

1-11-3128

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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OBERMAN, TIVOLI & PICKERT, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 09 L 9594
MERRILL LYNCH BUSINESS FINANCIAL SERVICES,	)	
MERRILL LYNCH PIERCE, FENNER & SMITH, INC.,	)	
DOES 1 through 10, <sup>1</sup>	)	Honorable
	)	Raymond Mitchell,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justice Rochford and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly dismissed the plaintiff's third amended complaint alleging fraud, where the allegations lacked specificity and particularity, and the plain language of the written agreement between the parties barred claims for fraud.

¶ 2 This appeal arises from the September 20, 2011 order entered by the circuit court of Cook County, which dismissed with prejudice a third amended complaint filed by the plaintiff, Oberman,

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<sup>1</sup>Although the captions of the complaint and amended complaints include "Does 1 through 10" as defendants-appellees, no specific allegations against these unknown individuals or entities have been made in the pleadings of record in the circuit court.

Tivoli & Pickert, Inc. (OTP), against the defendants, Merrill Lynch Business Financial Services, Inc. (Merrill Lynch Business) and Merrill Lynch Pierce, Fenner & Smith, Inc (Fenner & Smith). On appeal, OTP argues that the circuit court erred in dismissing its third amended complaint with prejudice. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The plaintiff, OTP, is an accounting firm that caters to the motion picture industry. Merrill Lynch Business and Fenner & Smith provide financial services to their clients, including brokerage services through their "Working Capital Management Account" (WCMA) program. In 2002, OTP entered into a WCMA agreement with Fenner & Smith, which set forth the terms relating to services provided to OTP under a WCMA account. The WCMA agreement provided in relevant part that Fenner & Smith and Merrill Lynch Business, with respect to the WCMA commercial line of credit, "each reserves the right to terminate a client's participation in the WCMA service at anytime for any reason." The WCMA agreement further stated that "[i]f the client's subscription to the WCMA account is terminated for any reason, any and all amounts owing under the WCMA [c]ommerical [l]ine of [c]redit \*\*\* will become immediately due and payable."

¶ 5 On May 6, 2003, OTP entered into a separate "WCMA loan and security agreement" (loan agreement) with Merrill Lynch Business, whereby Merrill Lynch Business extended a commercial line of credit to OTP in the amount of \$5 million, with a loan maturity date of May 31, 2004. The loan agreement was secured by OTP's assets as collateral and guaranteed by the owners of OTP. The loan agreement expressly incorporated by reference the terms of the WCMA agreement, and provided, pursuant to paragraph 2.2(k), that Merrill Lynch Business "may at any time, in its sole

discretion and at its sole option, renew the WCMA [commercial] [l]ine of [c]redit," and that OTP had a right to terminate the WCMA line of credit at anytime upon written notice to Merrill Lynch Business. Paragraph 3.7(p) of the loan agreement contained an integration clause, stating that the document "constitutes the entire understanding and represents the full and final agreement between the parties"; that the terms of the loan agreement may not be contradicted by evidence of prior written agreements or "prior, contemporaneous or subsequent oral agreements" between the parties; that there were "no unwritten oral agreements of the parties"; and that OTP acknowledged that neither Merrill Lynch Business nor Fenner & Smith made any promises regarding the loan terms other than what was expressly set forth in the loan agreement. Paragraph 3.7(r) stated that, by executing the loan agreement, OTP acknowledged that it understood the provisions of the agreement, that OTP's representatives were provided with ample opportunity to consult with counsel prior to signing the document, and that the loan agreement was entered into "freely and voluntarily, without duress or coercion." The loan agreement contained a choice-of-law provision for Illinois law and a forum selection provision for Illinois courts.

¶ 6 On June 2, 2004, Merrill Lynch Business renewed the commercial line of credit to OTP for another year, with a maturity date of June 30, 2005, and increased the line of credit to \$7 million. On December 1, 2005, Merrill Lynch Business again renewed the commercial line of credit for another year by extending the maturity date to June 30, 2006.

