2017 IL App (2d) 161110-U
No. 2-16-1110
Order filed September 8, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NAPLETON ENTERPRISES, LLC, directly and as Beneficial Owner under STANDARD BANK AND TRUST COMPANY, as Trustee Under Trust Agreement dated January 7, 2003, and known as Trust No. 17569,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 14-CH-1212
POPULAR COMMUNITY BANK FOUNDATION, INC., f/k/a Banco Popular North America; 334 GRAND JOINT VENTURE, LLP; WINDY CITY AUTO GROUP CORPORATION; and BAHARY PARTNERSHIP,	)	
Defendants	)	
(Popular Community Bank Foundation, INC., f/k/a Banco Popular North America, and Grand Joint Venture, LLP, Defendants-Appellees).	)	Honorable Robert G. Gibson, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff forfeited its arguments due to insufficient presentation. Forfeiture aside, we affirm the trial court's section 2-619.1 dismissal. 735 ILCS 5/2-619.1 (West 2016).

¶ 2 Plaintiff-appellant, Napleton Enterprises, LLC (Napleton), the beneficiary of Trust Agreement No. 17569, dated January 7, 2003 (the Trust), filed a seven-count complaint against defendants-appellees, Popular Community Bank Foundation, Inc., f/k/a Banco Popular North America (Banco), and 334 Grand Joint Venture, LLP (Grand). Napleton based each claim on a right of first refusal (ROFR) between Standard Bank and Trust Company, as trustee of the Trust, and an entity *not* named in the instant complaint, Windy City Auto Group Corporation (Windy City). The ROFR provided that, if Windy City desired to sell a piece of commercial real estate located at 334 Grand Avenue (the property) and received a *bona fide* offer from a third party, Windy City was required to provide the Trust with notice and an opportunity to purchase the property under identical terms.

¶ 3 Windy City was succeeded by Bahary Partnership (Bahary). Bahary entered bankruptcy proceedings. Bahary transferred title of the property to Banco, its mortgage lender, not a party to the ROFR, as part of a settlement approved by the bankruptcy court *via* an instrument titled "deed in lieu of foreclosure" (Bahary to Banco, the first conveyance). Banco then sold the property to Grand, also not a party to the ROFR (Banco to Grand, the second conveyance).

¶ 4 Neither the Trust nor Napleton received notice of either conveyance. When Napleton learned of the conveyances, it filed a complaint against Bahary, Banco, and Grand based on their alleged disregard of its rights under the ROFR. (The Trust, by this point, had dissolved, and, according to Napleton, it had assumed the Trust's rights under the ROFR.) The trial court entered a default judgment against Bahary only. Bahary reopened bankruptcy proceedings,

staying Napleton's trial court case against Banco and Grand. After the interposing bankruptcy proceedings, Napleton filed the instant amended complaint against Banco and Grand.

¶ 5 Defendants moved to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2016) (allowing for combined dismissal motions pursuant to sections 2-615 and 2-619). The trial court granted the motion and denied Napleton's motion to reconsider. The court, focusing on the section 2-615 bases, determined that Napleton did not plead facts sufficient to show that either the first or second conveyance triggered the ROFR such that its rights were implicated and it was entitled to relief. The court stated that this foundational omission undermined every count.

¶ 6 Napleton appeals. However, pervasive shortcomings in Napleton's briefs require us to find any true challenge to the sufficiency of its pleadings forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Napleton presents an ill-defined theory of the case and cites irrelevant or incomplete bankruptcy authority. In its opening brief, it altogether fails to cite to principles of contract interpretation, examine the terms of the ROFR, or discuss the elements of any one count.

¶ 7 Still, in our discretion, we choose to explain why, forfeiture aside, we affirm the dismissal. And, we note that, at the crux of this case, the ROFR simply failed to directly address a situation, such as the instant bankruptcy, where it might extinguish without ever triggering. While Napleton may have lost its chance to ever exercise the ROFR under ordinary market conditions, it does not follow that Napleton should benefit from Bahary's bankruptcy at Banco and Grand's expense.

¶ 8 I. BACKGROUND

¶ 9 The property at issue in this case is a parcel of commercial real estate located at 334 Grand Avenue in Elmhurst. Indications of value in the record are as low as $750,000 and as high as $2.8 million, but Grand most recently purchased the property for $1.5 million. Grand operates a motorcycle business on the property.

