2012 IL App (2d) 111275-U
No. 2-11-1275
Order Filed June 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, As Trustee for WASHINGTON MUTUAL MORTGAGE PASS THROUGH CERTIFICATE SERIES 2005-AR2,	)	Appeal from the Circuit Court of Du Page County
Plaintiff-Appellant,	)	
v.	)	No. 11-CH-475
DOMINICK DOLCI, PAMELA DOLCI, HAWTHORNE CREDIT UNION, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: Plaintiff adequately pleaded claims for reformation and an equitable lien; equitable causes of action were not barred by the existence of an adequate legal remedy.

¶ 1 I. INTRODUCTION

¶ 2 Plaintiff, Deutsche Bank National Trust Company (as trustee for Washington Mutual Mortgage Pass Through Certificate Series 2005-AR2) appeals the grant of a motion to dismiss its two-count, first-amended complaint against defendants, Dominick Dolci, Pamela Dolci, Hawthorne Credit Union, unknown owners, and non-record claimants (the trial court had earlier dismissed

plaintiff's initial complaint, granting plaintiff leave to replead). In the first count of its complaint, plaintiff attempted to set forth a cause of action for reformation of a mortgage that secured a loan to Dominick Dolci from Washington Mutual Bank (WAMU). The second count sought, in the alternative, an equitable lien on certain property that was allegedly promised as security for the loan. For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.

¶ 3 II. BACKGROUND

¶ 4 Defendants filed a motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (see 735 ILCS 5/2-619.1 (West 2012)), asserting that the complaint failed to state a claim and also raising affirmative matter. 735 ILCS 5/2-619.1 (West 2012). A motion to dismiss under section 2-619.1 is a combined motion where a defendant advances argument under both sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615 (West 2012); 735 ILCS 5/2-619 (West 2012). In reviewing such a motion, we accept all well-pleaded facts as true, drawing all reasonable inferences against the movant. *Balmoral Racing Club, Inc. v. Gonzalez*, 328 Ill. App. 3d 478, 484 (2003). To the extent the motion relies on affirmative matter not apparent on the face of the motion, a supporting affidavit shall be filed. See *Curtis Casket Co. v. D.A. Brown & Co.*, 259 Ill. App. 3d 800, 804-05 (1994).

¶ 5 According to the complaint, the Dolcis own a parcel of residential property in Hinsdale (the "subject property"), which they purchased for $1,255,000. Dominick Dolci applied for an $800,000 loan that was to be secured by a first mortgage on the subject property. The complaint states, "All documentation submitted stated that Dominick R. [Dolci] would hold title to the Subject Property in his individual name." Based on such representations, WAMU approved the loan. Further, "[s]ince Dominick R. [Dolci] represented to WAMU that he would be taking title to the Subject

Property in his individual name, a condition of the loan disbursement was that Pamela [Dolci] be removed from the purchase contract." WAMU required this condition so that the mortgage would attach to the entirety of the subject property. One factor upon which WAMU based its approval of the loan was that the ratio of the value of the loan was about 65% of the value of the Subject Property.

¶ 6 A closing was held on October 1, 2004. Neither Dominick R. Dolci nor Pamela Dolci attended, and Dominick P. Dolci appeared as their attorney-in-fact "with a Power of Attorney to execute all documentation necessary to purchase the Subject Property and execute a mortgage secured by the Subject Property." Through the attorney-in-fact, Dominick R. Dolci reaffirmed that he would take title to the property in his individual name, "signing the Loan Application that so stated" (the loan application is attached as exhibit A, and it states that title will be held solely by Dominick R. Dolci). Also through the attorney-in-fact, Dominick R. and Pamela Dolci "executed one or more documents representing that the mortgage to WAMU would be a first mortgage on the Subject Property." Pamela, by the attorney-in-fact, executed the mortgage in two places. In one place, her signature is unrestricted, but in the other, it states that she signed "solely to waive her homestead interest." The complaint further alleged, "The deed received at closing was a conveyance to both Dominick R. and Pamela [Dolci], contrary to the Loan Application signed at closing and contrary to every representation made by Dominick R. [Dolci] at closing." It continued, "On information and belief, the Homestead Restriction was placed on the mortgage by the attorney-in-fact *** acting under the mistake in fact that Dominick R. [Dolci] would be accepting title in his individual name." WAMU agreed to disburse the mortgage because it mistakenly believed that Dominick R. [Dolci] received title in his individual name.