¶ 7 In 2006, Merrill Lynch Business decided not to renew the commercial line of credit under the loan agreement. On June 16, 2006, Merrill Lynch Business and OTP executed a document entitled "notice of non-renewal and amendment to WCMA [loan agreement]" (notice of non-

renewal), which stated Merrill Lynch Business' intention not to renew the commercial line of credit to OPT. The notice of non-renewal expressly incorporated the terms and conditions of the loan agreement, but amended the June 30, 2006 maturity date to July 31, 2006. It also included provisions stating that OTP agreed to pay Merrill Lynch Business an "[e]xtension [f]ee" of \$10,000 for the extension of the maturity date, and to pay an "[e]xit [f]ee" of \$100,000 for "extending the time in which to pay the [loan balance] and all related interest, fees and other charges." The notice of non-renewal further asserted that OTP, by executing the document, acknowledged that it had no claim against Merrill Lynch Business or Merrill Lynch Business' affiliates in connection with the loan documents, or any other matter, and that OTP had "no defense to payment of any amounts owing, or any right of counterclaim for any reason," under the parties' loan documents.

¶ 8 On August 13, 2009, OTP filed a complaint against Merrill Lynch Business and Fenner & Smith, alleging claims for breach of contract (count I), fraud (count II), and breach of fiduciary duty (count III) in connection with the terms of the loan agreement. On October 28, 2009, Merrill Lynch Business and Fenner & Smith filed a section 2-619.1 motion to dismiss (735 ILCS 5/2-619.1(West 2008)), arguing that OTP's complaint was deficiently pled and that the claims alleged were directly contradicted by the terms of the loan agreement.

¶ 9 On January 27, 2010, the circuit court dismissed all three counts of the complaint, and granted OTP leave to file an amended complaint. Specifically, the circuit court found that the fraud claim was not pled with specificity; that no facts were pled to establish a fiduciary duty owed by either Merrill Lynch Business or Fenner & Smith; that a breach of contract claim could not be established against Fenner & Smith because it was not a party to the loan agreement; and that OTP

had failed to allege that Merrill Lynch Business breached the terms of the loan agreement.

¶ 10 On April 23, 2010, OTP filed an amended complaint, which was substantially similar to the allegations made in the original complaint. The amended complaint alleged a breach of contract count against Merrill Lynch Business (count I), fraud counts against Merrill Lynch Business (count II) and Fenner & Smith (count IV), and breach of fiduciary counts against Merrill Lynch Business (count III) and Fenner & Smith (count V). On May 26, 2010, Merrill Lynch Business and Fenner & Smith filed a section 2-615 motion to dismiss (735 ILCS 5/2-615 (West 2008)), asserting that OTP failed to correct the deficiencies of the original complaint in the amended complaint.

¶ 11 On September 8, 2010, the circuit court dismissed counts I, III and V of the amended complaint with prejudice, and dismissed the fraud claims (counts II and IV) without prejudice. Specifically, the circuit court dismissed the breach of contract claim against Merrill Lynch Business on the basis that the express terms of the loan agreement allowed Merrill Lynch Business to "decline to renew [OTP's] line of credit for any reason or for no reason," and that OTP had not alleged any facts to demonstrate that Merrill Lynch Business acted in bad faith. The circuit court further noted that the fraud claims (counts II and IV) suffered from the same deficiencies as the original complaint, and did not allege with specificity each element required to state a cause of action for fraud—such as when the purported misrepresentations were made to OTP, how they were made to OTP, and why the alleged statements were false. The circuit court also found that the breach of fiduciary counts (counts III and V) should be dismissed because OTP failed to adequately allege the existence of a fiduciary relationship between the parties. The circuit court then granted OTP leave to replead the fraud claims only.

¶ 12 On October 5, 2010, OTP filed a second amended complaint, alleging fraud against Merrill Lynch Business and Fenner & Smith (counts II and IV), and reasserted claims for breach of contract and breach of fiduciary duty (counts I, III, V) that were materially identical to those counts in OTP's amended complaint. On November 4, 2010, Merrill Lynch Business and Fenner & Smith filed a section 2-615 motion to dismiss the second amended complaint (735 ILCS 5/2-615 (West 2008)), arguing that the breach of contract and breach of fiduciary duty claims had been previously dismissed with prejudice by the circuit court's September 8, 2010 order, and that OTP failed to cure the deficiencies in its fraud claims in the second amended complaint.

