2016 IL App (1st) 151793-U

FIFTH DIVISION
December 30, 2016

No. 1-15-1793

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

RREF II BHB-IL MPP, LLC by assignment from RREF II BHB Acquisitions, LLC, Plaintiff-Appellee, v. MICHAEL EDREI, REDOE ASSETS, LLC, and MOUNT PROSPECT PROPERTIES, LLC, Defendants-Appellants	)	Appeal from the Circuit Court of Cook County No. 13 CH 27556
REDOE ASSETS, LLC and MICHAEL EDREI, Counter-Plaintiffs-Appellants, v. BMO HARRIS BANK N.A., fka Harris N.A., Counter-Defendant-Appellee.	)	Honorable Michael F. Otto, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) there was no error in dismissing defendants' affirmative defenses and counterclaims and (2) the circuit court properly entered summary judgment in favor of RREF.

¶ 2 Defendants Mount Prospect Properties, LLC (Mount Prospect), Rodoe Assets, LLC (Rodoe), and Michael Edrei (Edrei) (collectively defendants) appeal from two orders entered by the circuit court of Cook County in a mortgage foreclosure action. Defendants specifically appeal those orders (1) dismissing their counterclaims and striking their affirmative defenses and (2) granting a motion for summary judgment in favor of RREF II BHB Acquisitions, LLC (RREF), predecessor in interest to plaintiff RREF II BHB-IL MPP, LLC (plaintiff). For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On October 14, 2008, BMO Harris N.A., fka Harris N.A. (BMO Harris) issued a commercial loan in the principal amount of $4,425,000 to Mount Prospect through its agent Edrei evidenced by a promissory note and secured by a mortgage on the property located at 1401 Feehanville Drive in Mount Prospect (the property). On the same day the note was executed, Redoe and Edrei (collectively the guarantors) executed and delivered to BMO Harris separate commercial guaranties, whereby they guaranteed the full payment and performance of all obligations owed by Mount Prospect to BMO Harris under the note. The guaranties further provided that the "undersigned guarantor acknowledges having read all the provisions of this guaranty and agrees to its terms." Mount Prospect defaulted under the note by failing to make a final balloon payment when due on October 14, 2013. Accordingly, BMO Harris demanded payment of all amounts due on October 25, 2013.

¶ 5 On December 13, 2013, BMO Harris filed the instant complaint seeking foreclosure of

the property and other relief. The complaint alleged four counts, count I sought foreclosure against all named defendants, count II alleged breach of the note against Mount Prospect, and counts III and IV alleged breach of the guaranties against the guarantors.

¶ 6 Thereafter, Mount Prospect and the guarantors filed an answer, counterclaims and affirmative defenses alleging that BMO Harris fraudulently induced the guarantors to execute the guaranties by falsely stating to Edrei that the guaranties were "limited 'bad boy' guarant[ies]" not full guaranties, *i.e.* a clause that the guarantors would only be responsible for nonpayment of the debt in the event the borrower engaged in certain "bad boy" acts, such as waste, fraud, or intentional misappropriation of funds. According to defendants, the guarantors were not represented by counsel during the extensive negotiation of the guaranties and BMO Harris waited "until just hours before the loan was scheduled to close before delivering the first draft of the Guaranties to Mr. Edrei." BMO Harris, through an agent, represented to Edrei that the documents were "final" and "complete" according to the "changes we discussed." When Edrei spoke with BMO Harris' agent the day before the transaction was schedule to close and asked if the document included the "bad boy" guaranty, the agent advised that the provision in question was contained therein. In reliance on the agent's statement, Edrei executed the guaranties on behalf of Redoe and himself personally. According to defendants, but for BMO Harris's false representation through its agent, Edrei would not have signed the guaranties.

¶ 7 Based on these facts, defendants asserted the following affirmative defenses: (1) common law fraud; (2) a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Illinois Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2014)); (3) mutual mistake; (4) reformation due to a unilateral mistake and fraud; and (5) breach of the covenant of good faith and fair dealing. The counterclaim alleged three counts: (1) fraud; (2) a violation of

the Illinois Consumer Fraud Act; and (3) breach of the duty of good faith and fair dealing.

¶ 8 On April 3, 2014, BMO Harris filed a motion to substitute RREF as the party plaintiff. On May 8, 2014, the circuit court granted RREF leave to substitute as plaintiff and file an amended complaint. The amended complaint was filed the next day, May 9, 2014.

¶ 9 Defendants filed an answer to the first amended complaint which included six affirmative defenses and three counterclaims on May 28, 2014. Defendant's affirmative defenses and counterclaim were the same as in their earlier responsive pleading, except for the inclusion of an affirmative defense for lack of standing in which they alleged that RREF failed to affix the allonge to the note as required by Illinois law.

