FIRST DIVISION
February 6, 2012

Nos. 1-09-1426 and 1-09-2307 cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LUCIUS SWILLEY, JEANETTE TAYLOR, UNITED LEGAL FOUNDATION and DO FOR SELF FOUNDATION,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 99 CH 16258
v.	)	Honorable Aaron Jaffe,
BUILDER'S CAPITAL CORPORATION; CITIBANK F.S.B.; MICHAEL SHEAHAN, Sheriff of Cook County,	)	Judge Presiding
Defendants-Appellees.	)	consolidated with:
	)	No. 00 L 10591
	)	Honorable Peter Flynn,
LUCIUS SWILLEY, JEANETTE TAYLOR, UNITED LEGAL FOUNDATION and DO FOR SELF FOUNDATION,	)	Judge Presiding
Plaintiffs-Appellants,	)	and
v.	)	No. 02 CH 4822
CITIBANK F.S.B.; BUILDER'S CAPITAL	)	Honorable James R. Epstein, Judge Presiding

CORPORATION; MICHAEL SHEAHAN, Sheriff of Cook County; HAUSELMAN & RAPPIN, LTD.; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; ALICE HALL, and MARCUS PERRES, CAMPANALE AND WIGODA, LTD.,

Defendants-Appellees.

NATIONSCREDIT FINANCIAL SERVICES CORPORATION,

Plaintiff-Appellee,

v.

ALICE HALL, LUCIUS SWILLEY, JEANETTE TAYLOR, UNKNOWN OWNERS, and NON-RECORD CLAIMANTS,

Defendants-Appellants.

* * * * * * * * *

LUCIUS SWILLEY, JEANETTE TAYLOR, ALICE HALL and SUBURBAN BANK AND TRUST CO. TRUST NO. 1-1737,

Counter-Plaintiffs-Appellants,

v.

CITIBANK F.S.B.; BUILDER'S CAPITAL CORPORATION; MICHAEL SHEAHAN, Sheriff of Cook County, HAUSELMAN & RAPPIN, LTD.; NATIONSCREDIT FINANCIAL SERVICES CORPORATION; MARCUS PERRES, CAMPANALE AND WIGODA, LTD.; and ALBANY BANK AND TRUST CO. TRUST NO. 11-5578,

Counter-Defendants-Appellees.)

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

O R D E R

Held: The circuit court did not err in denying the motions for substitution of judge as of right. None of the issues raised by plaintiffs have sufficient merit to warrant setting aside the sheriff's sale of the subject property.

¶ 1 These consolidated interlocutory appeals arise from a judicial sale (sheriff's sale) of a two-unit apartment building located at 7426 South Luella Avenue, Chicago, Illinois (Luella Property). The sale was held to satisfy a personal deficiency judgment that had been entered against Mr. Lucius Swilley in a mortgage foreclosure action (*Citibank, F.S.B. v. Swilley, et al.*, 94 CH 9936) involving property located at 2836 East 74th Place, Chicago, Illinois (Mortgaged Property). On appeal, Swilley raises a number of issues relating to the sheriff's sale of the Luella Property. None requires reversal.

¶ 2 BACKGROUND

¶ 3 The events underlying these consolidated interlocutory appeals began when Citibank foreclosed its mortgage on the Mortgaged Property. Swilley was a defendant in an action (*Citibank, F.S.B. v. Swilley, et al.*, 94 CH 9936) filed by Citibank to foreclose a mortgage in the principal amount of $150,000, relating to the Mortgaged Property. On May 1, 1996, subsequent to a judgment of foreclosure and sale of the Mortgaged Property, a personal deficiency judgment was entered against Swilley in the amount of $133,882.07. Citibank sought to enforce the deficiency judgment by levying upon and securing a sheriff's sale of the Luella Property.

¶ 4 On March 5, 1997, Citibank directed the sheriff to levy the Luella Property, and on the same day, the sheriff executed a certificate of levy stating that he had levied Swilley's interest in the property. On March 11, 1997, the certificate of levy was recorded in the office of the recorder of deeds.

¶ 5 Citibank then caused a notice of sheriff's sale to be published in the Chicago Daily Law Bulletin, giving notice that Swilley's interest in the Luella Property would be sold on August 5, 1997, which notice was filed with the clerk of the circuit court on June 16, 1997. The sheriff's sale did not go forward on August 5, 1997, but instead was held on February 3, 1998, resulting in Citibank purchasing what it then understood to be Swilley's one-half interest in the Luella Property for $40,000.

¶ 6 Swilley failed to redeem his interest in the Luella Property during the redemption period, which expired on or about September 4, 1998. On September 4, 1998, the sheriff issued a sheriff's deed conveying Swilley's interest in the Luella Property to Citibank. Swilley received a certified letter dated September 4, 1998 from Martin F. Hauselman, of Hauselman & Rappin, Ltd. (Hauselman), counsel for Citibank, informing Swilley that as a result of his failure to redeem, Citibank had deposited $7,500 with the sheriff in satisfaction of his homestead interest in the Luella Property.

