2012 IL App (2d) 110003-U
No. 2-11-0003
Order filed May 30, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FIRST BANK AND TRUST COMPANY OF ILLINOIS, an Illinois state commercial bank,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee and Cross-Appellant,	)	No. 09—CH—363
v.	)	
JOHN HOEPER and JAMES HOEPER, as guardians of the Estate of Donna Denten,	)	Honorable Mitchell Hoffman Judge, Presiding
Defendants-Appellants and Cross-Appellees.	)	

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: The trial court properly granted summary judgment in favor of the Bank on three counts of its verified complaint seeking foreclosure of one of its mortgagor's properties on the ground that the Bank was not in violation of: (1) the Truth in Lending Act; (2) the High Risk Home Loan Act; or (3) the Illinois Consumer Fraud and Deceptive Business Practices Act. The trial court also properly granted the mortgagor's guardians' motion for summary judgment on count IV of the Bank's complaint seeking foreclosure of another one of the mortgagor's properties when the "dragnet" clause purportedly used to secure the second property as collateral for the earlier, unrelated loan was contained in the recital portion only of the second

mortgage and was not incorporated by reference into the operating provisions of the second mortgage.

¶ 1 The appellants, John and James Hoeper, as co-guardians ("Guardians") of the estate of their mother, Donna Denten ("Denten"), appeal from an order of the trial court granting summary judgment in favor of the appellees, First Bank and Trust Company of Illinois (Bank) on counts I, II, and III of its verified complaint seeking foreclosure on one of Denten's properties (the "Mayflower Road Property"). The Bank cross-appeals the trial court's order granting the Guardians' motion for summary judgment on count IV of the Bank's complaint seeking foreclosure on another one of Denten's properties ("The Everett Road Property"). For the following reasons, we affirm both the trial court's order granting the Bank summary judgment on counts I, II, and III of its verified complaint and the court's order granting the Guardians' motion for summary judgment on count IV of the Bank's verified complaint.

¶ 2 I. FACTS

¶ 3 In 1995, the Bank made a loan providing funding of up to $3,500,000 ("Original Loan") to First Bank and Trust Company of Illinois, as Trustee under a Trust Agreement dated December 26, 1995, and known as trust number 10-1997 ("Trust") and Donna L. Denten (collectively known as "the Borrowers") to, among other things, fund a business investment. The Original Loan was secured by real property located at 405 North Mayflower Road ("Mayflower Property") in Lake Forest. The Original Loan was evidenced by a Promissory Note ("First Promissory Note") and secured by a mortgage ("Original Mortgage"), both of which were also signed on December 26, 1995, and were executed by the Trust and Denten, in favor of the Bank on the Mayflower Property.

¶ 4 The Original Loan was amended by five modification agreements dated December 1, 2000, December 15, 2003, December 9, 2004, May 25, 2006, and December 26, 2007 (referred to collectively with the Original Loan as the "Loan" and collectively with the Original Promissory Note and the Original Mortgage as the "Loan Documents."). Together, those modification agreements increased the principal amount of the Original Loan to $9,000,000. The First Promissory Note was altered by the modification agreements and by two allonges to the First Promissory Note. The Original Mortgage was also amended by each of the modification agreements.

¶ 5 The terms of the First Modification Agreement, which was executed in December 2000, indicated that the principal amount of the Original Loan was to be increased to $5,000,000, the interest rate was increased to 10%, and a new maturity date was set for December 31, 2003. Paragraph 14 of the First Modification Agreement read as follow s:

¶ 6 "That both parties hereto further mutually agree that all of the terms, provisions, stipulations, powers and covenants in the said NOTE, MORTGAGE, *** shall stand and remain unchanged and in full force and effect and shall be binding upon them except as changed or modified in express terms by this Agreement."

¶ 7 In December 2003, the Bank and Denton executed a Second Modification Agreement. That modification changed the interest rate to the greater of 7% or the prime rate plus 3% and extended the maturity date to January 2, 2005. Paragraph 15 of the Second Modification Agreement read as follows:

¶ 8 "That both parties hereto further mutually agree that all the terms, provisions, stipulations, powers, covenants in said Second Modification Agreement or any of the other Loan Documents including, but not limited to, the Note, the Mayflower Mortgage, *** shall

stand and remain unchanged and in full force and effect and shall be binding upon them except as changed and modified in express terms by this Second Modification Agreement."

¶ 9 In December 2004, the Bank and Denten executed a document entitled, "Loan Modification Agreement, Amendment to Note, Mortgage, and Other Loan Documents" (Third Modification Agreement). The terms of the this document increased the principal to $6,000,000, extended the maturity date until December 9, 2009, and changed the interest rate to the greater of 7% or the prime rate plus 2%. Paragraph 7 of the Third Modification Agreement read as follows:

¶ 10 "Agreements Continue. All the terms, provisions, stipulations, powers and covenants in the Loan Documents shall stand and remain unchanged and in full force and effect and shall be binding upon all parties thereto, except as changed or modified in express terms by this Modification Agreement. All references in the Loan Documents to the Note shall mean the Note as modified hereby."

¶ 11 Also in December 2004, the Bank made a loan providing funding of up to $750,000 to Denten for pre-development costs relating to a separate parcel of property that Denten had inherited several years earlier ("Second Loan"). The property was located at 799-801 W. Everett Road in Lake Forest (Everett Road property). The loan was evidenced by a promissory note (Second Promissory Note) dated December 9, 2004, and secured by a construction mortgage on the Everett Road property (Everett Road mortgage).

¶ 12 The recital to the Everett Road mortgage states, in pertinent part:

¶ 13 "**WHEREAS**, Lender is desirous of securing the prompt payment of the [Everett] Note, and of any replacement of notes *** together with interest and any premium thereon in accordance with the terms of the Notes and the [Everett] Loan Agreement, and any

> additional indebtedness accruing to Lender on account of any future payments, advances or expenditures made by Lender pursuant to, or any other obligation of Mortgagor arising under, any of the [Everett] Loan Documents, or under any other agreement or obligation in favor of Lender (all of the foregoing, the 'Secured Obligations')."