¶ 10 In response to defendants' answer, RREF and BMO Harris filed a motion to dismiss defendants' counterclaims and RREF filed a separate motion to strike the affirmative defenses. Both motions were brought pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)).[1] Regarding defendants' counterclaims of fraud, violation of the Illinois Consumer Fraud Act, and breach of the covenant of good faith and fair dealing, RREF and BMO Harris asserted that each of these claims was barred by the Illinois Credit Agreement Act (Credit Act) (815 ILCS 160/1 *et seq.* (West 2014)). RREF and BMO Harris further maintained that the terms of the guaranties barred any and all claims and defenses against BMO Harris. In regard to defendants' affirmative defenses, RREF argued that the defenses for common law fraud, violations of the Illinois Consumer Fraud Act, and breach of the covenant of good faith and fair dealing fail for the same reasons as the counterclaims. As to the affirmative defense of mutual mistake, RREF contended that defendants failed to set forth any facts that the

[1] The response brief indicates that it filed a "corrected" motion to strike the affirmative defenses to remedy a clerical error on July 23, 2014. This motion, however, does not appear in the record on appeal. While plaintiff included the corrected motion in its appendix, such an enclosure is improper and we will not consider it, particularly where no attempt has been made to make it part of the record. See *Scepurek v. Board of Trustees of Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶ 2.

mistake was mutual or that, if such a mistake was alleged, that it had such grave consequences that to enforce the contract would be unconscionable. As for the reformation affirmative defense, RREF asserted that it failed as a matter of law as defendants' failure to read the terms of the guarantee did not absolve them of liability when they had the opportunity to review the guaranties prior to execution. Lastly, RREF asserted that defendants failed to plead and prove RREF's lack of standing.

¶ 11 On October 20, 2014, after the matter was fully briefed,[2] the circuit court granted the motions and dismissed the three-count counterclaim as well as all of the affirmative defenses relating to the guaranties with prejudice. The circuit court dismissed the affirmative defense for lack of standing without prejudice and provided defendants with leave to replead, however, defendants never moved to amend their answer. The circuit court provided no basis for the entry of its order and the record does not include a transcript of the proceedings.

¶ 12 Thereafter, on November 12, 2014, RREF moved for summary judgment. In support of its motion, RREF attached the affidavit of Sergio Sotolongo (Sotolongo), "an authorized signatory and Vice President for Rialto Capital Management, LLC." Sotolongo averred that Rialto is a company related to RREF and "serves as attorney-in-fact for RREF pursuant to a limited power of attorney." According to Sotolongo, his job responsibilities include "administering the defaulted loan at issue in this action" and being the "corporate representative of RREF for purposes of providing testimony on matters set forth in this affidavit." Sotolongo averred the current total mortgage indebtedness, including principal and interest, was $4,572,677.37. Sotolongo further attested that counsel for BMO Harris and RREF had incurred attorneys fees and costs in the amount of $107,125.84 and that RREF continues to incur

[2] Once again, we are informed by the appellees that RREF's two reply briefs are not included in the record, but are attached to its appendix. However, RREF's reply to the motion for summary judgment filed January 15, 2015, is included in the record. It is defendants' response to the motion which is missing.

attorneys fees and costs related to this matter. Numerous documents were attached to Sotolongo's affidavit, including the loan payoff and payment history.

¶ 13 In response, defendants argued that RREF's supporting affidavit did not comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) or Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992) because the payment history attached to the affidavit was inadmissible hearsay.[3]

¶ 14 On January 29, 2015, the circuit court granted RREF's motion for summary judgment and entered a judgment of foreclosure and sale of the property. The property was sold on March 13, 2015, to RREF as the highest bidder. Subsequently, RREF assigned its interest in the judgment of foreclosure and certificate of sale to plaintiff on March 18, 2015.

¶ 15 RREF moved to confirm the sale of the property and grant possession to plaintiff on April 2, 2015. The circuit court also granted RREF's motion to substitute plaintiff on April 8, 2015. After the motion to confirm the sale was fully briefed and argued, the circuit court entered the order approving the sale on June 10, 2015, vesting title in plaintiff. This appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, defendants raise four arguments that the circuit court erred in: (1) dismissing certain of their affirmative defenses and counterclaims; (2) granting summary judgment in favor of RREF based on an improper affidavit; (3) failing to allow the parties to conduct discovery; and (4) awarding BMO Harris attorneys fees when it was no longer a party to the loan documents. We turn to address defendants' contentions beginning with the circuit court's dismissal of their affirmative defenses and counterclaims.

¶ 18 Motion to Dismiss

¶ 19 Defendants first contend that the circuit court erred in dismissing certain of their

[3] These arguments are gleaned from RREF's reply to the motion for summary judgment as defendants' response is not included in the record on appeal.

affirmative defenses and counterclaims because the instant action does not fall within the Credit Act (815 ILCS 160/1 *et seq.* (West 2014). In the alternative, defendants assert their claim under the Illinois Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2014)) was properly plead and that the waiver of defenses provision in the guaranties does not bar the guarantors' defenses of fraud and mistake. Specifically, defendants argue that their affirmative defenses and counterclaims for fraud and violation of the Illinois Consumer Fraud Act were improperly dismissed as well as their affirmative defense of mutual mistake. Defendants do not raise any arguments regarding reformation, breach of the covenant of good faith and fair dealing, or lack of standing. As no arguments have been raised regarding these claims, we will not consider them on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (arguments not raised on appeal are "waived"). For the reasons that follow, because we conclude that the Credit Act bars defendants' claims and affirmative defenses encompassing fraud, the Illinois Consumer Fraud Act, and mutual mistake, we need not address defendants' alternative arguments.