¶ 10 There are four parties, or groups of parties, relevant to this case: (1) the Trust, with Napleton as its beneficiary, the first owner of the property; (2) Windy City, whose undisputed successor for the purposes of this case is Bahary, the second owner of the property; (3) Banco, Bahary's mortgage lender, the third owner of the property; and (4) Grand, the fourth owner of the property.

¶ 11 A. The ROFR

¶ 12 In February 2004, the Trust entered into contract to sell the property to Windy City for $2.8 million. The contract, drafted by the Trust, named the Trust as the "seller" and Windy City as the "purchaser." The contract incorporated a ROFR. The ROFR provided, with strike-outs in the original and emphases added:

> "Grant of Right of First Refusal. Seller is hereby granted a Right of First Refusal with respect to the subject property and/or any business owned by purchaser and operating within the subject premises and/or any assets located thereon [the property] *only* as follows:
>
> *If purchaser desires to sell* the [property] or any part thereof *and received from some third party a bona fide offer for the purchase thereof*, purchaser shall disclose the terms of such offer to seller, in writing within five (5) days following the receipt of the offer by purchaser.

> Seller shall have seven (7) days after receiving notice of the terms of the offer within which to elect to exercise [its] right to purchase the [property] *on the identical terms to those offered by the third party*. In the event seller fails to notify purchaser in writing of its election to exercise such right within said time, seller shall have waived such right and no further obligations shall be required.
>
> Seller's right of first refusal *shall extinguish upon the 1st [first] sale* to any third party *bona fide* purchaser for value ~~or upon leasing~~ the [property]. [Initials of apparent party representatives.]
>
> Purchaser shall not be required to provide notice and seller's right of first refusal shall extinguish upon the sale to either of the purchasers, their spouses, children, relatives, heirs, ~~successors and/or assigns~~. [Initials of apparent party representatives.]
>
> Notice under the term of this right of first refusal shall be made by personal delivery of such notice or upon the mailing of said notice by regular mail to the addresses on the original contract of the parties hereto and the party's respective attorney so stated on said original contract. Notice shall be deemed effective one (1) day after mailing."

¶ 13 Sometime between February and April 2004, Bahary became Windy City's successor. The parties agree that, at this point, Bahary was bound by the terms of the ROFR.

¶ 14 In April 2004, the Trust conveyed the property to Bahary, and the deed of conveyance was recorded. This conveyance from the Trust to Bahary is not at issue on appeal. The ROFR was never recorded. (Instead, two years later, in January 2006, Napleton recorded a "Memorandum of Right of First Refusal." The memorandum reported that a ROFR existed as to the property and the businesses contained thereon, but the memorandum did not attach a copy of

the ROFR or disclose its terms.) In May 2004, the Trust dissolved and, according to Napleton, Napleton assumed the Trust's rights under the ROFR.

¶ 15 B. First Conveyance: Bahary to Banco

¶ 16 To close the 2004 sale of the property, Bahary procured financing from Banco. The mortgage was recorded in 2004.[1] By 2010, Bahary had defaulted on the mortgage. In August 2010, Banco initiated foreclosure proceedings against Bahary.

¶ 17 In October 2010, Bahary filed for bankruptcy. Bahary did not provide Napleton with notice of the bankruptcy proceedings. Bahary listed the property in schedule A of its bankruptcy papers. It listed a value of $750,000, but it did not disclose the ROFR.

¶ 18 As part of the bankruptcy discharge plan, Bahary moved the bankruptcy court to approve a settlement between itself and Banco. The settlement involved multiple properties. Specifically, as to the instant property, Bahary asked the bankruptcy court to approve a "turnover by deed-in-lieu or consent judgment." Bahary did not provide the Trust or Napleton with notice of the proposed settlement between itself and Banco. The bankruptcy court approved the settlement, and, on May 31, 2012, Bahary and Banco executed a "warranty deed in lieu of foreclosure." The deed was recorded. Banco then held title to the property.

[1] And, as we have mentioned, the memorandum of the ROFR was not recorded until 2006. We note upfront that Napleton never explains how Banco, the mortgagee, would take subject to the ROFR when the memorandum was not recorded until long after the mortgage lien attached to the property. Even though the latter part of our analysis adopts the rationale for dismissal favored by the trial court, this factor remains problematic for Napleton.

