2014 IL App (1st) 132324-U

No. 1-13-2324

September 30, 2014

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

AREA WIDE 79TH & WESTERN, LLC, an Illinois Limited Liability Company, and FAYSAL MOHAMED,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 12 L 1544
AHMAD T. SULAIMAN and SULAIMAN LAW GROUP, LTD.,	)	The Honorable James N. O'Hara,
Defendants-Appellees.	)	Judge, presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

Held: The circuit court did not err in granting defendants' motion to dismiss plaintiffs' legal malpractice claim where plaintiffs' defense to the underlying foreclosure proceeding that the bank and plaintiffs entered into an enforceable loan modification agreement could not be sustained under the Illinois Credit Agreements Act.

¶ 1 Plaintiffs, Area Wide 79th & Western, LLC (Area Wide), and Faysal Mohamed, sued their attorney, defendant Ahmad T. Sulaiman, and his law firm, defendant Sulaiman Law

Group, Ltd., alleging legal malpractice arising out of defendants' representation of plaintiffs in a commercial foreclosure action brought against them by Private Bank & Trust Company (Private Bank). On the advice of Sulaiman, plaintiffs entered into a settlement agreement with Private Bank in the foreclosure action. Plaintiffs subsequently brought a legal malpractice lawsuit against defendants, contending that Sulaiman failed to advise them that they had an enforceable loan modification agreement with Private Bank. Defendants moved to dismiss the legal malpractice lawsuit, arguing that although Sulaiman initially raised this defense on behalf of plaintiffs in the underlying foreclosure action, he ultimately concluded that it would not prevail under the Credit Agreements Act (the Act) (815 ILCS 160/1, *et seq.* (West 2010)). Following the circuit court's grant of defendants' motion and dismissal of the case with prejudice, plaintiffs appealed.

¶ 2 As this appeal comes to us following a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)), we take as true all well-pleaded facts alleged in the complaint. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 46. According to plaintiffs' complaint, the property at issue was commercial development property located at 79th Street and Western Avenue in Chicago, Illinois (the Property) where plaintiffs intended to construct a building for a Walgreens store and an outlot for a bank. In April 2008, Area Wide entered into a construction loan and corresponding $6.2 million promissory note and mortgage (Note 1 and Mortgage 1), in addition to a $200,000 non-revolving line of credit (Note 2), with Private Bank, which Mohamed personally guaranteed. The Walgreens was constructed and a lease was obtained with Walgreens for 25 years, which would pay $446,000 net per year. Further, plaintiffs had an agreement with TCF Bank to construct a bank on the outlot, for which TCF Bank agreed

to pay $2.2 million. In addition, plaintiffs asserted that they entered into an interest rate swap agreement with Private Bank in order to secure a low interest rate for a term/end loan, and Area Wide paid approximately $14,645.32 each month for the swap agreement.

¶ 3 When the notes with Private Bank matured and became due on November 1, 2009, plaintiffs subsequently negotiated several extension agreements with Private Bank to modify and extend the notes. The first modification agreement was executed on December 29, 2009, and extended the maturity date to January 29, 2010. After this maturity date expired, Private Bank and plaintiffs entered into a second modification on March 31, 2010, extending the maturity date to April 29, 2010. On June 29, 2010, they again entered into a third modification that extended the maturity date to August 29, 2010.

¶ 4 Plaintiffs alleged that, after the August 2010 maturity date, they again negotiated a modification with Private Bank in October 2010. However, despite this fourth modification, Area Wide was served with a notice of default by Private Bank on November 1, 2010, for failure to make the monthly interest and principal payments and pay the loans upon maturity on August 29, 2010, in addition to failing to settle mechanics liens on the property. Private Bank instituted foreclosure proceedings and filed a complaint on December 8, 2010.[1]

¶ 5 On December 30, 2010, Mohamed engaged Sulaiman and his law firm to represent him and Area Wide in the foreclosure action. In response to Private Bank's complaint, defendants filed an answer on behalf of plaintiffs in which they raised the affirmative defenses of estoppel, waiver, unclean hands/bad faith, and constructive contract, and asserted that plaintiffs and Private Bank had entered into an enforceable fourth modified loan

[1] The foreclosure action was titled: Metron Engineering & Construction Co. v. Area Wide 79th & Western, LLC, No. 09 CH 18122 (Cir. Ct. Cook Co.). Private Bank also instituted a separate lawsuit for default on the swap agreement, which was titled: Private Bank & Trust Co. v. Area Wide 79th & Western, LLC, No. 11 L 004383 (Cir. Ct. Cook Co.).

agreement. Private Bank moved to strike and dismiss on grounds that all of the affirmative defenses were barred because no document existed which satisfied the Credit Agreement Act.