¶ 20 In this case, the circuit court granted defendants' motion to dismiss under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)). "A motion under section 2-619.1 allows a party 'to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses.' " *Schloss v. Jumper,* 2014 IL App (4th) 121086, ¶ 15 (quoting *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003)); *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 23. A section 2-615 motion to dismiss attacks the legal sufficiency of the plaintiff's claims by asserting that the claims fail to state a cause of action upon which relief can be granted. 735 ILCS 5/2-615 (West 2014); *Zahl v. Krupa,* 365 Ill. App. 3d 653, 657-58 (2006). In contrast, a section 2-619 motion to dismiss "admits the legal sufficiency of the claims but

raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeat the action." *Zahl*, 365 Ill. App. 3d at 657-58; 735 ILCS 5/2-619 (West 2014). We accept all well-pleaded facts as true and draw all reasonable inferences in the light most favorable to the plaintiff. *Id.* at 658. A motion to dismiss under either section 2-615 or section 2-619 of the Code should not be granted unless it is clearly apparent that no set of facts can be established which would entitle the plaintiff to relief. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. We review the circuit court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Schloss*, 2014 IL App (4th) 121086, ¶ 15. We may affirm on any basis found in the record. *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 23.

¶ 21 Defendants assert that the Credit Act does not bar their claims for fraud, consumer fraud, and mutual mistake where the original written credit agreements (the guaranties) do not reflect the parties' intended terms. Defendants maintain that their claims and defenses "are not based on promises or oral credit agreements, but rather on a then-present statement of fact (that BMO Harris's banker had previously made changes to a written agreement when, in fact, he had not)." Thus, because their claims and defenses do not relate to an unfulfilled oral promise, but rather to the lender's conduct in inducing them to sign the credit agreement that did not reflect the parties' agreed-upon terms, their claims and defenses are not barred by the Credit Act.

¶ 22 In response, RREF asserts that the Credit Act clearly prohibits defendants from maintaining "an action on *or in any way related to* a credit agreement unless the credit agreement is in writing." (Emphases added.) 815 ILCS 160/2 (West 2014).

¶ 23 The Credit 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 not primarily for

personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1 (1) (West 2014). Guaranties are considered "credit agreements" under the Credit Act. See *Bank One, Springfield v. Roscetti*, 309 Ill. App. 3d 1048, 1058 (1999). Section 2 of the Credit Act states as follows:

> "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 2014).

The Credit Act further defines a "debtor" as "a person who obtains credit or seeks a credit agreement or claims the existence of a credit agreement with a creditor who owes money to a creditor." 815 ILCS 160/1(3) (West 2014).

¶ 24 Illinois courts have been strict in enforcing the Credit Act's terms. "First, the [Credit] Act clearly and unambiguously requires that all agreements be in writing. The plain language of the [Credit] Act precludes debtors from maintaining an action that relates to a credit agreement unless that agreement is in writing. The [Credit] Act does not permit any exceptions." *Machinery Transports of Illinois v. Morton Community Bank*, 293 Ill. App. 3d 207, 209 (1997). "There is no justifiable reliance on an oral credit agreement as a matter of law in Illinois." *First National Bank in Staunton v. McBride Chevrolet, Inc.*, 267 Ill. App. 3d 367, 373 (1994). An allegedly fraudulent misrepresentation has been held to be within the scope of what is barred by the Credit Act. *Westinghouse Electric Corp. v. McLean*, 938 F.Supp. 487, 492 (N.D. Ill. 1996) (cited with approval in *Teachers Insurance & Annuity Ass'n of America v. LaSalle National Bank*, 295 Ill. App. 3d 61, 69-70 (1998)). The broad wording of the statute dictates such an

interpretation, even though it may cause harsh consequences for bank customers in some circumstances. *McBride Chevrolet, Inc.*, 267 Ill. App. 3d at 372-73.

¶ 25 We find the case of *Hubbard Street Lofts LLC v. Inland Bank*, 2011 IL App (1st) 102640, to be instructive. There, Hubbard Street Lofts claimed that prior to the drafting of the promissory note, it had an agreement with Inland Bank that the interest rate for the loan would be calculated at 8.000% based on the 365/365 method. *Id.* ¶ 25. The agreement, however, was not reduced to writing and, in fact, the note executed by the parties provided for the 365/360 method by which to calculate the interest rate of the loan. *Id.* Because Hubbard Street Lofts could not demonstrate in writing that they had an agreement with Inland Bank to apply the 8.000% interest for 365 days, the reviewing court held the counts as to breach of oral contract, violation of the Illinois Consumer Fraud Act, and common law fraud were barred by the Credit Act. *Id.*

¶ 26 Similarly here, defendants allege that they had an agreement with BMO Harris that the guaranties would be "bad boy" guaranties. We decline to construe these allegations as suggested by defendants' on appeal—that the oral promise was actually a "then-present statement of fact" (that BMO Harris's banker had previously made changes to a written agreement when he had not)—and instead find that these allegations amount to an oral promise or, at most, an oral agreement. This agreement, however, was not reduced to writing and not signed by both parties. See 815 ILCS 160/2 (West 2014) (debtor may only maintain an action related to a credit agreement if the agreement is in writing and signed by both parties). Accordingly, defendants' reliance on this purported oral agreement as the basis for counts I and II of their counterclaim and their affirmative defenses of common law fraud and violation of the Illinois Consumer Fraud Act is precisely the situation the Credit Act prohibits. See *Hubbard Street Lofts LLC*, 2011 IL App (1st) 102640, ¶ 25. If an oral agreement is made between a bank customer and the bank,

and the bank for some reasons chooses not to honor the agreement, "the customer has no recourse in the law." *McBride*, 267 Ill. App. 3d at 373. "There is no justifiable reliance on an oral credit agreement as a matter of law in Illinois." *Id.* Accordingly, we find that the circuit court properly dismissed these counts and affirmative defenses, as they were barred by the Credit Act.