¶ 19 C. Second Conveyance: Banco to Grand

¶ 20 On May 6, 2014, Banco conveyed the property to Grand *via* a warranty deed recorded in Du Page County. Grand purchased the property for $1.5 million. Banco did not notify Napleton prior to selling the property to Grand.

¶ 21 On June 30, 2014, Napleton filed a complaint against Bahary, Banco, and Grand based on its alleged right to exercise the ROFR during either the first or second conveyance. On September 29, 2014, the trial court entered a default judgment as to Bahary only.

¶ 22 D. Return to Bankruptcy Court

¶ 23 In October 2014, Bahary moved to reopen bankruptcy proceedings. This stayed Napleton's trial-court action as to Banco and Grand. In bankruptcy court, Bahary moved for a rule to show cause as to why Napleton should not be held in contempt for violating the bankruptcy discharge injunction when it attempted to collect a debt in the trial court, *i.e.*, the alleged right to exercise the ROFR.

¶ 24 The bankruptcy court declined to find contempt. It stated that Napleton cannot have violated the discharge injunction where the "debt" it attempted to collect did not actually exist: "Because *** the [ROFR] was not ripe, there are no grounds for findings of contempt." The court explained that the first conveyance had not triggered the ROFR, because Bahary had not "desired" to sell the property, and there was no "*bona fide* offer" from a third party. The court concluded: "[N]ow that Napleton knows that its [ROFR] was of no consequence in the bankruptcy proceeding, this court will order Napleton to dismiss certain parties from the Du Page County lawsuit with prejudice."

¶ 25 The United States District Court for the Northern District of Illinois ruled that the bankruptcy court had exceeded its jurisdiction when it ordered Napleton to dismiss the Du Page County lawsuit. However, the Northern District affirmed the bankruptcy court's finding that Napleton could not have violated the discharge injunction where the "debt" it attempted to collect, *i.e.*, a right under the ROFR, did not exist.

¶ 26 E. Return to Trial Court: Brief Summary of the Seven Counts

¶ 27 The stay lifted and Napleton proceeded with its seven-count complaint against Banco and Grand. In count I, Napleton sought declaratory judgment against both Banco and Grand based on a refusal to honor their respective obligations under the ROFR. It sought judgment based on one of two mutually exclusive theories of the case. That is, either: (1) the first conveyance, from Bahary to Banco, triggered the ROFR, thus implicating its rights at that stage (theory one); *or* (2)(a) the first conveyance did *not* trigger the ROFR; (2)(b) the ROFR survived the first conveyance; and (2)(c) the second conveyance, from Banco to Grand, triggered the ROFR, thus implicating its rights at that stage (theory two). In count II, Napleton alleged breach of contract against only Banco for its failure to abide by the ROFR's notice requirement during the second conveyance (implicating theory two). In count III, an alternative to Count II, Napleton alleged tortious interference with a contract against only Banco for its conduct during the first conveyance (implicating theory one). In count IV, also an alternative to count II, Napleton alleged unjust enrichment against only Banco based primarily on its conduct during the first conveyance (implicating theory one). In count V, Napleton alleged tortious interference with a prospective economic advantage against only Grand based on its conduct during the second conveyance (implicating theory two). In count VI, Napleton alleged an action for specific performance against both Banco and Grand relating to the second conveyance (implicating

theory two). In count VII, an alternative to count VI, Napleton alleged an action for the imposition of a constructive trust against only Grand relating to the second conveyance (implicating theory two). In addition the relief sought in counts VI and VII, Napleton sought attorney fees and other relief deemed just and appropriate. In the alternative to the relief sought in counts VI and VII, Napleton sought monetary damages in the amount of the fair market value of the property.

¶ 28 F. Dismissal Proceedings

¶ 29 On May 16, 2016, Banco moved to dismiss the complaint pursuant to section 2-619.1 of the Code. Grand joined Banco as to the overlapping counts and moved separately pursuant to section 2-615 of the Code as to Counts V and VII. As to the section 2-615 bases to dismiss, defendants alleged, *inter alia*, that none of the claims were viable because the ROFR never triggered. As to the section 2-619 bases, Banco alleged, *inter alia*: (1) the ROFR was invalid as improperly executed by Napleton as opposed to the Trust; and (2) collateral estoppel required dismissal (based on statements made by the bankruptcy court that the ROFR never triggered).