¶ 13 On February 17, 2011, the circuit court granted the section 2-615 motion to dismiss the second amended complaint, finding that OTP again failed to plead the fraud claims with any specificity, and that the e-mail correspondence attached as exhibits to the second amended complaint did not contain any "representations" made to OTP. The circuit court refused to address OTP's breach of contract and breach of fiduciary claims (counts I, III and V), finding that they had previously been dismissed with prejudice by the court's September 8, 2010 order and that OTP had not filed a motion to reconsider the court's dismissal of those claims. The circuit court then specifically granted OTP "one more opportunity to allege its fraud claims."

¶ 14 On April 5, 2011, OTP filed a third amended complaint, alleging a single fraud count against Merrill Lynch Business (count I) and Fenner & Smith (count II). The essence of the fraud claims against Merrill Lynch Business and Fenner & Smith was that, had OTP known it would be charged certain fees and that OTP's commercial line of credit would be suddenly terminated by Merrill Lynch Business or Fenner & Smith, OTP would never have entered into the loan agreement. On May 25,

2011, Merrill Lynch Business and Fenner & Smith filed a section 2-615 motion to dismiss the third amended complaint (735 ILCS 5/2-615 (West 2008)), asserting that the third amended complaint failed to cure any of the deficiencies that formed the basis for the court's dismissals of OTP's previous pleadings.

¶ 15 On September 20, 2011, the circuit court granted the motion to dismiss the third amended complaint with prejudice. Specifically, the circuit court found that OTP "essentially pleads the same conclusions of fact and law complete with deficiencies of specific factual allegations as in previous complaints." The circuit court noted that while OTP had "added dates to two of the allegations, the allegations still [did] not indicate with specificity how the alleged misrepresentations were made." The circuit court further found that the e-mail correspondences, which was attached as exhibits to the third amended complaint, did not "contain representations made to [OTP], but rather [were] internal communications of [Merrill Lynch Business and Fenner & Smith]." Thus, the circuit court concluded, the e-mail correspondences could not serve as factual support for any alleged misrepresentations by Merrill Lynch Business and Fenner & Smith. Moreover, the circuit court found that even if the fraud claims were pled with the requisite specificity, they were barred by the integration and non-reliance clauses of the loan agreement. Further, the circuit court found that OTP's argument regarding economic duress could not stand, where OTP failed to allege that Merrill Lynch Business and Fenner & Smith made a wrongful act or threat to induce OTP to renew the loan agreement in 2005.

¶ 16 On October 18, 2011, OTP filed a notice of appeal before this court.

¶ 17

ANALYSIS

¶ 18 The sole issue before us on appeal is whether the circuit court erred in dismissing OTP's third amended complaint with prejudice.

¶ 19 As a preliminary matter, we note that OTP asserts arguments on appeal relating to the breach of contract and breach of fiduciary duty counts, which were dismissed with prejudice by the circuit court's September 8, 2010 order dismissing OTP's amended complaint. The circuit court's February 17, 2011 order reiterated that the September 8, 2010 order dismissed those claims with prejudice, and stated that OTP failed to file a motion to reconsider the court's dismissal of those claims. On appeal, the defendants argue that this court lacks jurisdiction to review the dismissed breach of contract and breach of fiduciary duty counts because OTP's notice of appeal *only* requested the review of the circuit court's September 20, 2011 order dismissing the third amended complaint—which solely alleged fraud claims against Merrill Lynch Business and Fenner & Smith.

¶ 20 Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. Sept. 1, 2006). The filing of a notice of appeal is "the jurisdictional step which initiates appellate review." (Internal quotation marks omitted.) *General Motors Corp. v. Pappas*, 242 Ill. 163, 176, 950 N.E.2d 1136, 1143-44 (2011). "Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obligated to dismiss the appeal." *Id.* at 176, 950 N.E.2d at 1144. "A notice of appeal confers jurisdiction on a court of review to consider only the judgment or parts of judgments specified in the notice of appeal." *Id.* A notice of appeal is to be liberally construed and " 'will confer jurisdiction on an appellate court if the notice,

when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal.' " *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 22 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433-34, 394 N.E.2d 380, 383 (1979)).

¶ 21 In the case at bar, OTP's notice of appeal expressly states that OTP was appealing from the "[o]rder of the Honorable Raymond W. Mitchell, entered on September 20, 2011 (*Attached hereto as Exhibit "A"*), granting [d]efendants' [m]otion to [d]ismiss [OTP's] [t]hird [a]mended [c]omplaint [p]ursuant to §2-615 of the Illinois Code of Civil Procedure." (Emphasis in original.) Even construing the notice of appeal liberally and as a whole, we cannot say that it fairly and adequately set out the circuit court's September 8, 2010 and February 17, 2011 orders as "judgments complained of" by OTP. Rather, the notice of appeal advised Merrill Lynch Business and Fenner & Smith of OTP's intention to appeal solely from the September 20, 2011 order dismissing the third amended complaint, and made no mention of the circuit court's previous orders dismissing OTP's breach of contract and breach of fiduciary claims.

