The representations allegedly included that Republic (represented by Justin Kennedy, its vice president of operations, during certain negotiations at its Oakbrook headquarters between 2010 and 2013): would not foreclose or file a *lis pendens*; would dismiss the foreclosure action and vacate/life the *lis pendens*; promised (but later refused) to enter into a separate note for the real estate taxes paid; and would report accurate information to the credit-reporting agencies (which it did not). Plaintiffs also asserted that, on June 17, 2005, at NBC's offices in Berkeley, at 3:30 p.m., NBC offered plaintiffs a personal loan to purchase their residence and the parties agreed that the loan was never to be used for business purposes. Plaintiffs, in reliance on these representations, signed the note and mortgage. However, Republic classified the loan as a business loan. Republic induced plaintiffs to enter into the loan, intending to create and design a scheme of a future defense based on the Illinois Credit Agreement Act.

¶ 48 On appeal, plaintiffs first maintain that they relied on the bank's representations that the note and mortgage were strictly a personal loan for acquiring their residence and that the bank knew its representations were false but intended to create a scheme of a future defense based on the Illinois Credit Agreement Act. These allegations, as Republic notes, concern NBC, and plaintiffs now concede that Republic is not responsible for NBC's acts or omissions. Thus, this argument fails against Republic. Plaintiffs' remaining arguments also fail. Their assertion that Republic has argued that the loan was classified as a business loan is inaccurate and, as noted above, belied by the record. Finally, plaintiffs' argument that they were fraudulently induced into entering into the settlement agreement that Republic did not intend to execute also fails because, as we determined above, they did not sufficiently plead the existence of any such agreement.

¶ 49 F. Count VI – Common-Law Fraud

¶ 50 Plaintiffs next claim that they adequately raised a common-law fraud claim, where they pleaded that they relied on Republic's promises and representations in accepting, to their detriment, the proposed settlement agreement and the fraudulent promises of future performance.

¶ 51 "To state a cause of action for common-law fraud, a plaintiff must plead: (1) a false statement of material fact; (2) knowledge or belief by the defendant that the statement was false; (3) an intention to induce the plaintiff to act; (4) reasonable reliance upon the truth of the statement by the plaintiff; and (5) damage to the plaintiff resulting from this reliance." *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. A higher specificity standard applies to fraud claims. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. A plaintiff must at least plead with sufficient particularity facts that establish the elements of fraud, including what representations were made, who made them, when they were made, and to whom they were made. *Id.* See also *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 457 (1989) ("pleadings must contain specific allegations of facts from which fraud is the necessary or probable inference"). The basis of a fraud claim must be a statement of fact, not an expression of opinion. *Avon Hardware*, 2013 IL App (1st) 130750, ¶ 17. Whether a statement is one of fact or opinion depends entirely on the facts and circumstances under which the statement was made. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 45. "Furthermore, assurances as to future events are generally not considered misrepresentations of fact." *Id.* ¶ 41.

¶ 52 We reject plaintiffs' argument. This claim, like several others addressed above, relies on the existence of an alleged settlement agreement, which, as we have held, was not adequately pleaded. The trial court did not err in dismissing the common-law fraud count.

¶ 53 G. Count VII – Conversion

¶ 54 In their conversion count, plaintiffs pleaded that, when Republic dismissed its complaint in June 2012, it represented to the court that it waived its right to legal fees and costs incurred as a result of the foreclosure and *lis pendens* filings. However, they argued, Republic's act of claiming and exercising a lien right on plaintiffs' residence for legal fees and costs and its refusal to release its frivolous and fraudulent claim and lien was unlawful. Plaintiffs further alleged that, as a result, they were forced to deduct the amounts Republic claimed from the proceeds of the sale in order to mitigate their damages and effectuate the sale. On appeal, they argue that Republic wrongfully took funds allegedly incurred for legal fees, court costs, appraisal fees, and lien payment and that these funds were not taken as a result of the foreclosure action by agreement with plaintiffs or via court order. Rather, in their view, Republic took the funds as a condition for the release of the lien to affect the property sale and as an extortionist act and violation of the court order at the time of the dismissal of the foreclosure action. Plaintiffs also claim that they adequately pleaded that Republic wrongfully took monies in excess of the written note amount.

¶ 55 The elements of conversion are: (1) an unauthorized and wrongful assumption of control, dominion, or ownership by the defendant over the plaintiff's personalty; (2) the plaintiff's right in the property; (3) the plaintiff's right to the immediate possession of the property, absolutely and unconditionally; and (4) a demand for possession of the property. *General Motors Corp. v. Douglass*, 206 Ill. App. 3d 881, 886 (1990); see also *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114

(1998). The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held. *In re Thebus*, 108 Ill. 2d 255, 259 (1985).