¶ 6 In response to Private Bank's motion, defendants, on plaintiffs' behalf, cited several documents which they claimed set forth the terms of the fourth modification agreement.[2] Defendants asserted that the purported fourth loan modification agreement was evidenced by: (1) two letters from Private Bank from May 26, 2010, and August 3, 2010, which were signed by James Larrick, Associate Managing Director of Private Bank; (2) two emails sent by Larrick on October 20 and 22, 2010; and (3) records of several checks deposited by Mohamed and debits by Private Bank from Area Wide's business account held by Private Bank. Defendants conceded that there was no single document that contained the credit agreement and was signed by both parties, but contended that the above documents, when construed together, comprised a credit agreement which contained the relevant terms and the signatures of both parties.

¶ 7 The May 26, 2010, and the August 3, 2010, letters from Private Bank set forth the terms and conditions of extending the term and construction loans. The May 26 proposal letter provided for a $5,180,000 term loan and a construction loan of $1,280,000 and set forth the interest rates and other terms of the loans. The August 3 proposal letter provided for a term loan in the amount of $5,450,000 and a construction loan in the amount of $960,000, and also set forth the interest rates and other terms of the loans. However, both letters stated that they were presented to plaintiffs

[2] Defendants also argued that the parties' course of conduct evidenced an agreement because Private Bank and plaintiffs had entered into prior loan modifications and as these matured, Area Wide had continued to make payments and Private Bank had continued to accept them while they negotiated new loan modifications.

"for discussion purposes and will serve to outline the general terms and conditions under which the Bank will consider extending new loan facilities to Area Wide 79th & Western, LLC ('Borrower'). This letter is not to be construed as all-inclusive or as a commitment of financing from the Bank, in part or in whole, or in any way. Final approval of any credit extension is subject to customary due diligence by the Bank and the review and approval of our Credit Committee."

The proposal letters were titled, "Summary of Proposed Terms and Conditions." Larrick signed the letters and wrote, "[w]e look forward to further discussion on this proposal."

¶ 8 The October 20, 2010, email was from Larrick to Jay Wheeler, with copies to Faysal Alwad (presumably Mohamed) and Pat Ahern. Larrick wrote that he

"may be able to increase our loan by approximately $300,000+ from where we originally proposed it (total loan of $1,275,000). ***

We have started the process to get the increase and Walgreens takeout approved. One major holdup is the unpaid interest on the loan. These loans need to be current on interest prior to me requesting approval to modify/extend.

Faysal is aware of the unpaid interest[.] *** We must have a minimum payment on the loan of $16,790.79 before 10/29."

Larrick's email indicated that cash equity of $608,000 was needed.

¶ 9 In the October 22, 2010, email, Larrick wrote to Mohamed with a copy to Pat Ahern. Larrick wrote that he was following up on an earlier email to Mohamed informing him that his account was short approximately $325 for a $16,790.79 loan payment owed on July 29, 2010. Larrick wrote "[p]lease confirm when you receive this email and when the Area Wide 79th & Western account will have sufficient funds to make the 7/29 payment on the loan.

Please note, we will not be able to move forward with any new financing approvals until the loans are paid current on interest."

¶ 10 With regard to plaintiffs' check deposits and Private Bank's debits from the business account, defendants provided the following records: (1) on November 3, 2010, Area Wide deposited a $32,000 check signed by Mohamed with the description "Private Bank loan – swap rate loan"; (2) on November 8, 2010, Private Bank debited two payments: a $16,790.79 payment on Note 1 and a $559.72 payment on Note 2; (3) on November 23, 2010, Private Bank debited an additional $14,645.32 from the account for the swap agreement; (4) on November 29, 2010, Area Wide deposited a check for $32,000 which was signed by Mohamed with the description "Dec 2010 Rent"; (5) on November 29, 2010, Private Bank debited $559.72 from the account as the first payment of Note 2 as part of the term loan. Defendants asserted that Private Bank continued to debit monthly payments from the account in December 2010 and January 2011.