¶ 27 Defendants maintain that their remaining affirmative defense of mutual mistake is nonetheless allowed despite section 160/2 of the Credit Act. Defendants support their argument with what they acknowledge are "non-binding opinions" such as the special concurrence in *Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008 and the unpublished decision *American Chartered Bank v. Cameron*, 2014 IL App (1st) 132231-U (unpublished pursuant to Illinois Supreme Court Rule 23). Plaintiff correctly observes that concurring opinions, while persuasive, are not binding authority. *People v. Holt*, 372 Ill. App. 3d 650, 653 (2007). In addition, while unpublished appellate court decisions are not precedential, we may find them to be persuasive. See *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 374 (2005) ("[t]he fact [that] one court has used certain reasoning in an unpublished opinion does not bar courts in this state from using the same reasoning in their decisions").

¶ 28 We find *Schafer* to be distinguishable based on its specific facts and the reviewing court's obvious attempt to limit the holding of the case to those particular set of facts. In *Schafer*, the debtors initially filed a complaint for declaratory judgment against a bank, contending that the bank officer had mistakenly checked a box on the commercial security agreement (CSA) indicating that it secured all outstanding debts that they owed the bank, rather than the particular loan that gave rise to the execution of the CSA. *Schafer*, 2012 IL App (3d) 110008, ¶ 7. The Schafers claimed that the bank's interest in the equipment pledged as collateral for the loan was

extinguished when the loan was paid off and the equipment should not have been sold to satisfy the indebtedness to the bank that was in default. *Id.* ¶ 5. The Schafers's original claim of mutual mistake of fact was supported by the affidavit of the bank's loan officer confirming the wrong box had been "checked." *Id.* ¶¶ 7-8.

¶ 29 After the Schafers' first two complaints had been dismissed they subsequently filed a conversion action against the bank, which did not contain any allegations regarding the CSA. *Id.* ¶ 9. In response to the complaint, the bank filed an affirmative defense alleging that the CSA secured all present and future debts owed by the Schafers to the bank and attached a copy of the CSA. *Id.* ¶ 10. Thereafter, the Schafers filed a general denial to the material allegations contained in the affirmative defense. *Id.* The circuit court ultimately granted summary judgment in favor of the bank and the Schafers appealed. *Id.* ¶ 16.

¶ 30 Pertinent to this appeal, on review the Third District found that the Credit Act did not warrant summary judgment in favor of the bank. *Id.* ¶ 33. The reviewing court first observed that "our courts have consistently held that the Credit Agreement Act precludes *any action by a debtor* against a creditor 'so long as the action is in anyway related to a credit agreement.' " (Emphases added.) *Id.* ¶ 27. The *Schafer* court acknowledged, however, that the matter before the court did not involve an action by a debtor against a creditor based on a credit agreement, but instead involved whether "the Credit Agreement Act precludes the Schafers from challenging the validity of the CSA when it is *raised by a creditor* as an affirmative defense to a conversion action." (Emphases added.) *Id.* Examining the language of the Credit Act, the reviewing court found that the "plain language of the Credit Agreements Act reveals no prohibition against the Schafers challenging the validity of the CSA when it is raised by the creditor as an affirmative defense to a complaint for conversion." *Id.* ¶ 28 (quoting 815 ILCS 160/2 (West 2008)). Thus,

the reviewing court concluded in its narrow holding that the Schafers were not precluded by the Credit Act from raising the validity of the credit agreement in response to the bank's affirmative defense. *Id.* ¶ 31.

¶ 31 The facts of the present case are distinguishable from those of *Schafer*. Whereas in *Schafer* the credit agreement was raised by the *creditor* in an affirmative defense, here, it is the debtor-guarantors who seek to "maintain an action on or in any way related to a credit agreement." 815 ILCS 160/2 (West 2014). As previously stated, section 160/2 of the Credit Act provides:

> "*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." (Emphases added.) *Id.*

As noted by the *Schafer* court, our well-established case law demonstrates that 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. *Schafer*, 2012 IL App (3d) 110008, ¶ 27 (quoting *Bank One, Springfield*, 309 Ill. App. 3d at 1055); see *McBride Chevrolet, Inc.*, 267 Ill. App. 3d at 372. Our courts have determined that the broad language of the Credit Act was intended to extend beyond the existing Frauds Act (740 ILCS 80/1 *et seq.* (West 2014)), reasoning that by creating a new statute rather than amending the Frauds Act to include credit agreements, our legislature intended that the Act bar the traditional exceptions to the application of the statute of frauds. *McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758, 765 (1995); *Teachers Insurance & Annuity Ass'n of America*, 295 Ill. App. 3d at 68. Consequently, the affirmative

defenses and counterclaims raised by defendants fall squarely within the purview of section 160/2 of the Credit Act and thus the Credit Act bars those claims based on any alleged oral agreement.