¶ 30 At hearing, the trial court focused on the section 2-615 bases for dismissal, explaining that Napleton failed to plead that its rights under the ROFR had triggered. In the court's view, this foundational omission undermined every count. It stated:

> "There is a fundamental difference between a sale of a property that would trigger a [ROFR] and a deed in lieu of foreclosure. *** [T]he language about [']receives from some third party a *bona fide* offer for the purchase['] *** doesn't fit. *** A deed in lieu of foreclosure is a satisfaction of an indebtedness and a transfer of collateral on a loan. So a third party could never come in and create a situation that would be akin to that."

¶ 31 Napleton *agreed* that, with a deed in lieu of foreclosure, there is no opportunity to match a third party's offer as required by the ROFR. Napleton submitted, however, that the first conveyance was *not* accomplished by deed in lieu of foreclosure, but by a "sale" under section 363 of the Bankruptcy Code. 11 U.S.C. 363 (West 2016). According to Napleton, a section 363 sale has a matching concept "baked into it" and, thus, was capable of satisfying the ROFR.[2]

¶ 32 The court rejected Napleton's argument, noting the following. Napleton itself pled that the first conveyance was a deed in lieu of foreclosure. ("Banco took through a deed in lieu of foreclosure" (first amended complaint, ¶ 62)). Further, a "sale" under section 363 is not a triggering "sale" under the ROFR just because it uses the word "sale." Regardless of the title of the first conveyance, the ROFR was not triggered: "There's no offer ***. It's not a purchase ***. *** There's no way for a third party to match an offer in this setting, even if it were an offer. So for every reason, it just doesn't fit into what's attempting to be done." The trial court issued a written order granting Banco and Grand's section 2-619.1 motion and Grand's section 2-615 motion.

¶ 33 Napleton moved to reconsider. It again argued that the first conveyance was not a deed in lieu of foreclosure, but a section 363 sale. The trial court denied the motion. This appeal followed.

¶ 34 II. ANALYSIS

[2] Napleton never sufficiently explains the nature of a section 363 sale. However, in one of its cited cases (*In re Matter of Motors Liquidation Co.*, 829 F.3d 135, 145 (2nd Cir. 2016)), the court describes a section 363 sale as a transfer of assets to a successor corporation. Thus, even as we later accept aspects of Napleton's position for the sake of argument, we remain skeptical of Napleton's recitation of bankruptcy law.

¶ 35 Napleton appeals the trial court's section 2-619.1 dismissal. Section 619.1 provides:

> "Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based." 735 ILCS 5/2-619.1 (West 2016).

¶ 36 A section 2-619.1 motion is a combined motion, not a hybrid motion. *Reynolds v. Jimmy Johns Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 20. The separate section 2-615 and 2-619 claims are not to be comingled. *Id.* The Code and motion practice demand preservation of the distinctions between sections 2-615 and 2-619. *Id.* ¶ 51. Section 2-615 accepts all well-pleaded facts while questioning whether the pleadings state a cause of action. *Id.* ¶ 52. Section 2-619, in contrast, admits the legal sufficiency of the complaint but asserts an affirmative matter outside the complaint defeats or bars the cause of action. *Id.* ¶ 31. Dismissals under either section 2-615 or section 2-619 are reviewed *de novo*. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86 (2002).

¶ 37 In order to show that the trial court erred in dismissing the complaint under section 2-615, Napleton must explain why it did, in fact, plead a cause of action as to *each* of the seven counts. See, *e.g.*, *Reynolds*, 2013 IL App (4th) 120139, ¶ 55 (where an appeal is from dismissal of multiple counts of the complaint but the appellant only argues certain counts in the brief on appeal, the other counts are not considered and are deemed forfeited.) As Napleton itself alleged in its complaint, the survival of each count depends on the ROFR triggering, during either the