¶ 11 While the motion to strike and dismiss in the foreclosure proceeding was pending, plaintiffs settled with Private Bank on June 29, 2011. As part of the settlement agreement, which defendants helped negotiate, plaintiffs executed a deed in lieu of foreclosure for the Property. In exchange, Private Bank agreed to release to plaintiffs more than $200,000, which was being held in a court-ordered sequestered account and which Private Bank claimed as additional collateral for the loan. Private Bank also agreed to dismiss the foreclosure action and the swap action with prejudice. Mohamed was excused from his obligation as guarantor of the loans.

¶ 12 Plaintiffs subsequently initiated their legal malpractice case against defendants on February 9, 2012, and filed an amended complaint on May 8, 2011. Plaintiffs alleged that

defendants had a duty to advise them that they had the right to enforce the purported fourth modification agreement with Private Bank, that defendants should have taken steps to delay the foreclosure proceedings so that plaintiffs could secure takeout replacement financing, and that defendants should not have advised them to settle the foreclosure case before the circuit court ruled on Private Bank's motion to strike and dismiss. Plaintiffs also alleged that defendants failed to advise them of or negotiate regarding the potential tax consequences of the settlement agreement. According to plaintiffs' complaint, plaintiffs lost the stream of income from the Walgreens lease, the ability to sell the outlot to TCF Bank, to sell the property for approximately $7.5 million, to resolve the mechanics liens on favorable terms, and to resolve the default with Private Bank and enforce the fourth loan modification, and they became subject to significant tax liabilities.

¶ 13 Defendants moved to dismiss the amended malpractice complaint pursuant to section 2-619 of the Code, arguing that plaintiffs could not have successfully enforced the purported fourth loan modification because the various documents were insufficient to satisfy the Act's requirement that a credit agreement be in writing, contain the relevant terms and conditions, and be signed by the creditor and debtor. Defendants argued that they were not estopped from asserting that there was no enforceable fourth modified loan agreement, even though defendants advanced this defense on plaintiffs' behalf in the foreclosure proceedings. Defendants also contended that the facts did not support plaintiffs' contention that they could have obtained replacement takeout financing if defendants had delayed the foreclosure proceeding; defendants pointed out that more than eight months elapsed between the notice of default and the settlement. Defendants asserted that plaintiffs never informed Sulaiman that they were in the process of obtaining such financing or wanted a delay. Defendants

maintained that the recommendation to settle while Private Bank's motion was pending constituted a reasonable strategic decision by counsel. Defendants pointed out that in agreeing to the settlement, plaintiffs were relieved of their obligation to pay a loan deficiency of over $1 million and they received more than $200,000 held in the court-ordered sequestered account. Defendants also argued that plaintiffs failed to establish that any tax liability had been or would be incurred.

¶ 14 Plaintiffs filed a response to defendants' motion to dismiss, defendants filed a reply, plaintiffs filed a supplemental response, and defendants filed a supplemental reply. On June 21, 2013, the circuit court granted defendants' motion to dismiss pursuant to section 2-619 and dismissed the case with prejudice. This appeal followed.

¶ 15 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). In a section 2-619 motion to dismiss, the moving party "admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim." *Id.* The affirmative matter asserted against the defendant avoids the legal effect of or defeats the plaintiff's claim. *Id.* The court views the pleadings and any supporting documentary evidence " 'in the light most favorable to the nonmoving party.' " *Id.* at 367-68 (quoting *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997)). This court reviews *de novo* a dismissal pursuant to section 2-619. *Id.* at 368.

¶ 16 In order to establish a claim of legal malpractice, a plaintiff must establish the following elements: "(1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff

would have prevailed in the underlying action; and (4) damages." *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). Proximate causation in a legal malpractice setting requires a plaintiff to "essentially prove a 'case within a case,' that is, plaintiff must prove the underlying action and what her recovery would have been in that action absent the alleged malpractice." *Id.* at 200.

¶ 17 The Credit Agreements Act defines a "credit agreement" as "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money." 815 ILCS 160/1 (West 2010). The Act provides that "[a] debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 2010). Under section 3 of the Act, an agreement to modify or amend an existing credit agreement, "or to otherwise take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement" does not give rise to a "claim, counter-claim, or defense by a debtor that a new credit agreement [was] created, unless the agreement satisfies the requirements of Section 2." 815 ILCS 160/3(3) (West 2010). "Thus, an agreement to modify an existing credit agreement, or forbear from exercising remedies connected with an existing agreement, can give rise to a claim or defense that new agreement has been formed, so long as the agreement satisfies section 2." *Van Pelt Construction Company, Inc. v. BMO Harris Bank*, 2014 IL App (1st) 121661, ¶ 29.