¶ 32 Defendants advocate that we should adopt the reasoning of the *Schafer* special concurrence, wherein, according to defendants, Justice Lytton "found that the ICAA does not bar parties from asserting that there has been fraud or mistake in the formation of a credit agreement because there would be no 'assent,' or meeting of the minds, and thus no formation of the very agreement that gives rise to the application of the ICAA." The special concurrence provides in relevant part that assent is one of the three basic elements to the formation of a contract and "[t]here can be no valid assent [to a contract] if there has been mistake, fraud or duress." *Schafer*, 2012 IL App (3d) 110008, ¶¶ 38, 39. Accordingly, without proper assent a contract can be voided and "while the [Credit] Act applies to valid credit agreements, it cannot affect a voided, unenforceable contract." *Id.* ¶ 43. We, however, decline to find Justice Lytton's special concurrence persuasive in this instance, particularly (1) based on the specific facts of *Schafer* as discussed above and (2) in light of the wealth of Illinois jurisprudence that "the [Credit] Act bars all actions based on or related to an oral credit agreement," including a debtor's action for fraud. *McAloon*, 274 Ill. App. 3d at 762; see *McBride Chevrolet, Inc.*, 267 Ill. App. 3d at 372 (debtor's action for fraud founded upon alleged oral misrepresentations was barred by the Credit Act); *Hubbard Street Lofts LLC*, 2011 IL App (1st) 102640, ¶ 25; see also *Teachers Insurance and Annuity Ass'n of America*, 295 Ill. App. 3d at 69-70 (citing *Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216, 225 (1996), and *Westinghouse Electric Corp*, 938 F.Supp. at 493-94, favorably where the debtors' actions for fraud were barred by the Credit Act).

¶ 33 Defendants further rely on the unpublished decision of *American Chartered Bank* for its

analysis in distinguishing the facts in this cause from those of *Schafer*. See *American Chartered Bank*, 2014 IL App (1st) 132231-U, ¶ 37. We, however, need not rely on the *American Chartered Bank*'s analysis of *Schafer* where we have already provided an extensive analysis of *Schafer* herein. We also note that in *American Chartered Bank* the reviewing court found that the defense of fraud based on the misrepresentations allegedly made by the bank to induce the debtor to execute the guaranty was barred by the Credit Act. *Id.* ¶¶ 33, 35.

¶ 34 In sum, we conclude the circuit court did not err when it dismissed defendants' counterclaims and affirmative defenses relating to fraud, consumer fraud, and mutual mistake as these claims were barred by the Credit Act. See *Hubbard Street Lofts LLC*, 2011 IL App (1st) 102640, ¶ 25.

¶ 35 Motion for Summary Judgment

¶ 36 Defendants next contend that the circuit court erred when it granted summary judgment in favor of RREF because it was supported by an improper affidavit. Specifically, defendants allege that Sotolongo's affidavit did not provide any information from BMO Harris regarding the creation or entry of the payment history data that was generated when BMO Harris owned the mortgage and note. Defendants maintain that Sotolongo "fail[s] to establish a foundation for personal knowledge for the entire document [(the loan and payment history)], thus the affidavit "fails to establish that some part of the business record is admissible." Defendant also asserts that the Sotolongo affidavit did not comply with Illinois Supreme Court Rule 113 (eff. May 1, 2013).

¶ 37 Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file establish the absence of a 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 2014); *Palm v.*

2800 Lake Shore Drive Condominium Ass'n, 2013 IL 110505, ¶ 28. The purpose of a motion for summary judgment is to determine the existence or absence of a genuine issue as to any material fact; it cannot be used to resolve a disputed fact. *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. When ruling on a motion for summary judgment, the court must strictly construe all evidentiary material against the movant while liberally construing all of the evidentiary material in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is a drastic remedy which results in the disposition of a case without a trial and, as such, should not be granted unless the right of the movant is free from doubt. *Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶ 105. We review *de novo* the circuit court's decision to grant a motion for summary judgment. *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 38 Affidavits submitted in support of a motion for summary judgment must comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). "[A] court's determination of whether an affidavit offered in connection with a motion for summary judgment complies with Rule 191 is a question of law subject to *de novo* review." *Roe v. Jewish Children's Bureau of Chicago,* 339 Ill. App. 3d 119, 128 (2003). Rule 191(a) provides:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure [735 ILCS 5/2-1005], *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be

> shown are not within the personal knowledge of one person, two or more affidavits shall be used." Ill. Sup. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 39 A Rule 191(a) affidavit serves as a substitute for testimony given in open court and should satisfy the same requisites for competent testimony. *Avdic*, 2014 IL App (1st) 121759, ¶ 22. An affidavit may also serve to authenticate a document. *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 349 (2010); see *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002) (an affidavit submitted in a summary judgment proceeding serves as a substitute for testimony at trial). "If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999).

¶ 40 The admission of business records into evidence as an exception to the general rule excluding hearsay is governed by Illinois Supreme Court Rule 236 (eff. Aug. 1, 1992). *Avdic*, 2014 IL App (1st) 121759, ¶ 23. Rule 236(a) provides in relevant part:

> "Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility." Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992).

The requisite foundation under Rule 236 is only a showing that the records were made in the regular course of business, at or near the time of the transaction. *Id.*; *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42.

¶ 41 Likewise, Illinois Rule of Evidence 803(6) (eff. Apr. 26, 2012) governs the admission of "records of regularly conducted activity," including a memorandum, report, record, or data compilation, made at or near the time by a person with knowledge, or from information transmitted by a person with knowledge, if kept in the course of regularly conducted business, and it was the regular practice of that business activity to make such record. The determination of whether business records are admissible is within the sound discretion of the circuit court, and its determination will not be reversed absent an abuse of discretion. *Bank of America, N.A. v. Land,* 2013 IL App (5th) 120283, ¶ 13. An abuse of discretion occurs only where the court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the trial court. *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 81.