¶ 7 The complaint states that both parties proceeded under the belief that Dominick R. [Dolci] was taking title individually, but the deed created a joint tenancy between Dominick R. and Pamela Dolci. However, "[t]he effect of the Homestead Restriction on one part of the mortgage but not the other creates the possibility that the mortgage is a mortgage on only the fifty percent (50%) interest of Dominick R. [Dolci] rather than on the entire Subject Property." Therefore, according to the complaint, "[t]he mortgage needs to be reformed by deleting the Homestead Restriction to reflect the agreement of the parties that the subject mortgage be a lien on the entirety of the Subject Property." Plaintiff claims that as a result of the Dolcis' position that the mortgage only attaches to half the subject property, it does not have an adequate remedy at law. The Dolcis have obtained a second mortgage from defendant Hawthorne Credit Union, and plaintiff fears that Hawthorne will contend that its mortgage has first priority on half the subject property. The complaint also states that the Dolcis represented to Hawthorne that plaintiff's mortgage had first priority on the entire subject property.

¶ 8 Pertinent to the second count, which seeks an equitable lien, plaintiff alleged the following. Pamela Dolci purchased her 50% interest in the subject property with the proceeds of the loan. She represented that the mortgage would have first priority on the entire subject property, free of all defenses. The complaint states that all documents executed at the closing reflect the parties' intent that the mortgage have first priority on the entire subject property. It would be inequitable if no lien were placed on Pamela's half of the subject property, given her promise that a valid first mortgage would be placed on the subject property in exchange for the disbursement of the loan that allowed for its purchase. Moreover, she could not have purchased her half of the property if the loan had not been disbursed. This relief was expressly sought as an alternative to the relief sought in the first count of the complaint.

¶ 9 Defendants moved to dismiss, arguing both that the complaint failed to state a claim and that plaintiff was not entitled to invoke equity as it had adequate remedies at law. Defendants contended that a promissory note executed by Dominick R. Dolci constituted a promise to repay the loan and that the note is enforceable at law. Further, the mortgage, regardless of whether it is only on half the subject property, is an encumbrance rendering the subject property unmarketable. Finally, defendants noted that plaintiff did not allege that it did not have title insurance from which it could recover if it suffered monetary damages. Defendants also asserted that plaintiff's allegations are insufficient to show a mutual mistake of fact (a necessary element of a reformation action (*Zannini v. Reliance Ins. Co. of Illinois, Inc*., 147 Ill. 2d 437 (1992)). Regarding the equitable lien, defendants argue that plaintiff did not plead sufficient facts to show that Pamela made any representations about the scope of the mortgage beyond those expressed by how her attorney-in-fact executed that mortgage.

¶ 10 The trial court initially found that the mistake upon which plaintiff was basing its claim was one of law; however, the court subsequently ruled that it was granting the motion in accordance with section 2-619 of the Code (see 735 ILCS 5/2-619 (West 2012)), indicating that the dismissal was based on affirmative matter raised by plaintiff (presumably finding that plaintiff had an adequate remedy at law). In any event, we review the result at which the trial court arrived rather than its reasoning. *In re Marriage of Ackerley*, 333 Ill. App. 3d 382, 392 (2002). Moreover, as this cause comes to us following the dismissal on an action, we conduct *de novo* review. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App. (1st) 103482, ¶ 10. Hence, we owe no deference to the trial court. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 595 (2011).

¶ 11 III. ANALYSIS

¶ 12 We will first consider defendants' contention that plaintiff cannot proceed with equitable actions as it has an adequate remedy at law. As we conclude that plaintiff does not, we will then consider whether the complaint states a claim for either reformation or an equitable mortgage.

