

No. 1-15-3455

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

U.S. BANK, NATIONAL ASSOCIATION, as Trustee,)	Appeal from the
Successor in Interest to Bank of America, National)	Circuit Court of
Association as successor by merger to LaSalle Bank)	Cook County
National Association, as Trustee for Certificateholders)	
of Bear Stearns Asset Backed Securities, I LLC, Asset-)	
Backed Certificates, Series 2006-AQ1,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12 CH 33079
)	
KENNETH J. BUEHRING a/k/a KENNETH)	
BUEHRING and DENISE BUEHRING,)	
)	
Defendants-Appellants,)	
)	
(Unknown Owners and Non-Record Claimants,)	Honorable
)	John H. Ehrlich,
Defendants).)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Defendants’ appeal from the order denying them leave to file a recoupment counterclaim is moot where the plaintiff voluntarily dismissed its mortgage foreclosure claim following a loan modification agreement.

¶ 2 During the course of a mortgage foreclosure action, the defendants sought leave to file a defensive counterclaim for recoupment based on alleged violations of the Truth in Lending Act’s disclosure requirements. The trial court denied the defendants’ motion for leave to file the

counterclaim, as well as a subsequent motion to reconsider. The parties executed a loan modification agreement and thereafter the plaintiff voluntarily dismissed its foreclosure claim. Defendants did not file a timely appeal from the denial of leave to file a counterclaim. Defendants, however, successfully obtained a vacation of plaintiff's voluntary dismissal over plaintiff's objection. Plaintiff immediately voluntarily dismissed its reinstated foreclosure action. Thereafter, defendants timely filed an appeal of the trial court's denial of their motion for leave to file their counterclaim. Because the defendants' counterclaim seeks recoupment, which can only be raised in a defensive posture, a resolution of this appeal on the merits would result in no appropriate relief. We therefore dismiss the defendants' appeal as moot.

¶ 3 BACKGROUND

¶ 4 On July 31, 2006, Kenneth and Denise Buehring (collectively, the Buehrings) executed a promissory note payable to Argent Mortgage Company, LLC (Argent), secured by a mortgage on the Buehrings' home. On August 30, 2012, U.S. Bank¹ initiated a mortgage foreclosure action, alleging that the Buehrings were in default for failure to pay the monthly installments due under the note.² The Buehrings, through counsel, filed an appearance on September 7, 2012, and on January 30, 2013, the trial court granted the Buehrings additional time to answer, which they did on February 27, 2013.

¶ 5 On August 15, 2013, U.S. Bank moved for summary judgment, to which the Buehrings responded on September 13, 2013. On October 11, 2013, the Buehrings filed a motion for leave

¹On its complaint, the plaintiff is styled "U.S. Bank, National Association, as Trustee, Successor in Interest to Bank of America, National Association, as successor by merger to LaSalle Bank N.A., as Trustee for Certificateholders of Bear Stearns Asset Backed Securities, I LLC, Asset-Backed Certificates, Series 2006-AQ1." We will refer to the plaintiff as simply "U.S. Bank."

²Count II of U.S. Bank's complaint sought reformation of the mortgage, which was subsequently resolved through an agreed order.

to file a counterclaim. Their proposed counterclaim for recoupment alleged that Argent violated the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq. (2012)) by providing the Buehrings with an incomplete Truth in Lending Disclosure Statement and an incomplete Notice of the Right to Cancel (collectively, the TILA disclosures) in connection with the mortgage transaction. They alleged that these violations gave rise to civil liability under section 1640 of TILA (15 U.S.C. § 1640(a) (2012)), and that U.S. Bank, as an assignee of Argent, was liable for those damages under section 1641 of TILA (15 U.S.C. § 1641(e) (2012)).

¶ 6 On December 16, 2013, the trial court held a hearing on U.S. Bank's motion for summary judgment, as well as on the Buehrings' motion for leave to file their counterclaim alleging TILA violations. The trial court's written order states: "Defendant[s'] motion for leave to file a counterclaim (amended pleading) [*sic*] is denied with prejudice." The trial court's order entered and continued U.S. Bank's pending motions, and addressed certain other matters not germane to the issues on appeal.

¶ 7 The Buehrings moved to reconsider, arguing that the trial court misapplied the law where the Buehrings sought to raise their TILA claims as a defense to the foreclosure action, thus taking their claims outside of the one year statute of limitations contained in section 1640(e) of TILA (15 U.S.C. § 1640(e) (2012) (providing a one-year statute of limitations on damages claims under TILA, unless raised as a "defense by recoupment or set-off, except as otherwise provided by State law.")). On August 5, 2014, the trial court denied the motion. The trial court's order states, in relevant part: "(1) The Court finds Defendants['] proposed TILA claim is requesting rescission and should have been plead as an affirmative defense; [and] (2) The Court further finds that the proposed TILA claim would be barred under 15 U.S.C. § 1640 as well as 735 ILCS 5/13-207[.]"