¶ 56 We reject plaintiffs' assertion that they adequately pleaded conversion. Plaintiffs failed to specify the amount of any overpayment made when they paid off the mortgage. Further, any attorney fees and costs were explicitly allowed for via the note's terms. Also, the foreclosure dismissal order is silent as to fees and costs. To the extent that plaintiffs claim that the settlement agreement provided otherwise, the existence of any such agreement, as we have repeatedly noted, was not adequately pleaded anywhere in the complaint. Furthermore, plaintiffs' reference to funds tendered in excess of the note amount do not sufficiently plead a conversion, where the assertions are vague, unclear, and lack specificity. The arguments relating to any alleged promises to lift the lien also fail, because the *lis pendens*, as noted, terminated by operation of law when Republic voluntarily dismissed the foreclosure action. Finally, as Republic notes, the parties' relationship was contractual (*i.e.*, it was based on the note) and, therefore, the propriety of the assessment of attorney fees and costs in the payoff of the note is properly determined under the note's terms, not a conversion action, which is a tort claim. See, *e.g.*, *Hecktman v. Pacific Indemnity Co.*, 2016 IL App (1st) 151459, ¶¶ 13-14 (*Moorman* or economic loss doctrine precludes a tort recovery for solely economic losses).

¶ 57 H. Count VIII – Unjust Enrichment

¶ 58 Next, plaintiffs argue that they adequately pleaded an unjust-enrichment claim. In count VIII, plaintiffs argued that Republic breached the parties' alleged agreement for non-assessment of costs allegedly incurred as a result of the filing of the foreclosure and *lis pendens* actions.

¶ 59 To prevail on a claim for unjust enrichment, a plaintiff must prove that the defendant "retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates fundamental principles of justice, equity, and good conscience." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). A " 'cause of action based upon unjust enrichment does not require fault or illegality on the part of [the] defendant[ ]; the essence of the cause of action is that one party is enriched and it would be unjust for that party to retain the enrichment.' " *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804, 818 (2006) (quoting *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 864 (1998)). Unjust enrichment is not an independent cause of action; rather, it is a condition that may be brought about by unlawful or improper conduct, such as fraud, duress, or undue influence, or, alternatively, it may be based on contracts that are implied by law. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. Unjust enrichment does not apply where an express contract, oral or written, governs the parties' relationship. *Id.* A plaintiff is permitted to plead breach of contract claims in addition to unjust enrichment, but "the unjust enrichment claim cannot include allegations of an express contract." *Id.*

¶ 60 Here, the basis of plaintiffs' unjust enrichment claim is that Republic took their money by taking the property "hostage" (by threatening to prevent the sale) without releasing the "fraudulent" lien. That is, they appear to plead that Republic received payoff funds that were not properly assessed under the note's terms. We conclude that their claim was properly dismissed. The count contains insufficient allegations of fraud, duress, or undue influence. Further, because the basis of the parties' relationship was contractual, the remedy of unjust enrichment is not available. *Id.*

¶ 61 I. Count IX – Violations of the FCRA

¶ 62 In count IX, plaintiffs claimed that Republic intentionally and willfully reported erroneous information to the credit-reporting agencies and was grossly negligent in reporting information to them, in violation of the FCRA. According to plaintiffs, the parties agreed that Republic would pay real estate taxes through a *separate* note after certain monies were credited to plaintiffs and that plaintiffs never agreed to a change in the note/mortgage amounts reflecting payment of taxes. Republic, they further alleged, inaccurately reported to the agencies that plaintiffs were late on their payment up to 90 days. Republic's delay in posting the payments was a result, they claimed, of its own negligence. The bank knew the information concerning the late payments (and classifying the loan as a business loan but reporting it as a personal/consumer loan) it provided the credit agencies was erroneous.

¶ 63 We conclude that the trial court properly dismissed this count. First, as Republic notes, the note's amount was increased by $58,426.72 to reflect the amount of the delinquent taxes on the property (for 2006 through 2009). To the extent that plaintiffs assert an oral modification to the note's terms, their argument fails because parol evidence cannot be utilized to modify clear written provisions of a promissory note. See, *e.g.*, *Strosberg v. Brauvin Realty Services, Inc.*, 295 Ill. App. 3d 17, 27 (1998). Further, plaintiffs failed to specify the date of any such agreement and failed to identify the Republic employee who entered into the alleged agreement. Nor do they argue that the agreement was ambiguous.