¶ 13 It is, of course, clearly axiomatic that a plaintiff cannot seek an equitable remedy where an adequate remedy at law exists. *Newton v. Aitken*, 260 Ill. App. 3d 717, 720 (1994). To be "adequate," a legal remedy need not be identical to the equitable remedy sought; rather, it is sufficient if it is "clear, complete, and as practical and efficient to the ends of justice and its prompt administration as an equitable remedy." *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 548 (1977), quoting *K.F.K. Corp. v. American Continental Homes, Inc.*, 31 Ill. App. 3d 1017, 1021 (1975). The existence of an adequate remedy is an affirmative defense. *Hahn v. County of Kane*, 2012 IL App. (2d) 110060, ¶ 20; *Wood River Township v. Wood River Township Hospital*, 331 Ill. App. 3d 599, 603 (2002); *Estes v. Smith*, 244 Ill. App. 3d 681, 683 (1993); *Mohr v. Messick*, 322 Ill. App. 56, 59 (1944). The mere existence of a possible remedy at law is not sufficient to warrant the denial of equitable relief. See *American Life Insurance Co. v. Stewart*, 300 U.S. 203, 214 (1937), quoting *Davis v. Wakelee*, 156 U.S. 680, 688 (1895) (" 'Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.' "). We further note that reformation (*Estate of Hurst v. Hurst*, 329 Ill. App. 3d 326, 336 (2002)), foreclosure (*Metrobank v. Cannatello*, 2012 IL App. (1st) 110529, ¶ 19), and, obviously, the imposition of an equitable lien (see *Lewsander v. Wal-Mart* Stores, Inc., 296 Ill. App. 3d 169, 182 (1998)) are all equitable remedies.

¶ 14 Defendants point to three remedies that, they assert, are adequate: "(I) a suit in law for breach of the promissory note, (ii) a suit in law under the loan title insurance policy, and (iii) an equitable remedy in that there is a cloud on the title." The latter contention is perplexing—how

could plaintiff pursue other equitable remedies if reformation and an equitable lien are unavailable due to the existence of adequate legal remedies? The second is speculative, as we are not aware of the terms of any policy of title insurance, much less whether one exists. Moreover, to be an adequate remedy, it must exist against the same person from whom relief is sought in equity. *Interstate Cigar Co. v. United States*, 928 F. 2d 221, 224 (7th Cir. 1991), citing 30A C.J.S. Equity 25 (1965). This leaves only an action based on the note as a colorable contention.

¶ 15 The existence of a note has never been a bar to the maintenance of a foreclosure action. See, *e.g.*, *Standard Bank & Trust Co. v. Madonia*, 2011 IL App. (1st) 103516, ¶¶ 9-10; *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 240-41 (2004); *Northern Trust Co. v. Halas*, 257 Ill. App. 3d 565, 572 (1993); *Rago v. Cosmopolitan National Bank*, 89 Ill. App. 2d 12, 14-15 (1967); *Brenner v. Franke*, 18 Ill. App. 2d 202, 208-09 (1958). If an action based on a note were an adequate legal remedy, no one could ever maintain a foreclosure action, which is equitable in nature, where a note exists. However, as explained above, such actions are commonplace. In this case, the relief sought by plaintiff pertains to the scope of the mortgage, that is, whether it, or an equitable lien, attaches to the entire subject property or a portion thereof, respectively. It would be incongruous to hold that plaintiff is barred from maintaining an action regarding its ability to foreclose on the subject property when plaintiff would not be barred from actually foreclosing. As such, the existence of the note does not preclude plaintiff from seeking equitable relief in this case.

¶ 16 We note that defendants briefly assert that this action is barred by the plaintiff's purportedly unclean hands. The doctrine of unclean hands bars a party from seeking equitable relief where "the party *** is guilty of misconduct, fraud or bad faith toward the party against whom relief is sought if that misconduct is connected with the transaction at issue." *Long v. Kemper Life Insurance Co.*, 196 Ill. App. 3d 216, 219 (1990). Without citation to the record, defendants assert that WAMU had

access to relevant documents and was on notice of the homestead restriction. Defendants do not explain how this amounts to anything approaching "misconduct, fraud, or bad faith." *Id*. Accordingly, we will not consider this argument any further.

¶ 17 We now turn to the question of whether plaintiff has adequately pleaded a cause of action. We will begin with plaintiff's first count: reformation. While "[a] written contract may be reformed to reflect the intention of the parties"; generally, "[i]t is assumed that the parties' written agreement expresses their mutual intentions." *Suburban Bank of Hoffman Schaumburg v. Bousis*, 144 Ill. 2d 51, 58, 59 (1991). Clear and convincing evidence is required to overcome this presumption. *Brady v. Prairie Material Sales, Inc.*, 190 Ill. App. 3d 571, 578 (1989). Typically, a contract may only be reformed due to a mistake of fact and not one of law. *Beynon Building Corp. v. National Guardian Life Insurance Co.*, 118 Ill. App. 3d 754, 764-65 (1983). The mistake of fact must be mutual or the result of fraud by one of the parties. *In re Marriage of Braunling*, 381 Ill. App. 3d 1097, 1102 (2008). Nevertheless, where the interests of justice so require, a court may intervene when the mistake is one of law. *Estate of Hurst v. Hurst*, 329 Ill. App. 3d 326, 334 (2002).

