2018 IL App (1st) 171870-U
No. 1-17-1870
Order filed June 29, 2018

Second Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

REPUBLIC BANK OF CHICAGO, Plaintiff-Appellant, v. FBOP CORPORATION, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 17 L 1349 Honorable Raymond W. Mitchell, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Mason and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in finding that defendant's affidavit met the requirements of Supreme Court Rule 191(a) (eff. Jan. 4, 2013), and dismissing plaintiff's complaint for lack of standing.

¶ 2

¶ 3 We must decide whether an affidavit met the requirements of Supreme Court Rule 191(a) (eff. Jan. 4, 2013). If so, plaintiff Republic Bank of Chicago lacks standing to sue. Republic argues the affidavit of defendant in support of its motion to dismiss under section 2-619(a)(9) of

the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)) should have been stricken because (i) the affiant lacked personal knowledge, (ii) the affidavit was conclusory, and (iii) the affidavit failed to state facts on which the affiant based his conclusions.

¶ 4 We agree with the trial court that the affidavit satisfied Rule 191(a), and, thus, Republic had no standing to file suit.

¶ 5 Background

¶ 6 Defendant FBOP, an Illinois corporation, is the successor company to United Financial Holdings. Inc., an Illinois corporation whose business principal operating subsidiary is United Community Bank of Lisle, Illinois. This dispute arose from a financial transaction involving multiple parties in which United Financial sought to raise capital for its banking operations. It structured the transaction to take advantage of favorable tax and regulatory treatment. To effect the transaction, United Financial created United Financial Holdings Trust I (the Delaware Trust), a statutory trust established under Delaware law. United Financial then entered into a "Junior Subordinated Indenture" (the Indenture) with Wilmington Trust Company, as Trustee for the Delaware Trust for the issuance of "Securities" (defined as "unsecured junior subordinated debt securities in one or more series") to evidence loans made from the Delaware Trust to United Financial. The source of funds for the loans from the Delaware Trust to United Financial would come from proceeds from the sale of "Capital Securities" (defined as "undivided preferred beneficial interest" in the Delaware Trust).

¶ 7 The Indenture

¶ 8 The Indenture is lengthy, so we summarize only those sections pertinent to resolving the issues. Section 3.12 provided that United Financial had the right to defer interest payments for up

to five years after which the interest accrued would be payable. Failure to pay principal or interest, subject to the deferrals under section 3.12, would constitute an "event of default" under sections 5.1(a) and (b) of the Indenture.

¶ 9 Section 1.11 of the Indenture, entitled "Benefits of Indenture," provided that holders of capital securities, like plaintiff Republic Bank of Illinois, have legal and equitable rights, remedies, or claims only to the extent expressly provided for in certain sections of the Indenture, including section 5.8. That section provides that a holder of capital securities must comply with the terms and conditions of section 5.7 before bringing a suit directly against FBOP to enforce payment of principal and interest. Under Section 5.7, the holder of capital securities may not bring an action if the Trustee has already instituted a proceeding on the same event of default. But, under section 5.9, a holder of the capital securities' right to pursue direct claims is restored if the Trustee discontinues or abandons the proceeding or if the proceeding has been determined adversely to the Trustee. The Indenture provided that New York law applied, without regard to its conflicts of laws principles.

¶ 10 On November 13, 2003, United Financial and others executed a transaction involving three simultaneous steps. First, Delaware Trust entered into a "Capital Securities Purchase Agreement" with Hovde TPS Fund, LLC, under which Hovde purchased $6 million in Capital Securities (*i.e.*, preferred equity in the Delaware Trust). Hovde immediately assigned those Capital Securities to Republic Bank. United Financial then borrowed $6 million from the Delaware Trust and issued a $6,186,000 junior subordinated debenture to evidence that indebtedness. Under the terms of the debenture, interest was payable quarterly, and the principal was due on November 13, 2033. Wilmington, as Trustee, was listed as the holder of the debentures.