¶ 42 Defendants maintain that since Sotolongo did not have personal knowledge of BMO Harris's business records, he lacked the requisite personal knowledge of the facts stated in his affidavit. According to defendants, it follows that because Sotolongo lacked such personal knowledge, his affidavit could not provide the foundation for the admission of the loan payoff and payment history.

¶ 43 "In order to fulfill the foundational requirements of a business record, it is not necessary that the author or creator of the record testify or be cross-examined about the contents of the record." *Troyan v. Reyes*, 367 Ill. App. 3d 729, 733 (2006). The custodian or any other individual familiar with the business and its mode of operation may provide testimony for

establishing the foundational requirements of a business record. *Id.* The fact that the author of the record does not testify affects only the weight, not the admissibility of the record. *Id.* (citing Ill. S. Ct. R. 236 (eff. Aug. 1, 1992)). Moreover, " '[i]f, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.' " *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler*, 309 Ill. App. 3d at 795).

¶ 44 Sotolongo averred he is a vice president for Rialto Capital management and has "personal knowledge of the facts stated in this Affidavit, and could competently testify thereto if called upon to do so as a witness in this action." Sotolongo's affidavit explains that Rialto is in the business of administering loans owned by other companies that are related to Rialto and "to assist those related companies and entities in recovering upon those loans." RREF is a company related to Rialto. In regards to his connection with RREF, Sotolongo attested he has the "primary responsibility *** for administering the defaulted loan at issue in this action."

¶ 45 According to Sotolongo, his personal knowledge is based on his examination of RREF's "relevant books, records, and documents for the transactions that are the subject matter of this action" as well as his "own personal knowledge so obtained as a corporate representative of RREF." Sotolongo further attested that he is "familiar with Rialto's loan records and files relating to the loan made from BMO Harris Bank N.A., fka Harris N.A. *** to Mount Prospect Properties, LLC *** that is at issue in this litigation." In addition, Sotolongo stated that he "provide[s] this Affidavit as corporate representative in order to set forth relevant facts within the knowledge of RREF regarding (i) the origination of the Loan at BMO Harris; (ii) the transfer by BMO Harris of the Loan and loan documents that are the subject of this action to RREF; (iii) the

fact that RREF currently owns, holds, and is entitled to enforce the Loan and loan documents that are the subject of this action; and (iv) the sum due and owing to RREF under the Loan and loan documents." Sotolongo averred that he had knowledge regarding this information based on his examination of RREF's relevant books, records, and documents on these topics.

¶ 46 Regarding the documents attached to his affidavit, including the loan payoff and payment history, Sotolongo attested that they were (1) true and correct copies, (2) part of RREF's business records, (3) were "prepared at or near the time of the events and transactions reflected thereon and were prepared by persons with knowledge of the events and transactions reflected thereon" and (4) maintained in the ordinary course of business by RREF. According to Sotolongo, the loan payoff and payment history provided that as of October 22, 2014, $4,572,677.37 remained due and owing pursuant to the terms of the note with interest accruing per diem at a rate of $1,254.48.

¶ 47 Defendants maintain that the instant case is similar to the facts of *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082 (2007). There, the plaintiff filed suit against the bank for conversion and sought, as part of his damages, loss of income from his business. *Id.* at 1084. In support of his damages claim, the plaintiff introduced into evidence a series of documents including his monthly bank account statements. *Id.* at 1085. Regarding the bank statements, the plaintiff testified only that he kept the bank statements in the ordinary course of his business. *Id.* Based on those bank statements, a judgment was entered in favor of the plaintiff. *Id.*

¶ 48 On appeal, the defendant argued that the trial court improperly allowed the plaintiff's bank statements into evidence under the business records exception to the hearsay rule. *Id.* at 1086. The defendant contended that "someone from the banks was required to testify that the statements were kept in the regular course of the banks' business." *Id.* The reviewing court

found that, "Although his bank statements could have been admitted under the business records exception to the hearsay rule despite their preparation by an entity other than their proponent, [the plaintiff] did not present any evidence of the circumstances of their creation." *Id.* at 1088. The *Apa* court noted that the plaintiff "testified only that he kept the records in the regular course of his business" and that "[w]ithout proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence." (Internal quotation marks omitted.) *Id.* (quoting *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 416 (2005)).

¶ 49 While the facts of *Apa* indicated that the witness only testified that the bank statements were kept in the ordinary course of his business, the affiant in the present case averred not only that the "loan payoff and payment history" was maintained in the ordinary course of business, but that it was "prepared at or near the time of the events and the transactions reflected thereon and were prepared by persons with k knowledge of the events and transactions reflected thereon." Accordingly, the facts of *Apa* are inapposite to the facts of the present case. We also observe that the *Apa* court noted that the bank statements could have been admitted into evidence "despite their preparation by an entity other than their proponent" had a proper foundation been laid. *Id.* at 1088.