¶ 18 The main point of contention between the parties concerns whether plaintiff has pleaded a mistake of fact or law. Plaintiff's allegations, in essence, are that the parties intended a mortgage to attach to the entire subject property. They also believed that Dominick R. Dolci would hold title individually. However, the deed conveyed the property to Dominick R. Dolci and Pamela Dolci jointly. The attorney-in-fact acting for Dominick R. Dolci and Pamela Dolci executed the mortgage as if Dominick R. Dolci was taking title individually in that, in one place where he executed the mortgage for Pamela, it states that she is signing "solely to waive her homestead interest." As a result, and contrary to the parties' intentions, the mortgage (arguably) attached only to the interest held by Dominick R. Dolci, that is, half of the subject property.

¶ 19 Defendants contend that these allegations describe a mistake of law. They assert that WAMU was simply mistaken as to the legal effect of the homestead restriction that followed Pamela's signature on the mortgage document. We disagree, at least for the purposes of assessing the propriety of granting a motion to dismiss. We find sound guidance for the resolution of this issue in the case of *Farmer City Bank v. Guingrich*, 139 Ill. App. 3d 416 (1985). There, the defendant sought a line of credit from the plaintiff to cover certain bonding obligations. The defendant, the manager of a company known as Lotus Grain, signed a personal guaranty on behalf of the company. According to the defendant, the parties intended the guaranty to cover the line of credit; however, it was drafted such that it covered all obligations of Lotus Grain. Subsequently, the plaintiff foreclosed on certain unrelated mortgages, and, following that action, sought to recover a deficiency from the defendant. The defendant responded, *inter alia*, that the guaranty should be reformed to reflect the parties' intent that it was limited to the line of credit.

¶ 20 The *Guingrich* court agreed. *Id*. at 429. It began its analysis by acknowledging that reformation is only appropriate where the parties acted under a mutual mistake of fact and that a mistake of law would not support reformation. *Id*. at 427. The court then held that the evidence clearly established that the parties intended the guaranty to be limited to the line of credit. *Id*. at 428-29. It further found this mistake warranted reformation. *Id* at 429. The mistake in *Guingrich* concerned the scope of the guaranty. Here, plaintiff alleges a mistake regarding the scope of the mortgage. Thus, both the mistake in *Guingrich* and the mistake alleged in this case concern the parties' intent as to the extent of security that would be provided for a loan. Like the *Guingrich* court, we hold that such a mistake is one of fact, which, if proven, is sufficient to warrant reformation. See also *Fisher v. State Bank of Annawan*, 163 Ill. 2d 177, 182-84 (1994) (treating a mistake as to the extent of security provided for a loan as one of fact).

¶ 21 Defendants inappropriately rely on *Hartford Casualty Insurance Co. v. Moore*, 731 F. Supp. 800 (C.D. Ill. 2010). In that case, the parties agreed that a legal malpractice insurance policy should run (retroactively) from December 21, 2006, to December 21, 2007. An insurance agent advised that this would provide coverage dating back to the time when the attorneys were licensed to practice law. Subsequently, the attorneys were sued for failing to prosecute three appeals prior to December 21, 2006, which predated the policy. The attorneys sought to reform the policy to provide coverage. The court found reformation unavailable, noting that the parties actually intended the policy to be retroactive to December 21, 2006. *Id*. at 807. They were simply mistaken as to the legal effect of inserting that date into the policy—that is, whether a policy written in this manner would provide the coverage desired. *Id*. Defendants attempt to analogize this case to *Moore* by asserting that the parties knew the homestead restriction was included on the mortgage, but were mistaken as to its effect on the scope of the mortgage. Defendants' contention is premature. At the pleading stage, all inferences must be drawn in plaintiff's favor. *In re Huron Consulting Group, Inc., Shareholder Derivative Litigation*, 2012 IL App. (1st) 103519, ¶ 35. If defendants subsequently establish that the insertion of the homestead restriction was consistent with the parties' intent (or, if plaintiff fails to prove that it was not), no mistake occurred and reformation would not be appropriate. However, plaintiff has pleaded otherwise, which is sufficient to survive a motion to dismiss. We similarly reject defendants' reliance on *Harley v. Magnolia Petroleum Co.*, 378 Ill. 19 (1941), as we would be required to draw inferences in defendants' favor as well.

