SECOND DIVISION
September 25, 2018

No. 1-17-1901

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, N.A., SUCCESSOR BY MERGER TO WELLS FARGO BANK SOUTHWEST, N.A., FKA WACHOVIA MORTGAGE FSB, FKA WORLD SAVINGS BANK, FSB Plaintiff-Appellee, v. SOL GIROUARD A/K/A SOL E. GIROUARD; A/K/A SOL ELENA GIROUARD; MARTIN BERMAN; MICHAEL BERMAN; LOIS BERMAN; VOLUME SERVICES AMERICA, INC.; UNKNOWN OWNERS AND NONRECORD CLAIMANTS, Defendants (Sol Girouard and Martin Berman, Defendants-Appellants.)	)	Appeal from the Circuit Court of Cook County No. 11 CH 41976 Honorable Patricia S. Spratt, Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of defendants' counterclaim based on violation of Illinois Consumer Fraud and Deceptive Business Practices Act affirmed because claim was time-barred.

¶ 2 In this mortgage foreclosure suit brought by plaintiff-appellee Wells Fargo Bank, defendants-appellants Sol Girouard and Martin Berman appeal from the dismissal with prejudice of their counterclaim alleging that Wells Fargo's predecessor violated the Illinois Consumer Fraud and Deceptive Business Practices Act (CFA) (815 ILCS 505/1 *et seq* (West 2012)), by failing to disclose the certainty of negative amortization in the type of loan that was sold to Girouard.

¶ 3 On appeal, defendants argue that the court erred in dismissing their counterclaim because they alleged facts sufficient to state a claim for breach of the CFA. They also challenge the denial of their motion for reconsideration dismissing their counterclaim with prejudice. Finding no error, we affirm.

¶ 4 BACKGROUND

¶ 5 On March 25, 2008, Girouard executed documents evidencing a loan in the amount of $536,200 with an interest rate of 7.95% in exchange for a mortgage on her home at 2110 North Bissell Street in Chicago. The mortgage was held by Wachovia Mortgage, FSB, Wells Fargo's predecessor.

¶ 6 The terms of the mortgage allowed Girouard to select an initial monthly payment from a range of payment amounts approved by Wachovia. This was known as a "Pick-a-Payment" loan. The loan document stated that "from time to time," "monthly payments may be insufficient to pay the total amount of monthly interest that is due." In that case, the amount of unpaid interest would be added to the principal and would accrue interest at the same rate as the principal, a process called negative amortization.

¶ 7 Girouard defaulted on the loan in August 2011, and Wells Fargo filed its foreclosure complaint four months later, on December 7, 2011.

¶ 8 On October 10, 2012, defendants answered the complaint and pled a counterclaim alleging a violation of the CFA. Specifically, defendants alleged that Wachovia failed to disclose in the Truth in Lending Disclosure that the minimum monthly payment Girouard selected was insufficient to pay the interest necessary to avoid negative amortization. Defendants further alleged that because negative amortization was certain to occur based on the payment Girouard selected, the loan's statement that "monthly payments *may* be insufficient to pay the total amount of interest that is due" was untrue.

¶ 9 Wells Fargo moved to strike and dismiss defendants' counterclaim on the basis that (i) defendants failed to meet the heightened pleading requirements to state a claim for fraud, and (ii) that the counterclaim, though purportedly alleging a violation of the CFA, was in fact a claim under the federal Truth in Lending Act (TILA) (15 U.S.C. § 1640(e)), which was untimely because it was not brought within one year of the violation of TILA.

¶ 10 The court held a hearing on Wells Fargo's motion in August 2016 (the transcript of which is not in the record), and dismissed defendants' counterclaim without prejudice.

¶ 11 Defendants filed a motion to reconsider titled "Motion to Reconsider the Court's Dismissal of Defendants' Counterclaim and to Include Illinois Supreme Court Rule 304(a) Language in Any Order Dismissing Defendants' Counterclaim With Prejudice." The motion repeated defendants' arguments that they had stated a claim under the CFA and that their cause of action was not barred by the statute of limitations. Defendants also noted that Wells Fargo had entered into a settlement with eight state attorneys general, including Illinois' attorney general, who had investigated whether the Pick-a-Payment loans violated consumer protection laws. In concluding, defendants asked the court to reconsider its dismissal without prejudice, but went on to ask that the court include

"Illinois Supreme Court Rule 304(a) language" "in the event the Court dismisses Defendants' counterclaim with prejudice[.]"

¶ 12 Following briefing, the court held a hearing on June 7, 2017 (also not transcribed in the record), where it denied defendants' motion to reconsider with prejudice as to their counterclaim insofar as it was premised on Wells Fargo's alleged failure to disclose negative amortization, but allowed defendants the opportunity to replead to assert other counterclaims arising under the CFA that were not based on this non-disclosure. In response, defendants asked the court to enter an order including 304(a) language, stating that they could not raise any other counterclaims. The court granted defendants' motion and entered an order on July 6, 2017, dismissing their counterclaim with prejudice and finding that there was no just reason to delay appeal of that order. Defendants timely appealed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendants challenge both the order of August 12, 2016, dismissing their counterclaim without prejudice, as well as the order of July 6, 2017, dismissing their counterclaim with prejudice.