¶ 50 Indeed, Sotolongo's averments are more akin to those made by the affiants in *East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111. There, the defendant appealed the entry of judgment in the bank's favor arguing that the bank's affiant lacked the necessary personal knowledge to provide the foundation for the admission of the loan documents. *Id.* ¶ 94. Upon reviewing the affidavit, the reviewing court found that (1) his averments were sufficient to establish his personal knowledge, and (2) that the proper foundation was laid. *Id.* ¶ 97. In so

holding, the reviewing court observed that the affiant attested that his position as vice-president of the bank provided him with familiarity with the bank's loan operations and that he had reviewed all of the documents relating to the loan from the bank to the defendant, including those which predated his taking over the collection of the defendant's indebtedness to the bank. *Id.* The defendant further challenged the admissibility of the computer-generated payoff calculation document, arguing it was improperly admitted because the document "was not created by a person but by a computer, but none of the people who imputed the information into the computer were identified by [the affiant], or shown to have personal knowledge of the information they imputed into the computer." *Id.* ¶ 102. Relying on Illinois Rule of Evidence 803(6) (eff. Apr. 26, 2012) (setting forth the business records exception to the hearsay rule),[4] the reviewing court observed that the rule did not require the affiant to name each individual who input information into the computer and to provide the source of that person's information as the affiant "averred that the loan records and the payoff calculation document were maintained by Chase Bank in the course of its regularly conducted business activities." *Id.* The reviewing court further noted that the affidavit provided that the bank "maintained its loan records by logging in entries at or near the time of a recordable event by a person with knowledge or from information transmitted from a person with knowledge of the event." *Id.* Thus, the reviewing court concluded that the affiant's averments satisfied Rule 803(6). *Id.*

¶ 51 We conclude that the circuit court did not abuse its discretion when it admitted the loan payoff and payoff history into evidence. A business report generated by a third party is admissible "when it was commissioned in the regular course of business of the party seeking to introduce it." See *Argueta v. Baltimore & Ohio Chicago Terminal R. Co.*, 224 Ill. App. 3d 11,

[4] We observe, as did the court in *East-West Logistics, L.L.C.*, that Rule 803, "did not make any substantive changes to the requirements under Illinois Supreme Court Rule 236." *Id.* ¶ 99.

21 (1991). Sotolongo attested he was personally familiar with Rialto's loan records and files which included RREF's relevant books, records and documents, relating to the loan made from BMO Harris to Mount Prospect. He further averred he the loan payoff and payoff history were maintained in the ordinary course of business by RREF and were "prepared at or near the time of the events and transactions reflected thereon and were prepared by persons with knowledge of the events and transactions reflected thereon." Sotolongo's affidavit was thus admissible pursuant to Rule 236 and provided a sufficient basis upon which to conclude that RREF was entitled to judgment as a matter of law. See *Land*, 2013 IL App (5th) 120283, ¶ 14; *East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 102; *Avdic*, 2014 IL App (1st) 121759, ¶ 29.

¶ 52 Furthermore, notwithstanding defendants' arguments to the contrary, there is no requirement that the affiant be familiar with the records pertaining to the mortgage loan before litigation arose or have personally made the entries. *Avdic*, 2014 IL App (1st) 121759, ¶ 29; see *PennyMac Corp. v. Colley*, 2015 IL App (3d) 140964, ¶ 17. As stated in Rule 236, lack of personal knowledge by the maker may affect the weight afforded the evidence, but not its admissibility. *Avdic*, 2014 IL App (1st) 121759, ¶ 29 (citing *In re Estate of Weiland*, 338 Ill. App. 3d at 601); Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992). Thus, our review of the matter leads us to conclude that the affidavit RREF submitted in support of its motion for summary judgment also satisfied the requirements of Rule 191(a) and the business records concerning the underlying mortgage and note were properly admissible. See *Cornejo*, 2015 IL App (3d) 140412, ¶ 19; *Northbrook Bank & Trust Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 49 (rejecting the defendants' contention that the bank's affidavit in support of summary judgment was insufficient where it was not prepared by an employee of the predecessor bank).

¶ 53 In this same vein, defendants assert that Sotolongo's affidavit did not satisfy the

requirements of Illinois Supreme Court Rule 113 (eff. May 1, 2013). Rule 113 provides in pertinent part that all affidavits submitted in support of entry of a judgment of foreclosure shall contain, at a minimum, the following information:

> "(i) The identity of the affiant and an explanation as to whether the affiant is a custodian of records or a person familiar with the business and its mode of operation. If the affiant is a person familiar with the business and its mode of operation, the affidavit shall explain how the affiant is familiar with the business and its mode of operation.
>
> (ii) An identification of the books, records, and/or other documents in addition to the payment history that the affiant reviewed and/or relied upon in drafting the affidavit, specifically including records transferred from any previous lender or servicer. The payment history must be attached to the affidavit in only those cases where the defendant(s) filed an appearance or responsive pleading to the complaint for foreclosure.
>
> (iii) The identification of any computer program or computer software that the entity relies on to record and track mortgage payments. Identification of the computer program or computer software shall also include the source of the information, the method and time of preparation of the record to establish that the computer program produces an accurate payment history, and an explanation as to why the records should be considered 'business records' within the meaning of the law." Ill. S. Ct. R. 113(c)(2) (eff. May 1, 2013).