¶ 22 Finally, we note that plaintiff has adequately alleged that the mistake was mutual. The attorney-in-fact allegedly included the homestead restriction because he believed title would be held by Dominick R. Dolci individually and that WAMU agreed to the loan for the same reason. They

support this allegation by alleging that all documents pertaining to the loan stated that Dominick R. Dolci would hold title individually. The loan application is attached to the complaint.

¶ 23 In sum, plaintiff has adequately set forth a claim for reformation. Moreover, plaintiff does not have an adequate remedy at law. The trial court thus erred in dismissing the first count of plaintiff's first-amended complaint.

¶ 24 Turning to whether plaintiff's second count adequately alleges entitlement to an equitable lien, we hold that the trial court erred in dismissing this count as well. To plead entitlement to an equitable lien, a plaintiff must allege "(1) a debt, duty or obligation owing by one person to another and (2) a *res* to which that obligation fastens." *Hargrove v. Gerill Corp.*, 124 Ill. App. 3d 924, 931 (1984). Determining whether an equitable lien is warranted requires a consideration of the totality of the circumstances. See *Melrose Park National Bank v. Melrose Park National Bank, as Trustee under Trust Agreement 2372*, 123 Ill. App. 3d 282, 287 (1984) ("We believe that the facts in each case must be considered together and the court must decide whether, on balance, the facts are more indicative of an intent to create a personal property security interest or an intent to create an equitable mortgage."). An equitable lien may arise "wholly from general considerations of fairness and justice." *Agribank, FCB v. Whitlock*, 251 Ill. App. 3d 299, 310 (1993).

¶ 25 Construing the complaint in plaintiff's favor, as we must (*In re Huron Consulting Group, Inc., Shareholder Derivative Litigation*, 2012 IL App. (1st) 103519, ¶ 35), we initially note that the proceeds of the loan were used to purchase the subject property. Moreover, the subject property was clearly intended as collateral, as the mortgage attached to at least half of it under the documents executed by the parties. It is inferable that WAMU did not intend—and would not have made—a loan that was partially unsecured, which would be the result if the mortgage only attached to half the subject property. It is, in turn, inferable that defendants intended to use the entire subject property

as collateral to induce WAMU to make the loan. As such, the pleadings allow an inference that the parties intended the mortgage to attach to the entire subject property. This court has previously stated that "[E]ven in the absence of express language, if an agreement sufficiently manifests that specific property is intended to serve as security for a debt, then an equitable lien may be imposed on the property so identified." *La Salle National Trust, N.A. v. Village of Westmont*, 264 Ill. App. 3d 43, 75 (1994). Based on the pleadings, that would appear to be the case here. It would also seem that "general considerations of fairness and justice" (*Agribank, FCB*, 251 Ill. App. 3d at 310) would militate in favor of the imposition of an equitable lien.

¶ 26 Defendants also assert that since Pamela Dolci is not listed on the mortgage, she did not use the loan proceeds to acquire the subject property. We find this assertion disingenuous. Pamela acquired her interest in the property in the very same transaction in which the loan proceeds were disbursed and used to purchase the subject property. As noted above, this action is equitable in nature. Accordingly, we will not exalt form over substance. See *In re Estate of Crooks*, 266 Ill. App. 3d 715, 724 (1994), citing *Hogan v. Dalziel*, 40 Ill. App. 2d 19, 29 (1963) (" 'Equity always looks to the substance rather than to the form.' "); *Havana National Bank v. Wiemer*, 32 Ill. App. 3d 578, 583 (1975) ("In Illinois, courts of equity have, from earliest times, looked to the substance, not the form, of a transaction to discern whether a conveyance was absolute or in reality a mortgage."). It is, after all, a very old maxim that equity views "as actually done, [that] which ought to have been done." *Rankin v. Rankin*, 36 Ill. 293 (1865). Thus, we find it of no moment that Pamela is not expressly listed on the loan documents.

¶ 27 In sum, the trial court should not have dismissed this count of plaintiff's complaint either.

¶ 28 IV. CONCLUSION

¶ 29 In light of the foregoing, the order of the circuit court of Du Page County is reversed, and this cause is remanded for further proceedings.

¶ 30 Reversed and remanded.