first or second conveyance, such that Napleton was denied its rights under the ROFR and is entitled to relief. This requires citation to principles of contract interpretation and an examination of the ROFR's terms. As we will explain, to save counts I (declaratory judgment, in part), III (tortious interference with a contract), and IV (unjust enrichment), Napleton must look to the terms of the ROFR to explain why, under the unexpected foreclosure and bankruptcy context of the first conveyance, the ROFR triggered. Alternatively, to save counts I (declaratory judgment, in remaining part), II (breach of contract), V (tortious interference with a prospective economic advantage), VI (specific performance) and VII (constructive trust), Napleton must look to the terms of the ROFR to explain why it did *not* trigger during the first conveyance, survived the first conveyance, and *did* trigger during the second conveyance. Napleton must set forth the elements of each count and explain why it pleaded facts to meet those elements.

¶ 38 Napleton fails to do any of this. Instead, Napleton focuses almost exclusively on bankruptcy law. Napleton argues that the trial court: (1) violated dismissal procedure by making a factual determination that the first conveyance was accomplished by a deed in lieu of foreclosure. Napleton contends that the first conveyance was not accomplished by a deed in lieu of foreclosure but, rather, was a sale under section 363 of the Bankruptcy Code (11 U.S.C. § 363), and, therefore: (2) bankruptcy law entitled Napleton, as a party with an interest in the property, to notice of the sale and, upon that notice, an opportunity to exercise the ROFR during the first conveyance; and (3) without notice as required under the Bankruptcy Code, Banco took the property subject to liens, claims, and encumbrances, such as the ROFR and was bound by the ROFR during the second conveyance.

¶ 39 These bankruptcy arguments, even if meritorious, do not explain why the ROFR triggered such that Napleton was denied its rights under the ROFR and is entitled to relief. This

is not an appeal from a bankruptcy judgment, and we have no place deciding whether Napleton was wronged during Bahary's bankruptcy proceedings. (In fact, the bankruptcy court ruled it was not.) Napleton argues that the trial court made determinations concerning bankruptcy law, but the court did not. Rather, the court rejected Napleton's attempts to bring bankruptcy law into the case. Regardless of *general* obligations triggered in *Bahary*'s bankruptcy proceedings, Napleton must discuss the *specific* obligations, if any, triggered by the instant ROFR as they pertain to *Banco and Grand*.

¶ 40 Separately, in order to show that the trial court erred in dismissing the complaint under section 2-619, Napleton must explain why the affirmative matters asserted by defendants, the (in)validity of the ROFR and collateral estoppel, do not defeat or bar each cause of action. In its opening brief, Napleton fails to raise even the specter of these issues. Instead, it waits for defendants to raise these arguments as additional bases to affirm the dismissal, and then it replies. Napleton's oversight is *somewhat* understandable, because the trial court focused on section 2-615 when explaining why it granted the combined motion to dismiss. The trial court did not discuss the section 2-619 bases. We do not find forfeiture on this point alone, where the trial court, *arguably*, issued in substance a section 2-615 dismissal and found no need to address the section 2-619 grounds.

¶ 41 Still, pervasive shortcomings in Napleton's briefs—presenting an ill-defined theory of the case, focusing on alleged procedural shortcomings in bankruptcy court while failing to address the key issue of the ROFR's applicability, failure to cite to contract-interpretation law, failure to argue in favor of its interpretation of the ROFR, failure to individually address the viability of any one specific count—compel us to find any pertinent challenge to the dismissal forfeited.

¶ 42 "[A] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research." *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010). Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires a clear statement of contentions with supporting citation of authorities and pages of the record relied on. *De novo* review refers to the level of deference given to the trial court. *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004). *De novo* review does not allow an appellant to present a court of review with a complicated legal issue to resolve on its own; the appellant still carries the burden of persuasion on appeal to explain, with citation to authority and fulsome argument, why the standing order is erroneous. *Yamnitz v. William J. Diestelhorst Co.*, 251 Ill. App. 3d 244, 250 (1993). Issues that are ill-defined or insufficiently presented may be forfeited. *Gandy*, 406 Ill. App. 3d at 875. Additionally, points not raised in an appellant's opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 43.

¶ 43 Napleton has put us in the position to conduct our own research and explain and develop its half-formed arguments before rejecting them. Napleton's piecemeal replies to arguments raised in defendants' response briefs do not remedy this flaw. We do not lightly issue a forfeiture determination, but, here, for the reasons stated, Napleton has crossed the line between a poor argument and an insufficiently-presented argument. Our forfeiture determination is dispositive.