¶ 14 In May 2006, the Bank and Denten executed a document entitled "Loan Modification Agreement, Amendment to Note, Mortgage and Other Loan Documents" (Fourth Modification Agreement). The terms of this document increased the Original Loan amount to eight million dollars, and the maximum secured by the note was listed as $16,000,000. Also, the interest rate was changed to the greater of 10% or the prime rate plus 2%. Paragraph five of the Fourth Modification Agreement contained the following clause:

¶ 15 > "Agreements Continue. All the terms, provisions, stipulations, powers and covenants in the Loan Documents shall stand and remain unchanged and in full force and effect and shall be binding upon all parties thereto, except as changed or modified in express terms by this Modification Agreement. All references in the Loan Documents to the Note shall mean the Note as modified hereby."

¶ 16 In June 2006, the Bank delivered to Denten a draft Modification Agreement to the Everett Mortgage (Everett Mortgage Modification). The draft modification stated that, "the Mortgage secured all obligations of Borrower to Lender and the parties desire to clarify one of the other obligations so secured." It further stated that the Everett Mortgage secured the debt then due under the Promissory Note as well as all future amounts advanced under the Promissory Note and made within 20 years of the date of the Everett Mortgage Modification.

¶ 17 Although Denten's attorney confirmed via e-mail that Denten had signed the Everett Mortgage Modification, and Denten testified in her deposition that she believed the Original Loan was eventually "cross-collateralized" by the Everett Road property, neither party alleges that the Everett Road Mortgage Modification was ever signed, and the record contains no executed copy of such a document.

¶ 18 On December 26, 2007, the parties entered into a Fifth Modification Agreement, which was entitled, "Fifth Amendment of Loan Documents." Paragraph 6(d) of that modification contains the following clause:

¶ 19 "Borrower and Lender each acknowledges that there are no other understandings, agreements or representations, either oral or written, express or implied, that are not embodied in the Loan Documents and this Agreement, which collectively represent a complete integration of all prior and contemporaneous agreements and understandings of Borrower and Lender; and that all such prior understandings, agreements and representations are hereby modified as set forth in this Agreement. Except as expressly modified hereby, the terms of the Loan Documents are and remain unmodified and in full force and effect."

¶ 20 In 2008, the Borrowers defaulted under the terms of the Promissory Note and the Original Mortgage by failing to make the payments thereunder. On January 26, 2009, the Bank filed a complaint seeking foreclosure on its mortgage on the Mayflower property (count I), foreclosure of liens and security interests in personal property (count II), damages for breach of promissory note (count III), and foreclosure on its mortgage of the Everett Road property (count IV).

¶ 21 On May 19, 2009, an appearance was entered on behalf of the Guardians. On May 22, 2009, John Hoeper, as co-guardian, sent a letter to the Bank purporting to rescind the Original Loan. On

June 24, 2009, the Bank filed a motion to modify rescission procedures to stay rescission of the Original Loan pending judgment in the lawsuit, pursuant to 15 U.S.C. § 1653(b) (2008). On July 27, 2009 the trial court granted the Bank's motion to stay.

¶ 22 In the meantime, on May 29, 2009, the Guardians filed their answer to the Bank's verified complaint and raised four affirmative defenses alleging that the Bank : (1) violated the Truth In Lending Act (TILA) (15 U.S.C. § 1601 (2008)); (2) violated the High Risk Home Loan Act (HRHLA) (815 ILCS 137/1 (West 2008); (3) violated the Illinois Consumer Fraud Act and Deceptive Business Practices Act ("Illinois Consumer Fraud Act") (815 ILCS 505/1 (West 2008); and (4) breached its fiduciary duties to Denten and her estate.

¶ 23 On July 10, 2009, the Bank filed a reply to the first three affirmative defenses and a motion to strike the Fourth Affirmative Defense. The trial court granted the Bank's motion to strike the Fourth Affirmative Defense. On May 19, 2010, the Guardians filed a Fifth Affirmative Defense which pertained to count IV of the Bank's verified complaint for foreclosure on the Everett Road property. Specifically, the Guardians argued that the Bank did not have a mortgage on the Everett Road property that secured the Original Loan (which secured by Mayflower property).

¶ 24 On March 22, 2010, the Bank filed a motion for summary judgment on all counts of its verified complaint. On July 15, 2010, the trial court granted summary judgment to the Bank on counts I, II, and III of the complaint and on the Guardians' First, Second and Third Affirmative Defenses. However, it deferred ruling on count IV of the complaint and the Guardians' Fifth Affirmative Defense. In making its ruling the trial court stated, in pertinent part:

¶ 25 "The court finds that there is no genuine issue of material fact, that the fourth and fifth modifications constitute continuations of the original loan as did the first, second and third modifications based on the language and effect of the agreement.

A review of the modification documents shows that each references the original note and then describes the changes to be made to that note. For example — and this is from the first modification which is Exhibit 15 to Plaintiff's Statement of Facts – the note says — Whereas borrower executed and delivered to the Bank a promissory note December 26, 1995 in the amount of $3,500,000 with a maturity date of December 1st, 2000. Now, therefore, for and in consideration of blank — I'm omitting some of the text — the parties hereby agree to Sub 2 that the maturity date described in said note be changed from on demand, that if no demand is made, then on December 1st, 2000 to on demand but if no demand is made then December 1st, 2003. Sub 4, that the principal loan amount described in said note be increased from $3,500,000 to $5,000,000 as stated in the allonge to the promissory note.

This language demonstrates the parties intended to modify the original loan — not enter into a new loan. And that language is found throughout the modification agreements.

Also, in addition to the language of the modification agreements themselves, the effect of each modification agreement was to increase Mrs. Denten's line of credit on the original loan sometimes for a longer term as in the first, second and third modifications and sometimes for the same term or a shorter term as in the fourth and fifth modifications.

However, none used new loan proceeds to pay off the outstanding balance on the original loan as would be the case on a refinance.

Things bring us squarely to consideration of the fourth modification. The fourth modification, in addition to increasing the line of credit on the original loan, also paid off the construction loan on Everett.