¶ 11 On January 1, 2007, FBOP Acquisition Company II, a wholly-owned subsidiary of FBOP, merged into United Financial. On that same day, the Trustee entered into a supplemental indenture with FBOP, under which FBOP assumed all of United Financial's liabilities under the Indenture. FBOP made all required payments under the Indenture from 2007 through May 13, 2009, when FBOP informed the Trustee that FBOP was electing to defer its required interest payments under section 3.12 of the Indenture. Republic Bank received no further payments of principal or interest after May 13, 2009. On October 30, 2009, bank regulators closed FBOP's subsidiary banks, and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver.

¶ 12 Republic Bank first sued FBOP in 2012, alleging, in relevant part, that FBOP breached the Indenture when FBOP's principal subsidiaries "ceased to exist and their consolidated assets were sold by the FDIC," which Republic Bank argued was an event of default under section 5.1(e) of the Indenture. Republic Bank filed a motion for summary judgment, which the trial court granted, finding that FBOP assumed United Financial's obligations under the supplemental indenture and the closing of FBOP's principal subsidiaries constituted an event of default.

¶ 13 The appellate court reversed. *Republic Bank of Chicago v. FBOP Corporation and Michael E. Kelly*, 2016 IL App (1st) 141588-U (unpublished order under Supreme Court Rule 23). We found, in part, that the Indenture provided that Republic Bank, as a holder of "Capital Securities" (*i.e.*, the preferred equity in the Delaware Trust), had the right to sue United Financial directly only if United Financial breached section 5.1(a) or (b) of the Indenture, which referred to a failure to make required interest or principal payments. Republic Bank's complaint, however, alleged an event of default under section 5.1(e), relating the regulatory seizure of United Financial's assets and the FDIC's sale of those assets. Under the Indenture, only the Trustee of the Delaware Trust (that is, Wilmington Trust Company) can declare an event of default under

section 5.1(e). Thus, we reversed the trial court's grant of the summary judgment motion and remanded. *Id*., ¶ 28.

¶ 14 On October 3, 2012, FBOP entered into a Trust Agreement and Assignment for the Benefit of Creditors of FBOP with Patrick Cavanaugh of High Ridge Partners, Inc., as assignee. FBOP assigned "all property and assets of FBOP whatsoever and where so ever situated. ***." On April 26, 2013, the Trustee, Wilmington, filed an affidavit of claim in the assignment for the benefit of creditors proceeding seeking more than $6 million dollars, which is the same principal and unpaid interest due under the Indenture.

¶ 15 Republic sent notice to FBOP and the Trustee of an event of default in the payment of interest on the Capital Securities under section 5.1(a) of the Indenture, demanding payment of $6,000,000, together with all accrued interest on the Capital Securities. Republic then sent another written notice to the Trustee under section 5.7 of the Indenture advising of its intent to file a direct action against FBOP. More than 60 days later, on February 7, 2017, Republic Bank filed a complaint for breach of contract, alleging FBOP's failure to pay principal and interest due under the Indenture to the Delaware Trust constituted an event of default under the Indenture and trust agreement.

¶ 16 FBOP moved to dismiss under section 2-619(a)(3) and (9) of the Code 735 ILCS 5/2-619(a)(9) (West 2014). FBOP argued Republic lacked standing under section 2-619(a)(9) to bring its claim, as it did not comply with section 5.7 of the Indenture. Specifically, FBOP stated that Republic could not comply with section 5.7, as the Delaware Trust had already brought a proceeding on the same events of default and had not abandoned or discontinued that proceeding. FBOP also argued that Republic's claim created duplicative litigation in violation of section 2-619(a)(3).

¶ 17 To supports its motion, FBOP filed the affidavit of Patrick Cavanaugh, the assignee in the assignment for the benefit of creditors proceeding. Paragraph 6 of Cavanaugh's affidavit states that "Wilmington Trust Company has not discontinued or abandoned [its claim in the Assignment for the Benefit of Creditors proceeding]. Nor has Wilmington Trust Company's claim been determined adversely to Wilmington Trust Company."