¶ 15 With regard to the August 12 order, we note that our jurisdiction is limited to appeals from final orders. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); see also *State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 556 (2009). Because the order of August 12 dismissed defendants' counterclaim without prejudice, it was non-final. See *Ally Financial Inc. v. Pina*, 2017 IL App (2d) 170213, ¶ 28 ("[A]n order stating that a dismissal is 'without prejudice' is not final and appealable."). This is so notwithstanding the fact that the trial court, in its July 2017 order dismissing

defendants' counterclaim with prejudice, stated that "there is no just reason to delay the enforcement or appeal" of all prior orders entered with regard to the counterclaim. It is well settled that the finality of an order is determined by its substance rather than its form (*Sherman West Court v. Arnold*, 407 Ill. App. 3d 748, 752 (2011)), and the substance of the August 12 order reveals that it is non-final. Accordingly, we conclude that we lack jurisdiction to review this order.

¶ 16 Turning then to the July 6, 2017 order, we initially address defendants' contention that the court lacked subject matter jurisdiction to enter an order dismissing their counterclaim with prejudice. According to defendants, their motion to reconsider did not request a dismissal with prejudice, and so the court lacked the authority to order such a dismissal. (Significantly, Wells Fargo did move for a dismissal with prejudice in its original motion to dismiss.) Assuming *arguendo* that a court lacks jurisdiction to dismiss a pleading with prejudice on a motion for reconsideration of a dismissal order that was without prejudice, the record belies defendants' claim that they did not request this relief. In the court's order of June 7, 2017, the court denied defendants' motion for reconsideration "with prejudice as to the amortization issue," but that order did not include 304(a) language, because the court allowed defendants to replead their counterclaim based on a different violation of the CFA. Defendants declined to replead, and instead moved for the court to enter an order "Denying Defendants' Motion to Reconsider *With Prejudice That Includes Illinois Supreme Court Rule 304(a) Language*" (emphasis added). The court granted defendants the relief they specifically sought, and they cannot now contend that the court's decision to do so was error. See *Forest Preserve District of Dupage County v. First National Bank of Franklin Park*, 2011 IL

10759, ¶ 27 ("A party may not urge a trial court to follow a course of action, and then, on appeal be heard to argue that doing so constituted reversible error.").

¶ 17 With regard to the merits of the court's decision, we note at the outset that defendants failed to include a transcript or bystander's report of the hearing on Wells Fargo's motion to dismiss or their own motion to reconsider. As appellants, it is defendants' burden to provide a complete record on appeal to support their claim of error, and in the absence of that record, we may presume that the court's order had a factual basis and conformed with the law. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Nevertheless, because this case presents an issue of law that we review *de novo* (see *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006) (motion for reconsideration premised on alleged errors in the court's application of existing law is question of law subject to *de novo* review)), we elect to address the merits notwithstanding the incompleteness of the record (see *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 29 (2003) (failure of appellant to provide report of proceedings did not bar review where issues on appeal involved questions of law).

¶ 18 On appeal, Wells Fargo argues four bases for dismissal of defendants' counterclaim: (i) it is foreclosed by a class action settlement; (ii) it is untimely under TILA; (iii) it is untimely under the CFA; and (iv) it is meritless. The record reflects that Wells Fargo raised the issue of the counterclaim's alleged untimeliness under TILA in briefing before the trial court, but the record is silent as to whether any of the other bases for dismissal were before the court. However, as Wells Fargo points out, we may affirm the trial court's judgment on any basis appearing in the record, even if those grounds were not argued before the court. See *In re Detention of Stanbridge*, 2012 IL 112337, ¶

74. Here, it appears from the face of the record that Girouard's counterclaim is indeed untimely under the CFA, and so we confine our discussion to that argument alone.

¶ 19 Section 10a(e) of the CFA sets forth the relevant limitations period and provides as follows:

> "Any action for damages under this Section shall be forever barred unless commenced within 3 years after the cause of action accrued; provided that, whenever any action is brought by the Attorney General or a State's Attorney for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages which is based in whole or in part on any matter complained of in said action by the Attorney General or State's Attorney, shall be suspended during the pendency thereof, and for one year thereafter." 815 ILCS 505/10a(e) (West 2012)

A cause of action under the CFA "accrues" when a party suffers injury. *Gredell v. Wyeth Laboratories*, 346 Ill. App. 3d 51, 57 (2004).

¶ 20 Here, Girouard executed the loan documents that contained the alleged fraudulent statements on March 25, 2008, and defendants filed their counterclaim under the CFA on October 10, 2012, over four years later. The record supports a finding that defendants' injury occurred on May 1, 2008, when Girouard's first mortgage payment was due, given that this payment was insufficient to fully pay the interest due that month, thus beginning the process of negative amortization. In support of their motion to reconsider dismissal of the counterclaim, defendants argued for the first time that a number of state attorneys general had sued Wells Fargo for claims arising out of its Pick-a-Payment loan program.

Defendants cited only an unauthenticated newspaper article regarding the matter and attached no other evidence supporting this new argument. But it is unclear from the record whether the Illinois Attorney General brought an action against Wells Fargo for violating the CFA which would have suspended the limitations period for the time such action was pending. While the record reflects that Wells Fargo entered into a settlement with the Illinois Attorney General (among others) following an investigation into its Pick-a-Payment loans, the record does not reveal whether that settlement was the result of an "action" brought by the Attorney General.

¶ 21 Any doubts arising from the incompleteness of the record are construed against the appellant (*Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 31), who has also failed to take advantage of the opportunity to file a reply brief in this case. With this in mind, we presume that there was no period of time in which the statute of limitations was suspended and conclude that the limitations period expired three years from the date of injury, or May 1, 2012. Defendants' counterclaim was therefore filed six months past the expiration of the statute of limitations, and as such, was properly dismissed with prejudice by the trial court.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we affirm the dismissal of defendants' counterclaim with prejudice.

¶ 24 Affirmed.