The agreement required new loan fees and title insurance. However, it is uncontested that the fourth modification did not pay off the original loan which was the subject of the original note and the first three modifications. As such, it could not constitute a new loan. If any of the prior loans, including the third modification, were consumer loans, then the TILA rescission period has run since the fourth modification could only have been a continuation of a prior consumer loan.

Alternatively, if the prior loans were business loans than [sic] the fourth modification did not convert those loans into a consumer loan because under Regulation Z it did not pay off the original indebtedness.

The Denten claim under the HRHLA applies — excuse me — strike that. The Denten claim under the HRHLA falls [sic] under the same reason. The HRHLA was not in effect when the original loan was initiated. Since the various modifications are merely continuations of that loan the HRHLA cannot be applied.

Similarly, Denten's ICFA claim, which is premised on the TILA and HRHLA claims, must fail.

Based on the foregoing the court hereby grants summary judgment to First Bank."

¶ 26 On August 18, 2010, the trial court entered a judgment of foreclosure and sale of the Mayflower property.

¶ 27 On August 26, 2010, the Guardians filed a motion for summary judgment on count IV of the Bank's verified complaint for foreclosure. In their motion, the Guardians argued that the Bank did not have a mortgage on the Everett Road property that secured the Original Loan. On October 19, 2010, the trial court granted summary judgment to the Guardians on Count IV of the Bank's verified complaint and the Guardians' Fifth Affirmative Defense. As a basis for its ruling, the court held that the language in the Everett Road Mortgage that the Bank pleaded made the Everett Road property collateral for the Original Loan – a "dragnet clause" – was not operative because it appeared in the recitals of the Everett Mortgage and not in the granting provisions.

¶ 28 II. ANALYSIS

¶ 29 On appeal, the Guardians argue that the trial court erred in granting the Bank summary judgment on counts I, II, and III of the Bank's verified complaint. Specifically, the Guardians argue: (1) the trial court erred in rejecting their argument that the Bank violated TILA when it found that the three-year statute of repose had run years before the Guardians moved to rescind the loan in 2009 when the modification agreements between Denten and the Bank were new agreements, each of which triggered disclosure obligations under TILA, and the fourth and fifth modifications were executed within the Act's three year statute of repose; (2) the Third, Fourth and Fifth Modification Agreements contained material modifications and created new agreements which were governed by the High Risk Home Loan Act ("HRHLA") (815 ILCS 137/1 (West 2008)); and (3) the trial court erred in rejecting the Guardians' defense based upon the Bank's violations of the Illinois Consumer Fraud Act. 815 ILCS 505/1 (West 2008).

¶ 30 On cross-appeal, the Bank contends that the trial court erred in granting summary judgment to the Guardians on count IV of its verified complaint based upon the Guardians' Fifth Affirmative Defense that the Everett Road Mortgage did not secure the Original Loan.

¶ 31 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). The summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). However, summary judgment is a drastic means of disposing of litigation and should not be granted unless the movant's right to judgment is clear and free from doubt. *Forsythe v. Clarke USA, Incorporated*, 224 Ill. 2d 274, 280 (2007). We review a trial court's order granting summary judgment on a *de novo* basis. *National City Mortgage v. Hillside Lumber,* Incorporated, 2012 IL App (2d) 101292, ¶ 5.

¶ 32 A. The Guardians' Appeal

¶ 33 Since the Guardians' first three affirmative defenses apply to the first three counts in the Bank's verified complaint, we will address the Guardians' arguments in the order that they are listed as affirmative defenses in their reply to the Bank's motion for summary judgment.

¶ 34 1. The Truth In Lending Act

¶ 35 In their First Affirmative Defense, the Guardians argued that the Bank violated TILA when it failed to provide certain disclosures as required under that Act. See 15 U.S.C. § 1635(f) (2008). The trial court rejected this argument, and found that the expiration of the three year statute of repose provided for in TILA barred the Guardians' affirmative defense since the Original Loan was

executed in 1995 and all of the Modification Agreements were simply continuations of the Original Loan.

¶ 36 On appeal, the Guardians claim that the trial court erred in finding that any claim under TILA was barred under the statute of repose because the modification agreements between Denten and the Bank were either new, substitute contracts or refinancings, each of which triggered disclosure obligations under TILA. Further, they argued, the Fourth and Fifth Modification Agreements were executed within three years of its motion to rescind the Loan and therefore the terms of those modifications were timely under TILA's three year statute of repose. In the alternative, the Guardians argue that even if the Fourth or Fifth Modification Agreements were not substitute contracts or refinancings, they still should be able to rescind those agreements to the extent that additional funds were lent and new security interests were granted. Finally, the Guardians contend that the statute of repose does not bar their right of recoupment under state law.

¶ 37 In response, the Bank argues: (1) the Guardians waived their argument that the modification agreements constituted new, substitute contracts because they did not present it to the trial court; (2) the trial court correctly held that the modification agreements did not qualify as refinancings of the Original Loan under TILA, and therefore they did not give rise to new disclosure obligations; and (3) the Original Loan was not subject to TILA in the first place because the undisputed evidence showed that the loan was business in nature, and not a consumer loan.

¶ 38 The Truth In Lending Act (15 U.S.C. §1601 (2008)), and its implementing Regulation Z (12 C.F.R. §226 (2008)), require that certain material disclosures be made to a consumer seeking an extension of credit secured by real property. *Drake v. Ocwen Financial Corporation*, No. 09-C-6114, 2010 WL 1910337 , at *7 (N.D. Ill. May 6, 2010). Generally, TILA disclosures are only

required before credit is extended, and subsequent events do not require new or further disclosures, except in circumstances specified in TILA or Regulation Z. See *Jackson v. American Loan Company*, 202 F.3d 911, 912 (7th Cir. 2000); 15 U.S.C. §1635(f) (2008); 12 C.F.R. §226.20 (2008). One exception occurs when a consumer "refinances" their loan. Pursuant to Regulation Z, "[a] refinancing occurs when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer." 12 C.F.R. § 226.20(a) (2008).