¶ 18 Republic responded to FBOP's motion to dismiss and separately moved to strike the Cavanaugh affidavit. Republic did not file a counter-affidavit, but argued the Cavanaugh affidavit was not sufficient to support FBOP's section 2-619(a)(9) argument. Republic also moved to strike paragraph 6 of the affidavit arguing that Cavanaugh lacked the requisite personal knowledge to testify that the Trustee had not discontinued or abandoned its claim, as he was not an officer, director, or employee of the Trustee, had not communicated with the Trustee, and had established no foundation to support conclusory testimony concerning the Trustee's alleged intentions. Republic also argued that Cavanaugh's statement that the Trustee's claim had not been adversely determined was without proper evidentiary foundation.

¶ 19 The trial court granted FBOP's motion to dismiss based on section 2-619(a)(9) alone, and did not address the section 2-619(a)(3) argument. The court concluded that Republic had not complied with section 5.7 of the Indenture, barring its claim on the basis of standing.

¶ 20 Section 5.7 provided that before instituting any proceeding, the holder of capital securities, like Republic, must first (i) give written notice to the Trustee of a continuing event of default; (ii) make a written request to the Trustee to institute a proceeding; and (iii) and offer the Trustee indemnity. The holder of capital securities may then proceed only if 60 days after receiving the notice, request, and offer of indemnity, the Trustee has failed to institute a proceeding. The court found that because the Trustee had already instituted a proceeding before

Republic gave notice of its claim, Republic could proceed only if its rights had been restored under section 5.9 of the Indenture, which required that the Trustee either abandon or discontinue its proceeding.

¶ 21 The trial court found that Cavanaugh's affidavit, and in particular, paragraph 6, in which he averred that the Trustee had not discontinued or abandoned its claim, was sufficient evidence that the claim was continuing and precluded the restoration of Republic's rights. The court rejected the suggestion that the Trustee must formally discontinue or abandon its claim. Instead, the court concluded that to provide formal notice of an abandonment or discontinuation of its claim, Wilmington had to notify Cavanaugh, as assignee, and "Cavanaugh's affidavit established he received no such notification." The court noted that Republic failed to offer a counter-affidavit or any other evidence the Trustee discontinued or abandoned its claim. Thus, the court granted FBOP's motion to dismiss and denied Republic's motion to strike the affidavit.

¶ 22 Analysis

¶ 23 Standard of Review

¶ 24 A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the plaintiff's claim. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000). A section 2-619 dismissal resembles the grant of a motion for summary judgment; we determine whether a genuine issue of material fact should have precluded the dismissal or, absent that, whether the dismissal was proper as a matter of law. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 254 (2004). Generally, we review *de novo* a section 2-619 dismissal. *Neppl*, 316 Ill. App. 3d at 583. And we review a trial court's

decision to dismiss a complaint with prejudice for an abuse of discretion. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008).

¶ 25 Section 2-619(a)(9)

¶ 26 Section 2-619(a)(9) of the Code permits the involuntary dismissal of a claim that is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). Affirmative matter is "something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). A plaintiff need not allege facts establishing standing. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 45 (2005). Instead, the burden falls to the defendant to prove a plaintiff's lack of standing. *Id*. A motion to dismiss for lack of standing asserts an affirmative matter that negates the cause of action completely. *Id*.; 735 ILCS 5/2-619 (West 2016).

¶ 27 Unless the affirmative matter is already apparent on the face of the complaint, the defendant must present evidentiary support satisfying its initial burden of going forward on the motion. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 37 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Then the burden shifts to the plaintiff to establish that the affirmative matter is either unfounded or involves an issue of material fact. *Id*. A plaintiff may overcome this burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2014). But, a plaintiff cannot rely on the allegations from his or her own complaint to refute that evidence. *Hollingshead v. A.G. Edwards & Sons, Inc*., 396 Ill. App. 3d 1095, 1101-02 (2009). If a plaintiff does not come forward with a counteraffidavit

refuting the evidentiary facts in the defendant's affidavit or other evidence, those facts may be admitted and the motion may be granted on the basis that plaintiff "failed to carry the shifted burden of going forward." *Hodge*, 156 Ill. 2d at 116; *Pleasant Hill Cemetery Ass'n*, 2013 IL App (4th) 120645, ¶ 21.