¶ 54 For the same reasons discussed above that Sotolongo's affidavit complies with Rule 191, Sotolongo's affidavit also complies with sections (c)(2)(i) and (c)(2)(ii) of Rule 113. Regarding section (c)(2)(iii), Sotolongo averred that as part of his "day to day duties, RREF utilizes the services of Quantum Servicing Corp. ('Quantum') to assist in the administration of loans that

RREF holds, including recording and tracking mortgage payments and amounts due." Sotolongo further averred that, "Quantum uses the loan servicing system LMS ('LMS') and automatically records and tracks mortgage payments and generates loan payoff and payment history reports. The LMS tracking and accounting program is recognized as standard in the industry." As to the method and time of preparation of the record, Sotolongo attested that, "When a mortgage payment is received, the following procedure is used to process and apply the payment, and to create the records I review: RREF's representative informs Quantum of the payment received. Payment is then applied to Mount Prospect's loan account for the payment of interest, principal, escrow, and other charges." Regarding accuracy of the computer software, Sotolongo averred that "LMS accurately records mortgage payments and expenses when properly operated. In the case at bar, LMS was properly operated to accurately record any payments made." Sotolongo further explained in his affidavit why the records should be considered "business records" within the meaning of the law when he stated, "The entries into LMS are made in the ordinary course of business at the time of the occurrence of such event by employees of Quantum." Based on our review of these averments, Sotolongo's affidavit complies with Rule 113.

¶ 55 Defendants nonetheless maintain that Sotolongo's affidavit fails to satisfy the requirements of Rule 113 because he failed to present any facts evidencing how the payments to BMO Harris were recorded or tracked. While Sotolongo's affidavit indicates that RREF did not receive any payments from Mount Prospect, and therefore Quantum had not made any entries reflecting payments into LMS, Sotolongo averred that when BMO Harris assigned its interest to RREF, the loan was in default and that RREF received Mount Prospect's payment history as part of the assignment of the loan. In addition, Sotolongo attested that the loan payoff and payment history "were prepared at or near the time of the events and transactions reflected thereon and

were prepared by persons with knowledge of the events and transactions reflected thereon and maintained in the ordinary course of business by RREF." As the affidavit demonstrates that the information inputted into RREF's computer program originated from BMO Harris, and further complied with Rule 113(c)(2)(iii), we conclude that RREF's affidavit in support of its motion for summary judgment satisfies Rule 113 and was properly considered by the circuit court. See also *Avdic*, 2014 IL App (1st) 121759, ¶ 29 (the bank employee need not have personally made the entries in the record keeping software or been familiar with the file before the dispute arose). Accordingly, we conclude the circuit court did not err in granting the motion for summary judgment.

¶ 56 Discovery

¶ 57 Defendants next contend that the circuit court abused its discretion when it denied them the opportunity to conduct discovery. The trial court is vested with broad discretion in supervising the conduct of discovery. *Vision Point of Sale v. Haas*, 226 Ill. 2d 334, 345 (2007). We review a circuit court's decision on the course and conduct of discovery for an abuse of discretion. *Rathje v. Horlbeck Capital Management, LLC*, 2014 IL App (2d) 140682, ¶ 30.

¶ 58 Defendants do not indicate any specific trial court rulings on discovery that they believe to constitute an abuse of discretion. In the absence of such rulings, defendants' argument is unreviewable. Moreover, defendants fail to cite pertinent (or any) authority to support their contentions about the conduct of discovery. Because defendants have not cited proper authority, their argument on this point is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36.

¶ 59 Attorneys Fees

¶ 60 Lastly, defendants assert that the circuit court erred when it ordered them to pay attorneys

fees that were incurred by BMO Harris after it had sold the loan to RREF. According to defendants, no obligation exists for defendants to pay both RREF's attorneys fees and BMO Harris's attorney fees once they became a third-party defendant to the foreclosure action.

¶ 61 While the record discloses that attorney fees were awarded to RREF when the circuit court granted RREF's motion for summary judgment, the record on appeal does not indicate (and defendants do not argue) that the issue of whether a portion of the attorney fees awarded was proper was presented to the circuit court for its consideration. Theories not raised during summary judgment proceedings are forfeited on review. *Avdic*, 2014 IL App (1st) 121759, ¶ 34. Our forfeiture rules serve the purpose to "encourage parties to raise issues in the trial court, thus ensuring both that the trial court is given an opportunity to correct any errors prior to appeal and that a party does not obtain a reversal through his or her own inaction." *1010 Lake Shore Association v. Deutsche Bank National Trust Co.*, 2015 IL 118372, ¶ 14. As defendants failed to raise this issue before the circuit court, we find this issue has been forfeited and decline to review it.

¶ 62 Moreover, the record is devoid of (1) defendants' response to the motion for summary judgment and (2) any transcripts of the hearing on the motion for summary judgment. As the appellants, defendants had the burden to provide a complete record on appeal to support any claim of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of a complete record on appeal, any doubts which may arise will be resolved against the appellants, and "it will be presumed that the order entered by the [circuit] court was in conformity with law and had a sufficient factual basis." *Id.* at 392. Since defendants failed to provide this court with a transcript of the proceedings, Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005) required the filing of either a bystander's report or an agreed statement of facts, but these documents were not

provided. See *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003). As a result of defendants' failure to provide this court with a complete record, any doubts resulting from the incompleteness of the record must be resolved against defendants. *Foutch*, 99 Ill. 2d at 392 (1984)." Thus, it is reasonable to conclude that in considering RREF's motion for summary judgment, the circuit court reviewed the accompanying loan documents and affidavits in its decision-making process regarding the award of attorneys fees. Accordingly, in the absence of a complete record, we must presume that the circuit court acted correctly and in conformity with the law when it granted RREF's motion for summary judgment.

¶ 63 CONCLUSION

¶ 64 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 65 Affirmed.