¶ 39 Under TILA, a borrower's right to rescission shall expire "three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter [§§1631 *et seq.*] have not been delivered to the obligor." 15 U.S.C. §1635(f) (2008). TILA permits no federal right to rescind, defensively or otherwise, after the three year period referred to in §1635 has run. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419 (1998) (affirming the rejection of a borrower's affirmative defense seeking to rescind a mortgage agreement pursuant to the TILA because the three-year limitation period had passed).

¶ 40 We will first address the Bank's argument that the Guardians have forfeited the issue that the Fourth and Fifth Modifications materially altered the Original Loan and that they were therefore substitute contracts which were executed with the intent to replace the original obligations.[1] The Bank contends that the Guardians' argument constitutes a new theory on appeal and cannot stand. Specifically, the Bank argues that in the trial court, the Guardians made no arguments that as a matter of law, the Fourth and Fifth Modifications "materially altered" the loan. Instead, they contend, the

[1]Although the Bank alleges that the Guardians have "waived" this argument, this issue is more properly analyzed as one involving an alleged forfeiture. See *People v. Phipps*, 238 Ill. 2d 54, 62 (2010) (while forfeiture applies to issues that could have been raised but were not, waiver is the voluntary relinquishment of a known right).

Guardians argued below that the Fourth Modification was a "refinancing" of the Original Loan for consumer purposes.

¶ 41 The Guardians have not forfeited this issue. Here, the issue before the trial court and the issue before this court are the same. In their response to the Bank's motion for summary judgment, the Guardians alleged, "[t]he First Affirmative Defense is not barred by TILA's statute of repose, because the Fourth and Fifth 'Modifications' were not a continuation of the prior loan." In their appellate brief, the Guardians allege, "[e]ach successive modification was a substitute contract discharging the previous contracts. Each contract being discharged, the latter contract was an entirely new obligation giving rise to renewed disclosure obligations under TILA." Either way this argument is phrased, the end result is the same: the Guardians are arguing that the modifications were separate agreements that required TILA disclosures, and the three-year statute of repose contained in TILA had not run on the Fourth and Fifth Modifications. Accordingly, the Guardians have preserved this issue for appeal.

¶ 42 In support of their argument that the Fourth and Fifth Modifications constitute substitute contracts which superceded the Original Loan and other modification agreements, the Guardians argue that this case is similar to *McLean County Bank v. Brokaw*, 119 Ill. 2d 405 (1988). In *McLean*, a bank began making loans to a farmer to finance his business. At the bank's request, the farmer's mother and father signed a guaranty agreement in the amount of $50,000 for their son's debt. After his debt had increased beyond that amount, the parents signed a second guaranty agreement for $75,000, which the parties agreed would be substituted for the first agreement. *Id*. at 454. As their son's debt continued to increase, the defendants later signed a $100,000 guaranty, and then a $200,000 guaranty. When the bank requested that the defendants sign a $250,000 guaranty the wife

refused to sign it, but the husband signed it without the wife's knowledge. The bank later asked the defendants to sign a $300,000 guaranty, and they both refused. *Id*. at 409-410.

¶ 43 When the son defaulted on his loan, the bank filed a two-count complaint against the defendants. Count I named the husband as a defendant and alleged a breach of guaranty agreement in the amount of $250,000. Count II named the wife as a defendant and alleged a breach of the guaranty agreement that was executed by both the husband and the wife for $200,000. *Id*. at 405.

¶ 44 The trial court ruled in favor of the wife on the $200,000 guaranty agreement, and held that the subsequent $250,000 guaranty agreement signed by the husband had superceded the previous agreements that had been signed by both defendants. With regard to the $250,000 guaranty agreement, the trial court ruled in the bank's favor against the husband. *Id*. at 410.

¶ 45 The appellate court, however, held that the defendants were jointly and severally liable on the $200,000 agreement, and that the husband was individually liable for an additional $50,000. This was a result, the appellate court said, of the husband individually executing the $250,000 guaranty agreement. *Id.* In reversing the appellate court, the Supreme Court noted that the Bank conceded that when subsequent guaranty agreements were signed, they replaced earlier agreements. Therefore, the court held, the parties' consent to a substituted agreement rescinded the $200,000 agreement and discharged the husband and the wife's obligations under that contract. Accordingly, the trial court property held that the husband, as the signatory on the substituted $250,000 contract, was solely liable for that amount. *Id*. at 416.

¶ 46 The Guardians argue that the Fourth and Fifth Modifications, like the subsequent guaranty agreements in *McLean*, were substitute contracts in that "each discharged its predecessor so that there was only a single controlling contract at the time." *Id*. at 415.

¶ 47 We are not persuaded that the Fourth and Fifth Modifications were substitute contracts. The critical difference between the instant case and the facts in *McLean* is that in *McLean,* the Bank conceded that when subsequent guaranty agreements were signed, they replaced earlier agreements. No such concession occurred here. Further, the language contained in the Fourth and Fifth Modifications makes it clear that the terms of the Original Loan remained in full force and effect as to each modification, with the only changes being made to those explicitly listed in a particular modification agreement. Specifically, the Fourth Modification stated:

¶ 48 "Agreements Continue. All the terms, provisions, stipulations, powers and covenants in the Loan Documents shall stand and remain unchanged and in full force and effect and shall be binding upon all parties thereto, except as changed or modified in express terms by this Modification Agreement. All references in the Loan Documents to the Note shall mean the Note as modified hereby."

¶ 49 A similar clause in the Fifth Modification reads as follows:

¶ 50 "Borrower and Lender each acknowledges that there are no other understandings, agreements or representations, either oral or written, express or implied, that are not embodied in the Loan Documents and this Agreement, which collectively represent a complete integration of all prior and contemporaneous agreements and understandings of Borrower and Lender; and that all such prior understandings, agreements and representations are hereby modified as set forth in this Agreement. *Except as expressly modified hereby, the terms of the Loan Documents are and remain unmodified and in full force and effect."*

¶ 51 Since we find that the language in the Fourth and Fifth Modifications make it clear that they are simply amendments to the Original Loan, we reject the Guardians' argument that those

agreements constituted new, substitute contracts which replaced the agreement which immediately preceded it.