¶ 64 Turning to the FCRA:

> "The FCRA is a consumer protection act that imposes certain duties on CRAs and 'furnishers of information' to CRAs. Furnishers of information, including mortgage lenders, are required to (1) report accurate information to CRAs regarding consumers, see 15 U.S.C. § 1681s-2(a); and (2) conduct an investigation after receiving *notice from a CRA* of a dispute lodged by a consumer regarding information provided by the furnisher, see *id.* § 1681s-2(b). Consumers have no private right of action against furnishers for

> reporting inaccurate information to CRAs regarding consumer accounts. See *id.* § 1681s-2(c)(1). Instead, the only private right of action consumers have against furnishers is for a violation of § 1681s-2(b), which requires furnishers to conduct an investigation following notice of a dispute. See *id.*
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> Upon receipt of a *notice from a CRA* that a consumer disputes the completeness or accuracy of any information provided by a furnisher, the furnisher must (1) conduct an investigation with respect to the disputed information; (2) review all relevant information provided by the CRA; and (3) report the results of the investigation to the CRA. See *id.* § 1681s-2(b)(1). If the furnisher finds, following an investigation, that an item of information disputed by a consumer is incomplete, inaccurate, or cannot be verified, the furnisher must either modify, delete, or permanently block reporting of that information. See *id.* § 1681s-2(b)(1)(E). Further, with respect to information the furnisher finds to be inaccurate or incomplete, the furnisher also must report those results to all other CRAs. See *id.* § 1681s-2(b)(1)(D)." (Emphases added.) *Felts v. Wells Fargo Bank, N.A.*, 893 F.3d 1305, 1312 (11th Cir. 2018).

¶ 65 Here, on December 21, 2012, over two years before plaintiffs filed their complaint, *plaintiffs* wrote to Republic, stating that the agencies had been reporting their loan as a line of credit and "not as a real estate secured loan first mortgage[,] which is having a devastating effect on our credit reports and credit score." *They* requested that Republic either delete the loan from their reports or report it as a real estate loan. Plaintiffs noted that *they* had contacted the agencies and disputed their reporting. In a January 16, 2013, letter, Republic responded to plaintiffs, stating that, according to its records, the loan was being accurately reported to the agencies "as a

Home Equity product, which is a revolving line of credit, requiring monthly interest only payments, and secured by real estate." The record contains no subsequent correspondence from plaintiffs challenging Republic's assertions. Further, as noted, the note explicitly provides that it is a home equity line of credit. Similarly, as to plaintiffs' arguments concerning certain late payments, the record reflects that Republic responded to their concerns, specifically, stating that the late payments were accurately reported. Plaintiffs' filings contain no response challenging Republic's conclusion. There is no letter in the record to Republic *from the credit agencies* concerning a dispute that plaintiffs lodged. The only notice Republic received was from *plaintiffs*, which does not implicate the FCRA. Finally, plaintiffs' assertions that Republic's allegedly inaccurate reporting was intentional and willful are bare and conclusory. This count was properly dismissed.

¶ 66 J. Count X – Slander/Cloud on Title

¶ 67 Plaintiffs next argue that they adequately pleaded slander/cloud on title. In their complaint, plaintiffs asserted that Republic continued the *lis pendens* without justification and that, absent a pending complaint for foreclosure, the continuation violated the law.

¶ 68 "Slander or disparagement of title is established where there has been a false and malicious publication, either oral or written, of words disparaging a person's title to property which results in special damages." *Home Investments Fund v. Robertson*, 10 Ill. App. 3d 840, 842 (1973). The act of maliciously recording a document which clouds another's title to real estate is actionable as slander of title. *Whildin v. Kovacs*, 82 Ill. App. 3d 1015, 1016 (1980). More recent cases have required a showing of actual malice, which requires knowledge by the defendants that the disparaging statements were false or were made with reckless disregard of their truth or falsity. *Pecora v. Szabo*, 94 Ill. App. 3d 57, 66 (1981). Reckless disregard concerning the truth or falsity of a matter has been defined as publishing the allegedly damaging matter " 'despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth.' " *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24-25 (1993) (quoting *Mittelman v. Witous*, 135 Ill. 2d 220, 237-38 (1989)).

¶ 69 Plaintiffs contend that Republic's insistence on keeping the *lis pendens* recorded and published despite the settlement agreement and termination of its foreclosure action and plaintiffs' demands were motivated by malice and to achieve its conspiracy objective. We reject this argument outright because it is based on the alleged settlement agreement, which, again, we determined above was not sufficiently pleaded and the fiction that the *lis pendens* did not terminate when the foreclosure complaint was dismissed. Accordingly, the trial court did not err in dismissing this count.

¶ 70 K. Count XI – Accounting/Injunctive Relief

¶ 71 Next, plaintiffs argue that the trial court erred in dismissing their claim for an accounting. "The right to an accounting is not an absolute right, but one which should be accorded only on equitable principles." (Citations omitted.) *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 555 (1993). One requirement is that the plaintiff must show the absence of an adequate remedy at law. *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 500-01 (1986). Here, plaintiffs failed to plead any facts in support of their assertion that there was no adequate remedy at law. Plaintiffs' complaint contains only their bare conclusory assertion of no adequate legal remedy. Thus, we conclude that the trial court properly dismissed this count.