¶ 22 In response, OTP argues that the notice of appeal conferred jurisdiction on this court to review the circuit court's September 8, 2010 and February 17, 2011 orders, because they were "necessary steps" to the September 20, 2011 order, the September 20, 2011 order "relate[d] back" to the previous orders, and the defect in the notice of appeal was in form rather than in substance.

¶ 23 An exception to the requirement under Rule 303(b)(2) exists to confer jurisdiction on the reviewing court, despite a defect in the notice of appeal, when the orders which are not expressly mentioned in the notice of appeal constitute a "necessary step" to or "a step in the procedural

progression leading to the judgment which was specified in the notice of appeal." (Internal quotation marks omitted.) *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 23; *Bank of America, N.A. v. 108 N. State Retail*, 401 Ill. App. 3d 158, 169, 928 N.E.2d 42, 53 (2010).

¶ 24 In this case, we find that the exception does not apply to confer jurisdiction on this court to review the circuit court's previous orders, which were not expressly specified in the notice of appeal. The circuit court's September 8, 2010 dismissal of the breach of contract and breach of fiduciary claims with prejudice, which was reaffirmed by its February 17, 2011 order, was not a necessary step to or a step in the procedural progression leading to the September 20, 2011 judgment relating to the dismissal of OTP's fraud claims. The mere fact that the circuit court previously dismissed the breach of contract and breach of fiduciary claims *with* prejudice in the same orders that dismissed the fraud claims *without* prejudice, did not automatically confer jurisdiction upon this court to review any judgment other than that which was specified in the notice of dismissal of the third amended complaint, and the subsequent notice of appeal; which solely alleged fraud claims against Merrill Lynch Business and Fenner & Smith. Thus, we hold that this court lacks jurisdiction to review the circuit court's previous orders of September 8, 2010 and February 17, 2011.

¶ 25 Even if this court had proper jurisdiction over the circuit court's September 8, 2010 and February 17, 2011 orders, the result would remain the same because OTP has procedurally defaulted any challenge to the dismissal of its breach of contract and breach of fiduciary duty claims against Merrill Lynch Business and Fenner & Smith. See *Vilardo v. Barrington Community School District* 220, 406 Ill. App. 3d 713, 941 N.E.2d 257 (2010).

¶ 26 In order to avoid forfeiture on appeal, "a party wishing to preserve a challenge to an order

dismissing with prejudice fewer than all of the counts in his complaint has several options." *Id.* at 719, 941 N.E.2d at 263. "First, the plaintiff may stand on the dismissed counts and argue the matter at the appellate level." *Id.* "Second, the plaintiff may file an amended complaint realleging, incorporating by reference, or referring to the claims set forth in the prior complaint." *Id.* Under this second option, a simple paragraph or footnote in the amended pleadings notifying the defendant and the court of the plaintiff's intention to preserve the dismissed portions of his former complaints for appeal is sufficient. *Id.*, citing *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114, 664 N.E.2d 267, 271 (1996). "Third, a party may perfect an appeal from the order dismissing fewer than all of the counts of his or her complaint prior to filing an amended pleading that does not include reference to the dismissed counts." *Vilardo*, 406 Ill. App. 3d at 719, 941 N.E.2d at 263. In the case at bar, we find that OTP has not pursued any one of these options, and thus, has forfeited review on appeal of the dismissed breach of contract and breach of fiduciary duty claims against Merrill Lynch Business and Fenner & Smith. See *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 28 (plaintiff forfeited his right to seek review of the circuit court's dismissed claims, where the second and third amended complaints did not "incorporate, reallege or otherwise refer to those counts, and no appeal was taken before the filing of the second and third amended complaints"); *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 30 ("[w]here there is a completed amendment that does not refer to or adopt a prior pleading, the earlier pleading ceases to be part of the record and is abandoned and withdrawn for most purposes."). Moreover, we note that the record is devoid of any evidence that OTP filed a motion to reconsider the circuit court's September 8, 2010 and February 17, 2011 orders, thereby depriving the circuit court of the opportunity to review its

decisions and correct any alleged errors in dismissing the breach of contract and breach of fiduciary duty counts. Therefore, we hold that only OTP's fraud claims against Merrill Lynch Business and Fenner & Smith, which were alleged in the third amended complaint, are properly before this court on appeal.