¶ 52 The Guardians argue that the above language is superficial and conclusory, and that it should not be read to mean that the "old contracts" are still in effect because: (1) notwithstanding the language in the modifications that some terms of the agreements continue, it was clearly the intention of the parties that a refinancing occurred with the Fourth and Fifth Modifications because each modification extended new credit to Denten at a different rate; and (2) if we find that no refinancing occurred even though a new agreement was made with new credit extended and a new interest rate, such a ruling would effectively constitute an illegal waiver of TILA disclosure requirements.

¶ 53 First, contrary to the Guardians' claim, we do not read the language in the Fourth and Fifth Modifications to mean that the "old contracts" are still in effect. Instead, the language of the modifications makes it clear that each modifications was just that – a modification of the Original Loan with various changes in each document. The fact that each modification may have extended new credit to Denten at a different rate does not make them "refinances" pursuant to TILA. As we have noted, a refinancing occurs when an existing obligation is satisfied and replaced by a new obligation and that obligation was undertaken by the same consumer. *Jackson v. American Loan Company, Inc.*, 202 F.3d 911, 912 (7th Cir. 2000) (citing Official Staff Commentary to 12 C.F.R. §226, Supp. I, p.399). Here, the Fourth and Fifth Modification Agreements did not satisfy Denten's obligations under the Original Loan and replace them with new obligations because the existing obligation was *never* satisfied.

¶ 54 Other courts have also held that a modification agreement containing similar language as that contained in the Fourth and Fifth Modification Agreements did not cancel the existing obligation and

therefore did not constitute a refinancing. In *Drake v. Ocwen Financial Corporation*, No. 09-C-6114, 2010 WL 1910337 (N.D. Ill. May 6, 2010), the plaintiff brought an action under TILA against Ocwen Financial Corporation and Ocwen Loan Servicing, LLC ("Ocwen") when the plaintiff, who had a loan secured by a mortgage on her home, entered into a loan modification agreement with Ocwen (who had been assigned the plaintiff's mortgage from another entity) after she had difficulty making her mortgage payments. After the plaintiff had entered into the modification, she discovered that the principal balance after the modification included not only the principal, interest and finance charges, but also the costs of the foreclosure proceedings against her home, late charges, and other charges related to the modification that were not disclosed in the modification agreement. *Id*. at *2.

¶ 55 In ruling that the loan modification was not a "refinancing" under TILA and therefore it did not need to contain TILA disclosures, the district court for the Northern District of Illinois relied on the following clause in the loan modification: "[A]ll covenants, agreements, stipulations, and conditions in your note and Mortgage will remain in full force and effect, except as herein modified, and none of your obligations or liabilities under your Note and Mortgage will be diminished or released by any provisions." *Id*. at *8. Specifically, the court held:

¶ 56 "In this case, it is clear that Drake's modification did not replace the existing obligation and replace it with a new one. Therefore, no TILA disclosures are required for the modification. Because TILA disclosures are not required, Ocwen Servicing's failure to include them is not a TILA violation." *Id*. at 9.

¶ 57 Other jurisdictions have come to the same conclusion under similar facts. For example, the Northern District of California has held that a modification agreement which contained a term that the modification was not a satisfaction of a prior note could not have been a refinancing for the

purposes of TILA. *Katz v. Cal-Western Reconveyance Corp*., No. 5:11cv032, 2010 WL 424453 at *10-11 (N.D. Cal. Jan. 27, 2010). Also, a Pennsylvania Bankruptcy court held that a modification to a loan containing no language that the modification replaced the original loan, and in fact suggesting otherwise with language similar to that in the instant modification agreement (among other requirements, that the parties were bound by the terms and provisions of the original loan), was not a refinancing and did not trigger a new TILA disclosure obligation. *In re Sheppard*, 299 B.R. 753, 762-765 (Bkrtcy E.D. Pa 2003).

¶ 58 We are not persuaded by the Guardians' argument that if we find no refinancing occurred such a ruling will effectively constitute an illegal waiver of TILA requirements. As we have held, the modification agreements at issue were not new agreements but instead were simply modifications to the Original Loan. Since no "new agreements" were formed, the modifications were not substitute contracts or even refinancings. Accordingly, no TILA mandated disclosures were required upon their execution.

¶ 59 As an alternative argument, the Guardians contend that even if this court determines that the modifications did not discharge previous agreements, or that those discharges did not give rise to new disclosure obligations, they should still be able to rescind the Fourth and Fifth Modification Agreements to the extent that additional funds were lent and new security interests were granted. As support for this proposition, the Guardians claim that pursuant to section 226.23(f) of the Code of Federal Regulation ("Code"), "a borrower may rescind the 'new money' portion of certain 'refinancings,' but not the 'old money' portion". 12 C.F.R. §226.23(f) (2008); *In re Porter*, 961 F.2d 1066 (3rd Cir. 1992).

¶ 60 As even the Guardians point out in their contention, this section of the Code only applies when there has been a refinancing. See 12 C.F.R. §226.23(f) (2008). Since we have held that the Fourth and Fifth Modification Agreements did not constitute refinancings, the additional funds which were advanced in those agreements cannot be rescinded pursuant to section 226.23(f) of the Code. 12 C.F.R. §226.23(f) (2008). Accordingly, this argument too must fail.

¶ 61 The last argument the Guardians make with regard to TILA is that the statute of repose does not bar their right of recoupment under state law. 15 U.S.C. §1635(f) (2008). Specifically, they argue that under the High Risk Home Loan Act (815 ILCS 137/1 (West 2008)), the "Bank's loan" was illegal because it did not verify that Denten could pay it.

¶ 62 The Guardians have forfeited this argument. In addition to the fact that they devoted only one paragraph to this claim, they have also failed to cite any authority to support their assertion that they were entitled to recoupment under Illinois law. "A reviewing court is entitled to have issues defined with pertinent authority cited and cohesive arguments presented [citation], and it is not a repository into which an appellant may foist the burden of argument and research ***." *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 365 (2011) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 681 (1993)).