¶ 72 L. Count XII – Defamation, Slander, and Libel

¶ 73 Plaintiffs next argue that they adequately pleaded a claim for defamation, slander, and libel. They maintain that Republic made defamatory, slanderous, and libelous statements in

2014 or 2015 and that its statements were motivated by malice. They specifically point to the alleged release, in 2015, of false statements and disclosures to Zannis and @ Properties of plaintiffs' private financial information.

¶ 74 To establish defamation, a plaintiff must present facts showing that: (1) the defendant made a defamatory statement about the plaintiff; (2) the defendant made an unprivileged publication of that statement to a third party; and (3) the publication caused damages. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006). "A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." *Id.* Statements that do not contain factual assertions are protected under the first amendment and may not form the basis of a defamation action. *J. Maki Construction Co. v. Chicago Regional Council of Carpenters*, 379 Ill. App. 3d 189, 199-200 (2008). Likewise, a statement may not form the basis of a defamation action where it is substantially true. *Id.* at 203. To establish either slander or libel, a plaintiff must show that: (1) the defendant made a false statement concerning the plaintiff; (2) there was an unprivileged publication of the defamatory statement by the defendant to a third party; and (3) the plaintiff was damaged. *Stavros v. Marrese*, 323 Ill. App. 3d 1052, 1057 (2001).

¶ 75 In their complaint, plaintiffs alleged that, in March 2015, certain communications related that plaintiffs' house was in foreclosure with a recorded *lis pendens* pending by Republic. Further, Republic (according to Zannis) had informed Zannis that it would not renew the note and would foreclosure because plaintiffs had severe financial problems and that Republic would give Zannis the property listing. The allegations are bare and conclusory. Plaintiffs did not identify the Republic employee who related any information to Zannis, and the *lis pendens*, again, had terminated by operation of law. The count was properly dismissed.

¶ 76 K. Count XIII – Judicial, Equitable, and Promissory Estoppel

¶ 77 Plaintiffs' final argument is that they adequately pleaded a claim for judicial, equitable, and promissory estoppel. We reject this argument.

¶ 78 First, we agree with Republic that plaintiffs' count XIII is procedurally improper because it alleges three separate causes of action in one count. See 735 ILCS 5/2-613(a) (West 2018) (each cause of action "shall be separately designated and numbered").

¶ 79 Second, we conclude that plaintiffs' assertions concerning judicial estoppel are legally insufficient. Five elements are generally required for the doctrine of judicial estoppel to apply. The party to be estopped must have: (1) taken two positions; (2) that are factually inconsistent; (3) in separate judicial or quasi-judicial administrative proceedings; (4) intending for the trier of fact to accept the truth of the facts alleged; and (5) have succeeded in the first proceeding and received some benefit from it. *Seymour v. Collins*, 2015 IL 118432, ¶ 37. Plaintiffs assert that Republic claimed entitlement to legal fees and costs in the foreclosure action in violation of the court's order dismissing the foreclosure action without costs. We disagree. The court's order dismissed the action without granting *or* denying costs. Also, as noted above, any attorney fees and costs were explicitly allowed for via the note's terms and the foreclosure dismissal order, again, did not address fees and costs. Thus, judicial estoppel has no application here, because plaintiffs failed to adequately plead that Republic took two inconsistent positions in separate judicial or quasi-judicial proceedings.

¶ 80 Third, plaintiffs' assertions concerning promissory estoppel also fail. To establish a claim for promissory estoppel, the plaintiff must prove that: (1) the defendant made an unambiguous promise to the plaintiff; (2) the plaintiff relied on such a promise; (3) the plaintiff's reliance was expected and foreseeable by the defendant; and (4) the plaintiff relied on the promise to its detriment. *Centro Medico Panamericano, Ltd. v. Benefits Management Group, Inc.*, 2016 IL App (1st) 151081, ¶ 25. Plaintiffs' allegations focus on the purported settlement agreement, which was not adequately pleaded, and the reporting of the loan type to the credit agencies, which we also concluded above was belied by the record.

¶ 81 Finally, we conclude that plaintiffs failed to adequately plead equitable estoppel. To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other party misrepresented or concealed material facts; (2) the other party knew at the time it made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other party is permitted to deny the truth thereof. *Vaughn v. Speaker*, 126 Ill. 2d 150, 162-63 (1988). Plaintiffs' allegations primarily concern the reporting of the loan type to the credit-reporting agencies. As noted, the explicit terms of the note provide that it is a home equity line of credit, which is how the note was reported to the agencies. Thus, plaintiffs failed to assert any misrepresentation upon which they can base an equitable-estoppel claim. The trial court properly dismissed this count.

¶ 82 III. CONCLUSION

¶ 83 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 84 Affirmed.