¶ 27 Turning to the only remaining issue in this appeal, we determine whether the circuit court erred in dismissing OTP's third amended complaint with prejudice, which we review *de novo*. *Id.* at ¶ 14.

¶ 28 OTP argues that the fraud claims in the third amended complaint were pled with sufficient specificity, noting that it alleged which individuals made the misrepresentations to OTP, what misrepresentations were conveyed to OTP, and when they were made. OTP contends that the e-mail correspondences, which were attached as exhibits to the third amended complaint, substantiated the fraud allegations in the third amended complaint. Further, OTP contends that the terms of the loan agreement did not bar its fraud claims against Merrill Lynch Business and Fenner & Smith. Additionally, OTP maintains that OTP's fraud claims were not barred by the Illinois Credit Agreement Act.

¶ 29 Merrill Lynch Business and Fenner & Smith counter that the circuit court properly dismissed the fraud claims because, even after four failed attempts by OTP, the allegations in the third amended complaint were not pled with specificity. Further, they argue that the express terms of the loan agreement barred OTP's fraud claims. Moreover, they argue that the circuit court correctly rejected OTP's economic duress argument, on the basis that no allegations in the third amended complaint established any improper or wrongful threats by Merrill Lynch Business or Fenner & Smith.

¶ 30 A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint based on defects apparent on its face. *Duffy*, 2012 IL App (1st) 113577, ¶ 14. "In reviewing a section 2-615 dismissal motion, the relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* A section 2-615 motion to dismiss is granted where "no set of facts can be proved entitling the [p]laintiff to recovery." *Id.* However, a plaintiff "may not rely on factual or legal conclusions that are not supported by factual allegations." *Id.* We may affirm the circuit court's decision on any basis supported by the record. *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 31 To state a claim for fraud, a plaintiff must allege: (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the plaintiff had a right to rely on the statement; (4) the plaintiff's actual reliance on the statement; (5) the defendant's statement was made for the purpose of inducing the plaintiff to act; and (6) damages resulting from the plaintiff's reliance on the statement. See *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 528, 675 N.E.2d 897, 905 (1996). "A successful common law fraud complaint must allege, with specificity and particularity, facts from which fraud is the necessary or probable inference, including what misrepresentations were made, when they were made, who made the misrepresentations and to whom they were made." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 496-97, 675 N.E.2d 584, 591 (1996).

¶ 32 In the instant case, count I of the third amended complaint alleged a fraud count against Merrill Lynch Business. It alleged that Merrill Lynch Business charged approximately \$110,000 to

OTP's line of credit; that "[Merrill Lynch Business] intentionally misrepresented to OTP that there would be no exit fee charged to OTP, especially when Merrill Lynch called the WCMA Loan"; and that Merrill Lynch Business' representatives, "Daniel Downs and Randall Meck represented to Mr. Pickert and to Sanaa Wadsworth of OTP that there would be no fee for exiting the [loan agreement]." We find that each of these allegations failed to specifically plead when and how—orally or in writing—the alleged misrepresentations were made. Paragraphs 81 and 82 of count I alleged with more specificity that "[i]n October 2005, [Merrill Lynch Business'] representative, agent and employee Steven Istock represented to Gregory Pickert of OTP that there would be no fee for exiting the [loan agreement]," and that "[o]ne month before [Merrill Lynch Business] called the [loan agreement], Manny Augustine, a representative, employee and agent of [Merrill Lynch Business], represented to Gregory Pickert that [Merrill Lynch Business] would waive any late fees, penalties and exit fee in regards to the [loan agreement]." However, we find, as the circuit court correctly noted, that these allegations failed to include facts specifying how the alleged misrepresentations were made. Further, although OTP alleged that Merrill Lynch Business had a "duty to disclose such facts to OTP, and its omission to do so constitutes fraud," OTP fails to allege exactly what "facts" Merrill Lynch Business had a duty to disclose but had intentionally concealed from OTP.