¶ 63 For all these reasons, we find that the trial court did not err in concluding that the Guardians' TILA defense was barred by TILA's statute of repose. Accordingly, we need not address the Banks's final argument that the original loan was not subject to TILA since it cannot be construed as a consumer credit transaction.

¶ 64 II. The High Risk Home Loan Act

¶ 65 Next, we will address the Guardians' argument that the trial court erred in granting the Bank summary judgment on counts I, II and III of the Bank's verified complaint when: (1) the Third, Fourth and Fifth Modification Agreements contained material modifications which were governed by the High Risk Home Loan Act ("HRHLA") (815 ILCS 137/1 (West 2008)); and (2) the Bank violated HRHLA by lending to a borrower who was unable to repay the obligation, based upon a consideration of her current and expected income, other than through a sale of her residence.

¶ 66 In response, the Bank argues that the Guardians have forfeited their argument that the post-January 1, 2004 amendments (the Third, Fourth and Fifth Modification Agreements) to the Loan Documents subjected the loan to HRHLA because they did not present this issue to the trial court. *Forest Preserve District of DuPage County v. First National Bank of Franklin Park*, 401 Ill. App. 3d 966, 975 (2010) (a party forfeits an argument on appeal which was not raised in the trial court).

¶ 67 The Guardians appear to be conceding that they have forfeited this argument with regard to the Third and Fourth Modification Agreements when, in their reply brief, they note that in response to the Bank's motion for summary judgment, they argued that HRHLA was applicable to the Second and Fifth Modifications. Nevertheless, forfeiture is binding on the parties only and is not a limitation on the court itself. *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d 1003, 1028 (2009). Since this issue was presented to the trial court, at least with respect to the Second and Fifth Modification Agreements, we will address the issue of whether HRHLA, which was enacted prior to the execution of the Third, Fourth and Fifth Modification Agreements, subjected the loan to that law.

¶ 68 Section 15 of the HRHLA provides as follows:

¶ 69 "A creditor or broker shall not transfer, deal in, offer, or make a high risk home loan if the creditor or broker does not believe at the time the loan is consummated that the borrower will be able to make the scheduled payments to repay the obligation based upon a consideration of his or her current and expected income, current obligations, employment status, and other financial resources (other than the equity in the dwelling that secures repayment of the loan.) A borrower shall be presumed to be able to repay the loan if, at the time the loan is consummated, or at the time of the first monthly payments on the loan (including principal, interest, taxes, insurance, and assessments), combined with the scheduled payments for all other disclosed debts, do not exceed 50% of the borrower's monthly gross income." 815 ILCS 137/15 (West 2008).

¶ 70 Here, the Guardians have conceded that the HRHLA did not become effective until January 1, 2004. They also note that generally, a statute does not apply retroactively to a preexisting contract. *Northwest. Lincoln-Mercury v. Lincoln-Mercury*, 158 Ill. App. 3d 609, 612 (1987). However, they argue that "the law is clear that if parties modify a contract after the statute is enacted, the statute becomes applicable to it." As support for this proposition, the Guardian cite to *Northwest Lincoln-Mercury v. Lincoln-Mercury*, 158 Ill. App. 3d 609, 612 (1987).

¶ 71 In that case, the plaintiff, an auto dealer, and the defendant, an auto manufacturer, entered into a contract in 1978 whereby the plaintiff sold cars manufactured by the defendant. A dispute arose as the result of the defendant granting a new franchise to be located near the plaintiff's territory. The plaintiff conceded that the new franchise was allowable under the terms of their 1978 contract, but argued that the defendant's act in granting the new franchise violated a 1983 amendment to the Motor Vehicle Franchise Act ("MVFA"). Ill. Rev. Stat. 1985, ch. 121 ½, par.

752(q). The defendant argued that the MVFA was inapplicable to their contract because it did not go into effect until after the contract was singed. The plaintiff argued that the amendment to the MVFA applied, however, because the 1978 contract was amended in 1984 to increase one of the franchise owner's interest from 27% to 100%.

¶ 72 In reversing the trial court's grant of summary judgment for the defendant, the appellate court reviewed the 1978 contract and found that the defendant drafted the contract on its own special forms which emphasized the importance of the "personal nature" of the relationship between the auto dealer and the manufacturer. Therefore, the court held, the explicit procedure for change of ownership approval contemplated the need for a new agreement. Accordingly, by its own terms, the 1978 agreement was so materially altered that, in effect, it became a new agreement when it was altered in 1984. *Id.* at 612-13.

¶ 73 Contrary to the Guardians' assertions, the court in *Northwest Lincoln-Mercury* did *not* hold that if parties modify a contract after a statute is enacted which was not in effect at the time the original contract was signed, then that statute automatically becomes applicable to it. Instead, the court specifically framed the issue in that case as "whether the contracts entered into between [plaintiff] and [defendant] *were so 'renewed, changed, amended, modified or subject to novations'*" after 1983 that they became new contracts which could be properly regulated under an amendment to the MVFA. *Id*. at 610 (Emphasis added.).

¶ 74 We agree with the *Northwest Lincoln-Mercury* court that the change in ownership in the franchise agreement *in that case* was a material modification and that such an alternation effectively created a new contract at the time of its execution. Here, however, no such material modification occurred. As we have previously held, the parties consistently remained the same, and the terms of

the Fourth and Fifth Modifications Agreements made it quite clear that all the terms of the original agreement remained in effect except those which were specifically being altered in the modification agreements. The same holds true for the terms of the Third Modification Agreement.

¶ 75 We are likewise not persuaded by the other cases the Guardians cite where courts have held that modifications to a contract were sufficiently altered such that statutes which came into effect after the original agreement but before the modification were applicable to the terms in the original contract. None of those cases involved a loan and are therefore not sufficiently similar to the facts of this case to aid in our analysis. See *Louis Glunz Beer v. Martlet Importing Company*, 864 F. Supp. 810 (N.D. Ill. 1994) (agreements between a beer manufacturer and local distributors were sufficiently altered by the termination of a middle man such that a recently enacted statute became applicable); *Nebel, Incorporated v. Mid-City National Bank*, 329 Ill. App . 3d 957, 967 (2002) (amended lease agreement allowing new construction on the leased premises while also reaffirming the terms of the prior agreement brought those terms under current statutes).