¶ 44 Although clearly forfeited, we choose, in our discretion, to address Napleton's arguments and explain they are without merit. Each of Napleton's arguments challenge the section 2-615

bases for dismissal, so we, too, address Napleton's failure to plead a cause of action. Again, each count here depends upon the ROFR triggering during either the first or second conveyance, such that Napleton was denied its rights under the ROFR and is entitled to relief.

¶ 45 Further structure is necessary to understand Napleton's arguments. As Napleton acknowledges in count I for declaratory judgment, it offered two mutually exclusive theories of the case. Either: (1) the first conveyance, between Bahary and Banco, triggered the ROFR thus implicating its rights at that stage (theory one); or (2)(a) the first conveyance did *not* trigger the ROFR; (2)(b) the ROFR survived the first conveyance; and (2)(c) the second conveyance, between Banco and Grand, triggered the ROFR thus implicating its rights at that stage (theory two). On the face of the complaint, Napleton presented the theories as mutually exclusive; the first conveyance cannot *both* "trigger the ROFR" (theory one) and "not trigger the ROFR" (theory two). Applying certain terms of the ROFR, Banco cannot be *both* a third-party purchaser submitting a *bona fide* offer triggering the ROFR in the first conveyance (theory one) *and* a successor to Bahary bound by the terms of the ROFR when it desired to sell the property to Grand in the second conveyance (theory two). The ROFR states that the ROFR "shall extinguish upon the 1st [first] sale to any third party *bona fide* purchaser." Therefore, if Banco was a *bona fide* purchaser during the first conveyance, the ROFR subsequently extinguished, and Banco cannot be a successor to an extinguished ROFR in the second conveyance.

¶ 46 The first theory of the case implicates: (1) count I, in part, where Napleton sought declaratory judgment that the *first conveyance* triggered the ROFR; (2) count III, where Napleton alleged tortious interference with a contract against Banco under the theory that, at the time of the *first conveyance*, Banco encouraged Bahary to breach the notice requirements of the ROFR and, thus, Napleton lost its opportunity to exercise the ROFR at the time of the first conveyance;

and (3) count IV, where Napleton pleaded unjust enrichment against Banco under the theory that, had Napleton been able to exercise the ROFR at the time of the *first conveyance*, Banco would never have been in possession of a valuable asset.

¶ 47 The second theory of the case implicates: (1) count I, in remaining part, where Napleton sought an alternative declaratory judgment that Banco was a successor to Bahary, bound by the terms of the ROFR during the *second conveyance*; (2) count II, where Napleton alleged breach of contract against Banco based on Banco's failure to abide by the ROFR's notice requirement during the *second conveyance*; (3) count V, where Napleton alleged tortious interference with a prospective economic advantage against Grand based on Grand's purchase of the property in disregard for Napleton's rights during the *second conveyance*; (4) count VI, where Napleton sought specific performance against both Banco and Grand to acquire the property for an amount not to exceed the price set during the *second conveyance*; and (5) count VII, where Napleton sought a constructive trust against Grand based on Grand's wrongful and unjust acquisition of the property during the *second conveyance*.

¶ 48 We turn to Napleton's first argument,[3] that the trial court violated section 2-615 procedure by failing to accept the well-pleaded fact that the first conveyance was a sale under section 363 of the Bankruptcy Code, rather than a deed in lieu of foreclosure. Napleton does not fully explain why it is beneficial to it to view the first conveyance as a section 363 sale, but Napleton asserted below that a section 363 sale has a matching concept "baked into it."

¶ 49 In any event, Napleton's argument is based on a false premise, refuted by the record. Napleton did not *plead* that the first conveyance was a sale under section 363 of the Bankruptcy

[3] Napleton places this argument third in its brief. We place it first, because it is the most general challenge to the section 2-615 dismissal.

Code. Rather, it pleaded, "Banco took through a deed in lieu of foreclosure." Napleton only later *argued* in its written response to the motion to dismiss that the first conveyance was a section 363 bankruptcy sale. This alone is enough to reject Napleton's first argument. Moreover, regardless of the *title* of the first conveyance, Napleton still must explain why the *nature* of the first conveyance either triggered the ROFR, such that its rights were implicated, or caused Banco to take title subject to the ROFR. We further discuss these issues in relation to Napleton's second and third arguments.