¶ 33 Count I further alleged that the representations made by Merrill Lynch Business' representatives, "Mr. Downs and Mr. Meck, \*\*\* were false, and intentionally so." We find this allegation to be conclusory, where OTP failed to allege any facts specifying why the alleged representations were false. See *Coughlin v. SeRine*, 154 Ill. App. 3d 510, 516-17, 507 N.E.2d 505, 510 (1987) (conclusory allegations that attorney's representations to client were false were

insufficient upon which to pursue an action for fraud). Thus, we find that OTP has not sufficiently alleged the element of a false statement of material fact to support the fraud claim.

¶ 34 We further find that count I failed to allege that OTP had a right to rely on the alleged representations made by Merrill Lynch Business, an element which was necessary to support a claim for fraud. Although count I alleged that OTP "relied on" Merrill Lynch Business' misrepresentations, OTP has not alleged that it had a right to do so. Moreover, based on our review of the record, we find that the circuit court properly found that the e-mail correspondence, which was attached as exhibits to the third amended complaint, did not contain any representations made to OTP. Rather, that correspondence evidenced internal e-mail communications between representatives of either Merrill Lynch Business or Fenner & Smith, and could not serve as factual support for any misrepresentations upon which OTP detrimentally relied. Accordingly, our analysis of count I of the third amended complaint leads us to conclude that it failed to plead a cause of action for fraud, and therefore, the circuit court properly dismissed that count.

¶ 35 Count II of the third amended complaint alleged fraud against Fenner & Smith. We note that the allegations contained in count II appear substantially the same as those alleged in count I, with the exception that Merrill Lynch Business' name in several allegations is substituted with that of Fenner & Smith. Because count II's allegations are substantially similar to those contained in count I, they suffer from the same fatal defects as count I and thus, failed to sufficiently state a claim for fraud. Moreover, we note that OTP has failed to plead with specificity in count II as to *who* made the alleged misrepresentations, where Merrill Lynch Business' name and Fenner & Smith's name are mistakenly used interchangeably. In several allegations of count II, OTP repeatedly and erroneously

referred to Merrill Lynch Business' name where Fenner & Smith's name should have been substituted—such as "OTP relied on the fraudulent representations of [Merrill Lynch Business] representatives"; "[Merrill Lynch Business] \*\*\* fraudulently represented repeatedly that [it] would waive any late fees, penalties and exit fee in regard to the [loan agreement]; and "[Merrill Lynch Business] predatory lending practices \*\*\* were intended to take advantage of OTP[s] financial position and force OTP to agree to excessive and unreasonable terms." Conversely, paragraph 97 of count II addressed "Mr. Downs and Mr. Meck" as representatives of Fenner & Smith, rather than representatives of Merrill Lynch Business as stated in count I. Thus, we find that count II of the third amended complaint was not only confusing, but fatally deficient. Therefore, the circuit court properly dismissed the third amended complaint in its entirety.

¶ 36 Assuming, *arguendo*, that OTP's fraud claims contained the requisite specificity, we find that the claims were barred by the plain language of the loan agreement. "[A] party who signs a written agreement and has had an opportunity to review it may not subsequently claim that he was fraudulently induced to enter into the agreement based on misrepresentations as to its terms." *Nilsson v. NBD Bank of Illinois*, 313 Ill. App. 3d 751, 762, 731 N.E.2d 774, 783 (1999). Further, "where parties formally include an integration clause in their contract, they are explicitly manifesting their intent to protect themselves against misinterpretations which might arise from extrinsic evidence." *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 464, 706 N.E.2d 882, 885 (1999); see *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 29 (plaintiff was bound by the clear language of the written agreement which contained the entire agreement between the parties).

¶ 37 Here, the plain and clear language of the integration clause, under paragraph 3.7(p) of the loan agreement, provided that the loan agreement "constitutes the entire understanding and represents the full and final agreement between the parties"; that the terms of the loan agreement may not be contradicted by evidence of prior written agreements or "prior, contemporaneous or subsequent oral agreements" between the parties; that there were no unwritten oral agreements of the parties; and that OTP acknowledged that neither Merrill Lynch Business nor Fenner & Smith made any promises regarding the loan terms other than what was expressly set forth in the loan agreement. Paragraph 3.7(r) of the loan agreement stated that, by executing the loan agreement, OTP acknowledged that it understood the provisions of the agreement, that OTP's representative were provided with ample opportunity to consult with counsel prior to signing the document, and that the loan agreement was entered into voluntarily and without duress. Further, the 2006 notice of renewal, which expressly incorporated the terms and conditions of the loan agreement, provided that OTP, by executing the document, acknowledged that it had no claim against Merrill Lynch Business in connection with the loan documents. Based on the plain language of these provisions, we find that OTP could not allege fraud against Merrill Lynch Business and Fenner & Smith based on any alleged statements made outside the written agreement.