¶ 76 The Guardian's last claim within this argument is that the express terms of the modifications acknowledged, implicated and submitted to the laws of Illinois. Thus, regardless of the extent to which each agreement was altered, the Guardians submit, the clear intent of the modifications control over prior ones. Because each subsequent modification made specific reference to the law of Illinois, they argue, it was clear that the parties intended to be governed by the law of Illinois as it existed at each modification. Therefore, the Third, Fourth and Fifth Modifications were subject to the terms of HRHLA because it became effective before the execution of those particular modifications.

¶ 77 We are not persuaded. The fact that an "Illinois law governs" provision was included in the modifications in no way makes the parties subject to new Illinois laws which were not in effect at the time the Original Loan was signed. Further, the Guardians cite no authority for this proposition.

¶ 78 Since a modification alone is not sufficient to trigger the application of a law that was not in existence at the time the Original Loan was executed, and the modifications contained in the Third, Fourth and Fifth Modification Agreements did not sufficiently alter the terms of the Original Loan, we hold that the trial court did not err in discounting this affirmative defense.

¶ 79 III. Illinois Consumer Fraud Act Violations

¶ 80 Finally, the Guardians argue that the trial court erred in granting the Bank summary judgment on counts I, II and III of its verified complaint in light of their Third Affirmative Defense, specifically, that the Illinois Consumer Fraud Act (815 ILCS 505/1 (West 2008)) was violated when the Bank violated both TILA and HRHLA.

¶ 81 In response, the Bank argues that since it did not violate TILA or HRHLA it also did not violate the Illinois Consumer Fraud Act. 815 ILCS 505/1 (West 2008).

¶ *82* Like their argument that TILA's statute of repose did not bar their right of recoupment under state law, the Guardians have forfeited this argument. The Guardians devote exactly one paragraph to this contention in their appellate brief, and they cite no legal authority within that paragraph, not even a cite to the Illinois Consumer Fraud Act itself. 815 ILCS 505/1 (West 2008). See *Timothy Whelan Law Associates, Ltd. V. Kruppe,* 409 Ill. App. 3d 359, 365 (2011) (the appellate court is not a repository into which appellant may foist the burden of argument and research). Accordingly, we will not address this issue.

¶ 83 For all these reasons, the trial court properly granted summary judgment to the Bank on counts I, II and III of its verified complaint.

¶ 84 IV. Everett Road Mortgage

¶ 85 On cross-appeal, the Bank argues that the trial court erred in granting summary judgment to the Guardians on count IV of the verified complaint and the Guardians' Fifth Affirmative Defense.

¶ 86 In count IV, the Bank sought to foreclose on the Everett Road property. In their Fifth Affirmative Defense, the Guardians pleaded that the Bank did not have a mortgage on the Everett Road property that secured the Original Loan. In granting summary judgment to the Guardians on count IV, the trial court held that Illinois law was clear that "whereas" clauses were considered mere recitals, the terms of which were not binding obligations unless referred to in the operative portions of the contract. *McMahon v. Hines*, 298 Ill. App. 3d 231 (1998); *First Bank and Trust Company of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35 (2003). The trial court then held that the language in the Everett Road Mortgage that the Bank claimed made the Everett Road property collateral for the Original Loan, a "dragnet clause," was not operative because it appeared in the recitals of the Everett Mortgage and not in its granting provisions.

¶ 87 Again, the clause at issue read as follows:

¶ 88 "**WHEREAS**, Lender is desirous of securing the prompt payment of the [Everett] Note, and of any replacement of notes *** together with interest and any premium thereon in accordance with the terms of the Notes and the [Everett] Loan Agreement, and any additional indebtedness accruing to Lender on account of any future payments, advances or expenditures made by Lender pursuant to, or any other obligation of Mortgagor arising

under, any of the [Everett] Loan Documents, or under any other agreement or obligation in favor of Lender (all of the foregoing, the 'Secured Obligations')."

¶ 89 The Bank argues that in declining to consider the dragnet clause contained in the recital, the trial court failed to give effect to the intent of the parties. It claims that unlike other recital clauses, the dragnet clause contained in the Everett Road mortgage is a substantive provision that describes part of the consideration being given for the mortgage and it is consistent with the operative provisions in that mortgage. In fact, the Bank claims, the language in the Everett Road Mortgage "effectively incorporates the dragnet clause into the operating provisions of that mortgage." At the very least, the Bank claims, the trial court should have considered the dragnet clause as extrinsic evidence of the parties' intent, along with other such evidence showing that the parties intended the Everett Mortgage to provide security for the Original Loan.

¶ 90 An all encompassing clause like the one contained in the Everett Road Mortgage recital is referred to as a "dragnet clause" or an "anaconda mortgage" because by its broad terms the debtor is "enwrapped in the folds of secured indebtedness." *Farmers and Mechanics Bank v. Davies*, 97 Ill. App. 3d 195, 2000 (1981). Such provisions are not favored and are to be carefully scrutinized and strictly construed against the mortgagee. *Id.*

¶ 91 Whether the security of a mortgage extends to the secondary liabilities of a mortgagor is a question of the parties' intent, to be determined in the first instance by the language of the mortgage itself. *National Acceptance Company of America v. The Exchange National Bank of Chicago*, 101 Ill. App. 2d 396, 404 (1968). As with any contract, a court may consider extrinsic evidence if an ambiguity exists on the face of the mortgage. *Ford v. Dovenmuehle Mortgage, Inc.*, 273 Ill App. 3d 240, 248 (1995). However, where no ambiguity exists, the intentions of the parties must be

determined from the language used and may not be changed by extrinsic evidence. *Gassner v. Raynor Manufacturing Company*, 409 Ill. App. 3d 995, 1006 (2011).