¶ 28 Sufficiency of Cavanaugh's Affidavit

¶ 29 Republic concedes that the Trustee initiated a proceeding on April 26, 2013, and that under sections 5.7 and 5.9 of the Indenture, Republic would be precluded from instituting a proceeding on the same event of default unless the Trustee's "proceeding has been discontinued or abandoned for any reason or has been determined adversely to the Trustee." Republic contends, however, that FBOP has failed to present sufficient evidence to establish that the Trustee has not discontinued or abandoned its claim or that the claim has not been determined adversely to the Trustee.

¶ 30 FBOP contends Cavanaugh's affidavit, and, particularly, paragraph 6, establishes that the Trustee has not discontinued or abandoned its claim. Republic asserts, however, that the trial court should have granted its motion to strike paragraph 6 of the affidavit, as it does not comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), is conclusory, and not based on personal knowledge. Republic asserts that absent the Cavanaugh affidavit, FBOP has presented no evidence of lack of standing, which precludes dismissal under section 2-619(a)(9).

¶ 31 Illinois Supreme Court Rule 191(a) (eff. Jan. 4. 2013) states, in relevant part, that affidavits made in connection with a motion for involuntary dismissal under section 2-619 "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."

¶ 32 Republic first contends the trial court should have stricken Cavanaugh's affidavit as Cavanaugh made no effort to authenticate the Trustee's claim or establish the claim as a business record under Supreme Court Rule 236 (eff. Aug. 1, 1992). Republic cites nothing in the Indenture document or the caselaw to support the contention that, as an assignee, Cavanaugh had an obligation to formally authenticate the Trustee's claim or establish it as a business record. Thus, we disregard this argument.

¶ 33 Republic also contends the trial court should have stricken the affidavit, as Cavanaugh does not have the requisite personal knowledge to testify as to whether the Trustee has discontinued or abandoned its claim. Republic notes that the affidavit fails to detail any communications between Cavanaugh and the Trustee. Further, in his deposition testimony, Cavanaugh stated he had not communicated with the Trustee in the four years since receiving the claim. Republic also asserts that Cavanaugh does not have a relationship with the Trustee as an officer, director, or agent, or to establish a foundation for his testimony.

¶ 34 Cavanaugh's affidavit meets the requirements of Rule 191(a). The statements in the affidavit are based on his "personal knowledge" as assignee and addresses what occurred in the assignment for the benefit of creditors proceeding. Cavanaugh averred that he received an affidavit of claim from the Trustee and attached a copy of the claim as an exhibit to the affidavit. He further averred that the assignment for the benefit of creditors proceeding was ongoing and that the "Trustee-Assignee continues to pursue assets of FBOP Corporation for the benefit of its

creditors." Cavanaugh stated that the Trustee had not discontinued or abandoned its claim and it had not been determined adversely against the Trustee. The statements in the affidavit are based on Cavanaugh's knowledge and, as FBOP asserts in its brief, Cavanaugh was not purporting to speak on behalf of the Trustee regarding its intentions with its claim.

¶ 35 Moreover, Republic could have presented a counter-affidavit to refute the contentions in Cavanaugh's affidavit. As noted, once FBPO presented an adequate affidavit, it "satisfie[d] the initial burden of going forward on the motion' " and the burden then shifted to Republic to show the affirmative matter to be either unfounded or involving an issue of material fact. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 37 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). Republic could have overcome this burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2014). But, Republic did not offer a counter-affidavit or other proof and did not request a continuance under Supreme Court Rule 191(b) (eff. Jan. 4, 2013), to conduct additional discovery. Instead, Republic chose to stand on the allegations in its complaint. Thus, because Republic failed to refute the evidentiary facts in Cavanaugh's affidavit, the trial court did not err in granting the motion on the basis that Republic "failed to carry the shifted burden of going forward." *Hodge*, 156 Ill. 2d at 116.