¶ 18 The plain language of the Act "is very clear and very broad. The language bars all actions by a debtor based on or related to an oral credit agreement." *McAloon v. Northwest Bankcorp, Inc.*, 274 Ill. App. 3d 758, 762 (1995). "There is no limitation as to the type of actions by a debtor which are barred by the Act, so long as the action is in any way related to a credit agreement. *** The language of the Act bars all actions by a debtor based on, or related to, an oral credit agreement. *** Therefore, all actions which depend for their existence upon an oral credit agreement are barred by the Act." *First National Bank in Staunton v. McBride Chevrolet, Inc*., 267 Ill. App. 3d 367, 372 (1994). The Act has been construed as a "strong form" of the Frauds Act (740 ILCS 80/1 *et seq.* (West 1992)) and consequently bars even traditional exceptions to the Frauds Act like equitable estoppel. *McAloon*, 274 Ill. App. 3d at 763-65.

¶ 19 On appeal, plaintiffs maintain that the various documents, emails, and bank account debits and credits, considered together, formed a written credit agreement which satisfied the requirements of the Act.

¶ 20 As plaintiff asserts, a credit agreement may be comprised of several documents when these documents, construed together, meet the requirements of the Act. "A credit agreement often consists of several documents that, together, create the terms of the extension of credit. The documents are, in many instances, conditioned upon each other, and a default under one is usually a default under all. Significantly, the Act does not limit the definition of 'credit agreement' to being a single document." *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1058 (1999).

¶ 21 Plaintiffs concede that no single document exists in the present case which contains all the terms of a purported fourth loan modification agreement and which is signed by the

parties. Plaintiffs contend that the fourth modification is evidenced by the various proposal letters, emails, and bank deposits and debits. However, although the May 26 and August 3, 2010, proposal letters from Private Bank contain the terms of a proposed fourth loan modification and were signed by Private Bank representative Larrick, the letters clearly provided that they were proposals only, and not offers subject to plaintiffs' acceptance. It is apparent that Larrick did not have the authority to make such an offer and that before any agreement could be made, approval from Private Bank's credit committee must first be obtained. Significantly, the letters also were not signed by plaintiffs. See, *e.g.*, *McAloon*, 274 Ill. App. 3d at 762-63 (holding that the plaintiffs' breach of contract and fraud actions were barred by the Act as they were based on alleged oral misrepresentations by the defendants, and rejecting the plaintiffs' contention that the plaintiffs' written proposal of their loan request, which was initialed by the directors of the defendant bank, constituted a credit agreement because even if the initials could be construed as a signature, the proposal was not signed by the plaintiffs).

¶ 22 With regard to the October 20 and 22, 2010, emails from Larrick, we similarly conclude that they also fail to establish that a written credit modification agreement was created. Although email exchanges can potentially show that a credit agreement was formed, they nevertheless must contain the relevant terms of the agreement, just like any other document. For example, in *Van Pelt Construction Company*, 2014 Il App (1st) 121661, ¶ 35, this court held that emails exchanged between the attorneys for the debtor, lender, and guarantors regarding a proposed settlement did not satisfy the signed writing requirement of the Act even when construed together. In that case, the emails did not contain the relevant terms of the agreement, indicate every party to be bound, expressly incorporate other

documents with the terms, specify deadlines by which the parties had to fulfill their obligations, set forth the specific property to be transferred or the legal instruments to be rendered inoperable, or define how the parties would determine whether the guarantors' financial positions had improved. *Id.*

¶ 23 In the present case, Larrick's emails merely indicated that Area Wide had to become current with its outstanding interest payments before Larrick could move forward with obtaining financing approval. Moreover, the emails discussed different terms than were previously set forth in the proposal letters, *i.e.*, that the loan amount may be increased by $300,000 or more, that Mohamed would have to provide $608,000 in cash equity, and that the projected construction loan would be in the amount of $1,270,000. In contrast, the August 3, 2010, proposal letter provided for a construction loan of $960,000 and does not indicate the amount of cash equity to be provided by Mohamed. The emails also do not contain other material terms of a loan agreement, such as the interest rate, and they do not incorporate by reference either of the proposal letters. Further, as in the proposal letters, Larrick makes clear that he is not making a concrete offer subject to plaintiffs' acceptance, as the overdue interest must first be paid and he must still request "approval to modify/extend." Thus, even when viewed in conjunction with the proposal letters, we find this evidence insufficient to satisfy the signed writing requirement under the Act.