¶ 92 Illinois court have held that a "whereas" clause in a contract serves as a recital and is merely an explanation of the circumstances surrounding the execution of the contract. *McMahon* at 237. These recitals are not binding obligations unless referred to in the operative portion of the contract. *Id*. Compare *Regnery v. Myers*, 287 Ill. App. 3d 354, 360 (1997) ("whereas" clause merely a recital paragraph, the terms of which are not part of the contract), with *Brady v. Prairie Material Sales, Inc.*, 190 Ill. App. 3d 571, 577 (1989) (recital paragraphs were part of the contract because operative clause stated that the preceding terms of the agreement were not mere recitals).

¶ 93 The Bank contends that the trial court's interpretation of *McMahon* and *First Bank* regarding the significance of recitals was too restrictive. However, it does not explain how else these cases should have been read, and our review of both cases makes it very clear that in Illinois, the recitals contained in a contract are *not* binding on the parties and are instead simply explanations of the circumstances surrounding the execution of the contract unless referred to in the operative portion of the agreement. See *McMahon* at 237; *First Bank* at 45. Therefore, in order for the Bank to prevail, we must find that the language contained in the recital was incorporated into the operative portion of the contract.

¶ 94 The Bank concedes that the Everett Road Mortgage did not contain any language explicitly stating that the recitals were incorporated into the operating provisions. However, it argues that there was language in the contract "effectively accomplishing that result." Specifically, the Bank points to two areas in the Everett Road mortgage as support for this claim. First, the final granting clause of the mortgage states, "THIS MORTGAGE IS GIVEN TO SECURE payment of the principal and

the interest evidenced by the Loan Documents . . . (all of which obligations are included in the Secured Obligations)." The Bank admits that the definition of "Loan Documents" is not included in the mortgage, however, it states that the term "Secured Obligations" is defined in the recital.

¶ 95 We are not persuaded. To accept the Bank's theory would be to stand the law in Illinois on contract recitals on its head. Simply because the recital provides a definition of "Secured Obligations" does not mean that if such a term is referenced in the operating provisions of the contract then the Guardians are bound by an "agreement" that is only referred to in the whereas clause. Moreover, even if we were to find that the reference to "Secured Obligations" in the final granting clause serves as such an incorporation, and we do not, we find that the wording of the recital itself is not an agreement. The wording of that clause makes it quite clear that the parties did not agree that the Everett Road mortgage would serve as security for the Original Loan. The clause states, "[L]ender is *desirous* . . ." Whether the Bank desired for the Everett Road mortgage to secure the Original Loan is irrelevant in the absence of language that Denten agreed to these terms, and the whereas clause at issue does not contain such language.

¶ 96 Second, the Bank argues that because the recital is immediately followed by a preface to the granting clause that begins, "[N]ow, Therefore . . . .", this language "draws the recitals into the operative provisions of the mortgage just as if it were followed by "in consideration of the foregoing recitals." Since the mere reference to the recitals as reflecting consideration for the agreement is sufficient to sweep a recital into the terms of an agreement (*First Bank*, 338 Ill. App. 3d at 45), the Bank claims the "[N]ow, Therefore" clause is the same as a reference that the recitals act as consideration for the agreement.

¶ 97 We fail to see how a preface to the granting clause which begins "[N]ow, Therefore . . ." is sufficiently similar to a clause which specifically states that the recitals reflect consideration for the agreement such that the recitals can be incorporated into the terms of the contract. Further, the Bank does not explain why they should be treated the same, and it does not cite to any precedent where a court held as such. Accordingly, we find this argument to be without merit.

¶ 98 Third, the Bank argues that if the dragnet clause is not given an operative effect, is it superfluous, when in fact the purpose of such a clause is to protect a creditor against the possibility that it might forget to execute a security agreement. *Universal Guaranty Life Insurance Company v. Coughlin*, 481 F.3d 458, 464 (7th Cir. 2007).

¶ 99 The Bank's argument fails here because the purpose of a dragnet clause is irrelevant if that clause was not properly placed within the operative terms of the contract. As the Bank concedes, the Everett Road mortgage did not contain any language explicitly stating that the recitals were incorporated into the operating provisions. Additionally, for the reasons stated, we find that the language in the contract did *not* effectively accomplish that result.

¶ 100 Finally, the Bank argues that at the very least, the trial court should have considered the dragnet clause as extrinsic evidence, along with other evidence of the parties' intent that the Everett Mortgage would secure the Original Loan. See *First Bank* at 45-46 (a court may consider recitals to interpret the agreement if the language of the recitals is tracked in the operative language). Specifically, the Bank refers to the draft of the Everett Road Modification, which stated that the Everett Road Mortgage "secured all obligations of Borrower to Lender" and the language in the draft that the parties desired to "clarify one of the other obligations so secured." The Bank claims that this language confirms that the Bank believed that the Everett Road Mortgage Modification was merely

a clarification that the Everett Road Mortgage already secured the Mayflower Loan. Although the draft was never signed by Denten, the Bank contends that Denten's attorney's confirmation that the document was signed is admissible as a party admission, and that the attorney had both actual and apparent authority to confirm this information by virtue of his authority as an agent.

¶ 101 Here, as we have previously held, the recital in the Everett Road Mortgage was *not* tracked in the operative language of the mortgage. Further, simply because the operative provisions of the Everett Road Mortgage did not contain any dragnet-type language does not make those provisions ambiguous. The language in the Everett Road Mortgage was not ambiguous, and therefore we cannot look to extrinsic evidence to further determine the parties' intent. *Gassner v. Raynor Manufacturing Company*, 409 Ill. App. 3d 995 (2011) (where no ambiguity exists in a contract, the intentions of the parties must be determined from the language used and may not be changed by extrinsic evidence).

¶ 102 For the reasons stated, we hold that the trial court properly granted summary judgment to the Guardians on count IV of the Bank's verified complaint.

¶ 103 V. CONCLUSION

¶ 104 The trial court properly granted the Bank's motion for summary judgment on counts I, II, and III of its verified complaint. In addition, the trial court properly granted the Guardians' motion for summary judgment on count IV of the Bank's verified complaint.

¶ 105 Accordingly, the judgment of the circuit court of Lake County is affirmed.

¶ 106 Affirmed.