¶ 50 We next turn to Napleton's second argument, that bankruptcy law entitled Napleton, as a party with an interest in the property, to notice of the sale during the first conveyance, and, upon that notice, an opportunity to exercise the ROFR. This argument implicates the first theory of the case, because, in arguing that Napleton should have had the opportunity to exercise the ROFR during the first conveyance, it presumes that the ROFR was triggered during the first conveyance. This argument represents Napleton's attempt to establish counts I (in part), III, and IV as viable causes of action.

¶ 51 Napleton, citing *In re Placid Oil Co.*, 753 F.3d 151, 154 (5th Cir. 2014), notes that a debtor must provide actual notice to all known creditors to discharge their claims. And, in Napleton's view, said notice would have entitled it to exercise the ROFR and obtain title to the property.

¶ 52 We disagree. Even accepting for the sake of argument that Napleton was a creditor or party entitled to notice of the first conveyance *under Bankruptcy law*, Napleton does not explain why it was entitled to notice *under the ROFR*.

¶ 53 We interpret the ROFR as we would any other contract. An agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. *Air Safety, Inc., v.*

Teachers Realty Corp., 185 Ill. 2d 457, 462 (1999). Words are to be given their plain and ordinary meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). If the words in the contract are unambiguous, they must be enforced as written. *Id*.

¶ 54 Here, the ROFR unambiguously states that the Trust/Napleton was granted a right of first refusal with respect to the property *only*: "If the Purchaser [Windy City/Bahary] *desires to sell* the [property] or any part thereof and *receives from some third party a bona fide offer* for the purchase thereof, Purchaser [Windy City Bahary] shall disclose the terms of such offer to Seller [Trust/Napleton] in writing ***." (Emphases added.) Further, upon receiving notice, Napleton "shall have seven (7) days after receiving notice of the terms of the offer within which to elect to exercise [its] right to purchase the [property] *on the identical terms to those offered by the third party*." (Emphasis added.) Even if these terms were reasonably susceptible to more than one meaning, we would be obliged to construe them against the Trust as the drafter. *Central Illinois Light Co. v. Home Insurance Co*., 213 Ill. 2d 141, 153 (2004).

¶ 55 It is difficult to see how the plain and ordinary meaning of "desires to sell" equates to transferring title to a property under threat of foreclosure during bankruptcy proceedings. It is also difficult to see how the plain and ordinary meaning of a "*bona fide* offer" from a third party fits under the circumstances of this case. *Bona fide* offers are often used to determine the fair market value of a property (*Illinois State Toll Highway Authority v. Dicke*, 208 Ill. App. 3d 158, 168 (1991) (eminent domain case)). The term "market value," in turn, is defined as "the price property would command in the *open* market." (Emphasis added.) Black's Law Dictionary 971 (6th ed. 1995). Napleton provides no explanation of how this common understanding of a *bona fide* offer fits in the context of a bankruptcy proceeding where the property is exchanged as part of a *closed* settlement to only one possible party, Banco.

¶ 56 Finally, even if the first conveyance triggered the ROFR's notice requirement, it is difficult to see how Napleton would have been able to "purchase the [property] on the *identical terms* to those offered by the third party." (Emphasis added.) Napleton does not explain how it could have purchased the property under identical terms as Banco, where Banco forgave a mortgage debt in exchange for title to the property *and* in exchange for execution of certain transactions as to several other properties in which Napleton had no interest. Napleton seems to think it is entitled to surrender only a small portion of its 2004 $2.8 million payment received to buy back the property in 2012 at a foreclosure-level price in disregard of Banco's rights as a creditor.