¶ 36 Republic contends Cavanaugh's statement that the claim has not been "determined adversely" to the Trustee is belied by Cavanaugh's deposition testimony acknowledging that FBOP had assets of about $300 million (including a potential $265 million in federal tax refund litigation) and liabilities of over $867 million. In short, Republic asserts that because FBOP is insolvent, the Trustee's claim will never be paid and thus, in effect, it has been "adversely determined" against it. Cavanaugh did not, however, state that he had determined the Trustee

would not prevail on its claim. The likelihood of the Trustee's recovery depends on many factors, including the assets available, the validity of other claims, and the priority of claims. But even if the availability of assets reduces the likelihood of recovery that does not equate to an "adverse determination" of the Trustee's claim. Although the Trustee may indeed not recover the amounts owed, Cavanaugh's affidavit stated that no determination has been made, and Republic offered no evidence to refute that statement.

¶ 37 Republic also contends the trial court erred in finding that Republic was precluded from bringing its claim under section 5.9's restoration of rights provision, absent an "express declaration" from the Trustee that it has formally discontinued or abandoned its claim. Specifically, in denying the motion to strike, the trial court found that under the plain meaning of section 5.9 of the Indenture, Republic was precluded from reinstating its claim absent an "express declaration" from the Trustee to Cavanaugh that it has formally discontinued or abandoned its claim. The court found that by his affidavit Cavanaugh has averred that Wilmington has not done so. Republic asserts that nothing in the Indenture or trust agreement requires the Trustee to expressly declare to the assignee that it is discontinuing or abandoning its claim. Republic argues that under New York law (and Illinois law), if the parties intended to require an express notice of discontinuation or abandonment of a proceeding, the Indenture would have included that provision.

¶ 38 Under New York law, the abandonment of a contractual right " 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage' " *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P.,* 7 N.Y. 3d 96, 104 (2006) (quoting *General Motors Acceptance Corp. v Clifton-Fine Central*

School District, 85 N.Y. 2d 232, 236 (1995). "[W]aiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection." *Id.* (quoting *Gilbert Frank Corp. v Federal Insurance. Co.*, 70 N.Y. 2d 966, 968 (1988)).

¶ 39 Republic contends the Trustee's "failure to act" establishes abandonment Specifically, Republic asserts that the Trustee has taken no action since it submitted its claim to the assignee and notes that FBOP has not made any payment under the Indenture or Trust Agreement in more than eight years. We disagree with Republic's reasoning. While a failure to act can show abandonment of a claim, it must "evince an intent not to claim a purported advantage." *General Motors Acceptance Corp.*, 85 N.Y. 2d at 236. The Trustee filed a claim with the assignees, which plainly shows intent to claim a purported advantage. A failure to act in the intervening years is not a "clear manifestation of intent" to relinquish its claim. Given that the Trustee filed its claim with the assignee, notification to the assignee that it was abandoning its claim would constitute affirmative conduct.

¶ 40 We agree with Republic that the trial court erred in stating that "Cavanaugh's affidavit established that he received no such notification [of abandonment or discontinuation of the Trustee's claim]." Cavanaugh stated the Trustee had not discontinued or abandoned its claim, but stated nothing regarding receiving notification from the Trustee. As noted, however, the Trustee needed to make a "clear manifestation of its intent to relinquish" its claim. *Fundamental Portfolio Advisors, Inc.*, 7 N.Y. 3d at 104. Cavanaugh's affidavit supports a finding that the Trustee took no steps to do so, and Republic offered no counter-affidavit to refute that contention. The Trustee's ongoing claim precluded Republic from filing a claim for the same

event of default. Thus, the trial court properly dismissed Republic's complaint for lack of standing.

¶ 41 Republic contends the trial court abused its discretion by not allowing Republic to amend its complaint so that the parties could undertake additional discovery to determine if the Trustee has discontinued or abandoned its claim. But, Republic did not file a motion to amend in the trial court. Issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85. So, we will not address this argument.

¶ 42 Affirmed.