¶ 38 Nonetheless, OTP argues that all of Merrill Lynch Business' prior oral and written negotiations with OTP, including the e-mail correspondences attached as exhibits to the third amended complaint, had been "incorporated" into the 2006 notice of non-renewal. In support of this argument, OTP seizes on an isolated phrase in paragraph 2 of the notice of non-renewal: "[a]s [Merrill Lynch Business] and [OTP] have previously discussed." We reject this argument as being

without merit. The entirety of the language under paragraph 2 of the notice of non-renewal states, "[a]s [Merrill Lynch Business] and [OTP] have previously discussed, [Merrill Lynch Business] has elected not to renew the WCMA [l]ine of [c]redit for the following reason: Loan request not feasible as [Merrill Lynch Business] does not extend credit under the requested terms." Based on our examination of the entirety of paragraph 2 of the notice of non-renewal, we find that the only "discussion" between Merrill Lynch Business and OTP that was being incorporated into the terms of the notice of non-renewal involved Merrill Lynch Business' underlying reason for not renewing the commercial line of credit to OTP. Moreover, OTP's argument is further contradicted by the fact that the plain language of the notice of non-renewal expressly incorporated all other terms of the loan agreement, including the integration clause provision under paragraph 3.7(p), which, as discussed, barred OTP's fraud claims.

¶ 39 OTP further asserts that the plain language of the loan agreement did not bar its fraud claims, by arguing that Merrill Lynch Business "knew the serious financial impact to [OTP] if it did not have money from the loan, and used that unequal negotiating position to squeeze additional fees from [OTP] for a one-month extension" of the maturity date by the 2006 notice of non-renewal. We find that OTP made similar arguments, as noted by the circuit court, in OTP's response to Merrill Lynch Business and Fenner & Smith's section 2-615 motion to dismiss the third amended complaint. As the circuit court correctly noted, this argument could essentially be characterized as an "economic duress" argument.

¶ 40 Economic duress is an affirmative defense to a contract, "which releases the party signing under duress from all contractual obligations." *Bank of America, N.A.*, 401 Ill. App. 3d at 173, 928

N.E.2d at 57. "Duress occurs where one is induced by a wrongful act or threat of another to make a contract under circumstances that deprive one of the exercise of one's own free will." *Id.* at 173-74, 928 N.E.2d at 57. "[W]here consent to an agreement is secured merely through a demand that is lawful or upon doing or threatening to do that which a party has a legal right to do, economic duress does not exist." *Id.* at 174, 928 N.E.2d at 57. "Nor can such a defense be predicated on an allegation that consent to an agreement was obtained through hard bargaining positions or financial pressures." *Id.*

¶ 41 We agree with the circuit court's findings that the third amended complaint was devoid of any allegations that Merrill Lynch Business or Fenner & Smith made improper threats or wrongful acts to induce OTP to enter into the loan agreement. Thus, we hold that economic duress did not apply in this case and OTP's argument on this basis must fail.

¶ 42 We further reject OTP's various arguments in its briefs before this court regarding "constructive fraud," which were raised for the first time on appeal. It is well settled in Illinois that an appellant who fails to raise an issue before the circuit court forfeits the issue, and may not raise it for the first time on appeal. See *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93. We find that even if OTP's constructive fraud argument was properly before this court, the claim should be dismissed on the basis that the third amended complaint failed to sufficiently plead facts to establish a fiduciary relationship between the parties. See generally *Duffy*, 2012 IL App (1st) 113577, ¶ 33 (breach of fiduciary duty is a form of constructive fraud so that "where there is a breach of a legal or equitable duty arising out of a fiduciary relationship, a presumption of fraud arises"). Therefore, we hold that the circuit court properly dismissed the third amended complaint with prejudice. In

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light of our holding, we need not address Merrill Lynch Business and Fenner & Smith's alternative arguments in support of affirming the circuit court's dismissal of the third amended complaint.

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.