¶ 57 We reject Napleton's argument that bankruptcy law entitled it, as a party with an interest in the property, to notice of the sale during the first conveyance, and, upon that notice, an opportunity to exercise the ROFR. Napleton has not established by sufficient pleading that the first conveyance triggered the ROFR. As such, Napleton has failed to establish counts I (in part), III, and IV as viable causes of action, and the trial court properly dismissed those counts pursuant to section 2-615.[4]

¶ 58 Last, we turn to Napleton's third argument, that, without notice as required under the Bankruptcy Code, Banco took the property subject to liens, claims, and encumbrances, such as the ROFR. This argument implicates the second theory of the case, because it presumes that ROFR survived the first conveyance and that Banco was bound by the terms of the ROFR in the

[4] In its reply brief, Napleton argues that, even if the first conveyance *was* a deed in lieu of foreclosure, it triggered the ROFR. This argument is not properly raised, and we reject it. Napleton conceded at hearing that a deed in lieu of foreclosure would be unable to trigger the ROFR, because there would be no opportunity to match a third party's offer.

second conveyance. This argument represents Napleton's attempt to establish counts I (in remaining part), II, V, VI, and VII as viable causes of action.

¶ 59 We must note that Napleton's argument is difficult to follow. It appears to be: Banco is a successor corporation to Bahary. Bankruptcy law protects a successor against inheriting liabilities, if the debtor discloses them prior to the sale. 11 U.S.C. § 363(m) ("reversal *** on appeal *** of a sale *** of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith"); *Motors*, 829 F.3d at 163 (declining to protect a successor corporation where its predecessor did not disclose a liability). Napleton further notes that the terms of the ROFR provide that the ROFR does not extinguish upon sale to a successor. Therefore, in Napleton's view, Banco is bound by the terms of the ROFR.

¶ 60 Again, Napleton's argument is based on a false premise. That is, Banco is not a successor corporation to Bahary. Napleton makes no compelling argument that Banco is a successor corporation. The case upon which Napleton relies to establish that Banco is a successor corporation bound by the terms of the ROFR, *Motors*, 829 F. 3d 135, is wholly distinguishable.

¶ 61 In *Motors*, Old GM sought protection in bankruptcy proceedings, and moved to sell its assets in a section 363 sale. *Id*. at 145. New GM would acquire essentially all of the business, *i.e*., what one might think of as the automaker GM. *Id*. at 146. Once the sale closed, New GM could operate the automaker business free of Old GM's debts. *Id*. This is because, under the protections of bankruptcy law, the successor corporation acquires the business "free and clear of any interest in such property" and acts as a liability shield to prevent individuals with claims against the old corporation from suing. *Id*. However, this protection does not apply where the

old corporation fails to disclose claims of which it is aware. *Id*. at 159. In *Motors*, Old GM was aware of a faulty ignition switch but failed to disclose it, so New GM could not be protected from being sued over it: "if a debtor does not reveal claims that it is aware of, then bankruptcy law cannot protect it. Courts must limit the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." (Internal quotations omitted.) *Id*.

¶ 62 Here, Napleton does not establish by sufficient pleading that Banco is a successor corporation to Bahary. There is no issue about protecting the "debtor," Bahary, as it allegedly emerged as a successor corporation, Banco. The alleged successor, Banco, is not seeking a "new beginning." Banco did not seek to operate the Bahary business. Banco is a separate entity that merely sought title to property in exchange for payments owed.

¶ 63 We reject Napleton's argument that, as an alleged successor corporation to Bahary, Banco was bound by the terms of the ROFR. Napleton has not established that the ROFR survived the first conveyance or that Banco was bound by its terms in its sale to Grand. As such, Napleton has failed to establish counts I (in remaining part), II, V, VI, and VII as viable causes of action, and the trial court properly dismissed those counts pursuant to section 2-615.[5]

¶ 64 Given that we affirm the section 2-615 bases for dismissal, we need not address the section 2-619 bases for dismissal raised by defendants as alternative bases by which to affirm.

[5] In its reply brief, Napleton argues that, even if Banco is not a successor corporation to Bahary, Banco is still bound by the ROFR, because the ROFR ran with the land. This argument is not properly raised, and we summarily reject it. The ROFR shows no intent to run with the land and plainly states that it "shall extinguish upon the 1st [first] sale to any third party *bona fide* purchaser."

Likewise, we do not address additional unique factors in this case noted by defendants to be problematic, such as the dissolution of the Trust and the failure to record the ROFR.

¶ 65 III. CONCLUSION

¶ 66 For the reasons stated, Napleton presented insufficient arguments. Forfeiture aside, the appeal is without merit. We affirm the trial court's dismissal.

¶ 67 Affirmed.