¶ 24 Although the checks deposited into the Area Wide's account with Private Bank were signed by Mohamed and although Private Bank made debits to pay off the loans, we similarly cannot construe this in conjunction with the other documents to establish a written agreement for a fourth loan modification. Although the checks referred to an account number and the term and swap loans, these were existing loans. They did not refer to a fourth loan

modification or any of the other documents, such as the proposal letters or emails, they did not contain the relevant terms and conditions of a proposed modification, and they were not signed by Private Bank. The checks were deposited into Area Wide's own account. Plaintiffs contend that pursuant to Larrick's emails, one deposit of $32,000 by Mohamed on November 3, 2010, went toward paying the $16,790.00 in overdue interest which was debited on November 8, 2010, and that this satisfied a condition precedent for the loan modification. Based on Larrick's emails, however, the overdue interest was due no later than October 27, 2010, and bringing the loan current on interest only meant that Larrick could seek approval of a loan extension, not that a fourth modification agreement would be definitively reached. We also disagree with plaintiffs' contention that Private Bank manifested assent to a fourth loan modification by continuing to accept payments after it sent a notice of default and instituted foreclosure proceedings. We will not construe Private Bank's acceptance of payments on existing loans as an assent to the terms of a fourth loan modification, particularly when the terms and conditions of such a modification were not set forth in the debits, there was no signature, and no reference to other documents or emails.

¶ 25 On appeal, plaintiff relies heavily on *Help at Home, Inc. v. Medical Capital, LLC*, 260 F.3d 748 (7th Cir. 2001). In that case, the plaintiff non-medical home care provider sued the defendant capital firm which had allegedly agreed to provide financing to takeout a loan provided by another bank; the plaintiff brought claims for breach of contract, promissory estoppel, and breach of duty of good faith and fair dealing. *Id.* at 751. The plaintiff asserted that several documents, considered in conjunction, contained the terms of the agreement and signatures of the parties and therefore satisfied the Act. *Id.* at 754-55. The Seventh Circuit concluded that, even assuming that the plaintiff could rely on multiple documents for the

signature requirement under the Act, the documents signed by the parties were insufficient because the defendant only signed the commitment letter and some of the Uniform Commercial Code (UCC) financing statements, and the commitment letter did not reference any other documents that allegedly comprised the agreement and did not discuss the terms of the agreement. *Id.* at 756-57. Therefore, "[w]ithout some connection to the rest of the documents, we cannot read the commitment letter as demonstrating an intent to contract." *Id.* at 757. The court also held that the UCC financing statements were too far removed from the agreement to show an intent to contract as they were "designed solely to secure a property interest created by the underlying agreement," and the validity of this security interest depended on the underlying agreement. *Id.* Accordingly, the court held that the plaintiff's claims failed. *Id.*

¶ 26 Plaintiff argues that the present circumstances are distinguishable from *Help at Home*. We conclude that *Help at Home* actually supports a finding that the Act was not satisfied by the various documents relied on by plaintiffs. As in *Help at Home*, the documents relied on here were either not signed by both parties, failed to contain the pertinent terms of a loan modification agreement, or failed to reference other documents which set forth the relevant terms of an agreement. The proposal letters were not signed by plaintiffs, and the emails from Larrick also were not signed by plaintiffs and contained different terms than the proposal letters. Like the UCC financing statements in *Help at Home*, we find that the bank deposits and credits were too far attenuated to show an intent to contract, given that they related to the existing loans and did not refer to a fourth loan modification agreement. We note that the circumstances of the purported fourth loan modification are in marked contrast to those involved in plaintiffs' prior loan modification agreements with Private Bank, such as

the third loan modification agreement, which was set forth in one document that was titled "Third Loan Modification Agreement," contained all of the terms of the loan modification, and was signed by both Private Bank and plaintiffs.

¶ 27 Having concluded that plaintiffs' defense in the underlying foreclosure action, that an enforceable fourth loan modification agreement existed, would ultimately fail because it did not satisfy the signed writing requirements of the Act, we likewise conclude that plaintiffs have not shown that defendants' representation amounted to legal malpractice. *First National Bank of LaGrange*, 375 Ill. App. 3d at 196. As such, we find that the circuit court properly granted defendants' section 2-619 motion to dismiss. *Van Meter,* 207 Ill. 2d at 367.