¶ 8 On June 15, 2015, the trial court dismissed the foreclosure “without prejudice and without further cost,” and entered an agreed order to reform the mortgage. However, on October 13, 2015, the Buehrings filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2014)) to vacate the voluntary dismissal, asserting that U.S. Bank failed to give proper notice of the motion. In the section 2-1401 petition, the Buehrings stated that they had accepted a loan modification offer and had begun making payments, but that the dismissal had “harmed” their right to appeal the denial of the motion for leave to file a counterclaim, since the time in which to file a notice of appeal had expired by the time they learned of the dismissal order.

¶ 9 On October 29, 2015, the trial court granted the Buehrings’ section 2-1401 petition and vacated the June 15, 2015, dismissal order over U.S. Bank’s objection. In the same order, the trial court granted U.S. Bank’s oral request to dismiss the foreclosure action “without prejudice to refile upon a future default, without cost, effective [October 29, 2015].” On November 25, 2015, the Buehrings filed their notice of appeal, identifying the trial court’s December 16, 2013, and August 5, 2014, orders.

¶ 10 ANALYSIS

¶ 11 On appeal, the Buehrings argue that the trial court abused its discretion by denying them leave to file their counterclaim alleging violations of TILA’s disclosure requirements. They argue that the trial court misapplied the law by finding that the proposed counterclaim was time-barred under both section 1640 of TILA (15 U.S.C. § 1640 (2012)) and section 13-207 of the Code of Civil Procedure (735 ILCS 5/13-207 (West 2012)). U.S. Bank argues that the parties’ loan modification and the voluntary dismissal of the foreclosure action render this appeal moot. We agree with U.S. Bank that this appeal is moot, and thus do not reach the merits of the Buehrings’ arguments regarding the timeliness of their proposed counterclaim.

¶ 12 The Buehrings' proposed counterclaim sought "damages to be set off in recoupment resulting from the original lender's failure to provide a sufficient, complete, and accurate Truth in Lending Disclosure Statements [*sic*] and Notice of Right to Cancel in violation of [TILA] and its implementing regulations." They sought actual and statutory damages for these alleged TILA violations.

¶ 13 Section 1640(a) of TILA authorizes civil liability for actual and statutory damages, costs, and attorneys' fees against lenders who violate TILA's disclosure requirements. 15 U.S.C. § 1640(a) (2012). Generally, there is a one-year statute of limitations for such civil liability claims, although section 1640(e) permits raising disclosure violations as a matter of defense by recoupment or set off beyond the one-year statute of limitation, except as otherwise provided by state law. 15 U.S.C. § 1640(e) (2012). Here, the Buehrings entered into the initial loan agreement with Argent on July 31, 2006, and thus their right to bring an independent action against Argent or its assignee based on the alleged disclosure violations expired on July 31, 2007. Therefore, the Buehrings could only raise the alleged disclosure violations as a defense by recoupment or set off in response to an action to collect the underlying debt, to the extent permitted by Illinois law. 15 U.S.C. § 1640(e) (2012).

¶ 14 A recoupment claim is in the nature of a defense arising out of some feature of a transaction on which the plaintiff's action is grounded. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 415 (1998); *Bull v. United States*, 295 U.S. 247, 262 (1935). Recoupment deducts from a plaintiff's recovery all just allowances or demands accruing to the defendant with respect to the same contract or transaction, and is only available so long as a plaintiff's claim survives. *Distribution Services, Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811, 812 (5th Cir. 1990). A recoupment claim must be raised as a counterclaim. See 735 ILCS 5/2-608 (West 2012).

¶ 15 Here, the foreclosure action was filed as a result of a loan default that occurred on May 1, 2010. During the foreclosure proceedings, the parties agreed to modify the loan, which the Buehrings admitted in the trial court had the effect of de-accelerating the loan and undoing the default alleged in U.S. Bank's complaint. As the Buehrings made clear in the trial court, their proposed counterclaim containing the TILA recoupment claim was being brought in defensive posture to U.S. Bank's attempt to recover a debt, as their ability to bring a non-recoupment claim was certainly time-barred. When the parties entered into the loan modification, effectively settling the foreclosure claim, U.S. Bank could no longer pursue an action to recover a debt based on the default set forth in its complaint, and thus voluntarily dismissed the foreclosure claim. U.S. Bank's right to pursue the Buehrings for the alleged May 1, 2010, default did not survive the loan modification, and thus there is no pending action against the Buehrings to defend. Allowing the Buehrings to pursue a defensive counterclaim against U.S. Bank where no claim by U.S. Bank is pending against them would effectively permit the Buehrings to do what section 1640(e) of TILA prohibits: pursue a non-defensive damages claim beyond the TILA one-year statute of limitations. Therefore, even if we were to reach the merits of the Buehrings' claim and agree with them, we could not remand to allow the filing of the proposed recoupment claim. We therefore cannot grant the Buehrings any meaningful relief in this appeal, and they have not argued that any of the exceptions to the mootness doctrine are present here.

¶ 16

CONCLUSION

¶ 17 For the foregoing reasons, we dismiss this appeal as moot.

¶ 18 Appeal dismissed.