¶ 28 On appeal, plaintiffs also assert that defendants should not be allowed to adopt a position in the malpractice case that is contrary to the position they advanced on plaintiffs' behalf in the foreclosure proceedings. Defendants contend that they are not barred from asserting that there was no enforceable fourth loan modification agreement because judicial estoppel does not apply to them under the circumstances.

¶ 29 "The doctrine of judicial estoppel postulates that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. [Citations.]" (Internal quotation marks omitted). *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 59 (2009). For the doctrine to apply, it must be shown that the party to be estopped must have "(1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intended for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. [Citations.]" (Internal quotation marks omitted). *Id.* at 60.

¶ 30 It is indisputable that the position advanced by defendants occurred in a prior judicial proceeding, *i.e.*, the foreclosure proceeding against plaintiffs. Defendants do not disagree that the positions are contradictory, as defendants contended as plaintiffs' counsel in the foreclosure proceeding that plaintiffs and Private Bank had an enforceable loan modification agreement, and defendants asserted in the subsequent malpractice case that the loan agreement was unenforceable under the Act. However, "[t]he doctrine of judicial estoppel does not apply to all types of inconsistencies, but only to factual inconsistencies." *Giannini v. Kumho Tire U.S.A., Inc.*, 385 Ill. App. 3d 1013, 1019 (2008). Defendants have not taken contradictory factual positions regarding the documents and emails that were exchanged. Rather, they have offered differing assertions about the legal import of those facts. As such, they are not estopped from arguing that there was no enforceable fourth loan modification which satisfied the Act.

¶ 31 Further, we are inclined to agree with defendants that they were not bound in this legal malpractice action by positions taken on behalf of their clients in the underlying litigation. See *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 287-88 (2009) (holding that the defendant attorney was not estopped from arguing that the plaintiff would not have prevailed in the underlying litigation based on the plaintiff's contributory negligence even though the attorney had asserted in the underlying litigation that the plaintiff was not contributorily negligent, and despite the fact that the attorney testified in the malpractice case that he believed the plaintiff's underlying case was meritorious, because this constituted "merely his subjective opinion, not a judicial admission."), *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 529-30 (1995) (the defendant attorney was not equitably estopped from denying that the underlying action was meritorious because the plaintiff's estoppel argument was merely an

attempt to circumvent the proximate cause element of a legal malpractice claim, and the underlying complaint was dismissed in the pleading stages without an evidentiary hearing. Although the attorney admitted that he felt the plaintiff had a meritorious claim worth pursuing when he filed the lawsuit, the court found it "difficult to understand how or why [the attorney] would have responded in any other fashion. More importantly, however, [the attorney's] response was his subjective opinion. Such a general conclusion should not be considered so all conclusive.").

¶ 32 Here, an evidentiary hearing or determination of the merits never occurred as the parties settled while Private Bank's motion to dismiss was pending. Moreover, we agree with the *Ignarski* court that it is difficult to conceive why defendants would not have advanced such a claim on plaintiffs' behalf in the underlying foreclosure action, given the facts of this case. Indeed, similarly to the attorneys in *Ignarski* and *Orzel*, attorney Ross M. Zambon, who worked for the Sulaiman Law Group and was responsible for representing plaintiffs, averred in an affidavit attached to defendants' motion to dismiss that although there "was no fourth extension agreement comparable to the third loan extension agreement," he "cobbled together" the documents provided by Mohamed and argued that they constituted an agreement for a loan modification, and that while he believed this was the "best available argument for loan modification," he also "concluded that this argument was not likely to prevail." To the extent that defendants' position advanced on plaintiffs' behalf in the underlying litigation could be construed as an expression of defendants' opinion as to the merits of the case, this would constitute defendants' subjective opinion, "not a judicial admission." *Orzel,* 391 Ill. App. 3d at 530.

¶ 33 Plaintiffs have offered nothing in support of their estoppel theory or to rebut defendants' arguments, other than to cite Illinois Supreme Court Rule 137.[3] Considering our above discussion regarding the facts of this case and the related case law, we are not persuaded that Rule 137 precludes defendants' position in this case.

¶ 34 Based on the foregoing, we affirm the circuit court's decision granting defendants' motion to dismiss and dismissing the case with prejudice.

¶ 35 Affirmed.

[3] Rule 137 provides, in relevant part, that pleadings and other documents filed in court must be signed by the attorney of record and that the signature constitutes a certificate by the attorney that he has ready the pleading, it is well-grounded in fact, and it is "warranted by existing law *** and that it is not interposed for any improper purpose." Ill. S. Ct. R. 137(a) (eff. Jul. 1, 2013).