¶ 7 On September 18, 1998, Citibank filed an action for partition of the Luella Property in order to enable it to sell what it then believed to be Swilley's one-half interest in the property. Builders Capital Corporation (Builders Capital), the assignee of Citibank's interest, became a party-plaintiff in the partition action. On December 11, 1998, a judgment for partition was

entered and a sale scheduled for May 12, 1999.

¶ 8 On April 5, 1999, Swilley purportedly quitclaimed his interest in the Luella Property to his sister, Jeanette Taylor. On April 28, 1999, Citibank sold its interest in the Luella Property to Builders Capital.

¶ 9 Swilley intervened in the partition action as the executor of the estate of Ms. Sadie M. Anderson and filed a motion to dismiss the partition suit pursuant to section 2-619(a)(2) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 1996)). Swilley's motion was primarily based on his contention that he and Ms. Anderson held the Luella Property as joint tenants with right of survivorship and that Ms. Anderson was deceased.

¶ 10 Consequently, on August 4, 1999, Builders Capital voluntarily dismissed the partition action. Then, on August 11, 1999, Builders Capital filed a forcible entry and detainer action in the municipal division, seeking to evict Swilley from the Luella Property. Swilley moved to dismiss the forcible entry and detainer action for defective notice of termination of tenancy. Builders Capital voluntarily dismissed the forcible entry and detainer action.

¶ 11 Builders Capital deeded its interest in the Luella Property to Albany Bank & Trust Co. (Albany Bank), as Trustee under a Trust Agreement known as Trust No. 11-5578. Albany Bank thereafter conveyed its interest in the Luella Property to Suburban Bank and Trust Co. (Suburban Bank), as Trustee under a Trust Agreement known as Trust No. 1-1737.

¶ 12 On October 11, 1999, Suburban Bank transferred its interest in the Luella Property to Ms. Alice Hall. Incident to obtaining title to the Luella Property, Ms. Hall borrowed $153,837.16 from Nationscredit Financial Services Corporation (Nationscredit), and executed a mortgage on

the Luella Property as security for the borrowed funds.

¶ 13 On November 9, 1999, Swilley filed an action in chancery, case No. 99 CH 16258, against Citibank, Builders Capital, and the sheriff seeking to vacate the sheriff's sale of the Luella Property and for injunctive relief to avoid being evicted from the property. Swilley claimed he received no notice of the sheriff's sale held on February 3, 1998.

¶ 14 On July 20, 2000, Judge Aaron Jaffe issued an order denying Swilley's motion to vacate the sheriff's sale and his request for injunctive relief. Swilley filed an interlocutory appeal of Judge Jaffe's order.

¶ 15 On September 15, 2000, during pendency of the interlocutory appeal, Swilley filed a five-count complaint in the law division, case No. 00 L 10591, against Citibank, Hauselman, the sheriff, Builders Capital, and the law firm of Marcus, Perres, Campanale and Wigoda, Ltd. (Marcus), the firm representing Builders Capital.

¶ 16 In count I, Swilley brought a class action against Citibank for allegedly engaging in racial discrimination in violation of 42 USC § 1981, 42 USC § 1983, and 42 USC § 2000 *et seq*. (Title VII) for electing to foreclose on his property. In count II, Swilley brought a class action against the sheriff, Citibank, and Citibank's attorney Hauselman for allegedly violating his due process rights by selling the Luella Property without serving him with notice of the sheriff's sale. In count III, Swilley alleged that the sheriff, Citibank, and Hauselman engaged in fraud in their handling of the sheriff's sale. In count IV, Swilley accused Citibank and Hauselman of fraudulently concealing the date of the sheriff's sale. And in count V, Swilley alleged that Builders Capital and Marcus engaged in fraud by conveying a fee interest in the Luella Property

despite the fact that Citibank only foreclosed on a one-half interest in the property.

¶ 17 On January 15, 2002, after various motions to dismiss case No. 00 L 10591 were granted, Swilley filed an amended complaint. The amended complaint consisted of the same counts and sought similar relief against the same defendants. However, it included as additional party plaintiffs the United Legal Foundation and the Do-For-Self Foundation.

¶ 18 On March 6, 2002, Nationscredit filed suit against Ms. Hall in case No. 02 CH 4822 seeking to foreclose its mortgage secured by the Luella Property on the ground that Ms. Hall had failed to make timely mortgage payments. On July 23, 2002, Swilley and his sister Jeanette Taylor moved to intervene in the Nationscredit foreclosure action.

¶ 19 On September 18, 2002, Judge Peter Flynn dismissed much of the amended complaint in case No. 00 L 10591. Counts I, II, III, and IV were dismissed as to Citibank and Hauselman pursuant to Supreme Court Rule 103(b) (177 Ill.2d R. 103(b)), on the ground that plaintiffs had failed to exercise due diligence in effecting service of process. Count V as to Builders Capital and Marcus was dismissed pursuant to section 2-615 of the Code. In sum, the amended complaint was dismissed in its entirety except for counts II and III as they related to the sheriff. The sheriff was directed to appear through counsel at the next scheduled status date of September 27, 2002.

¶ 20 On September 30, 2002, we affirmed Judge Jaffe's order of July 20, 1999, in case No. 99 CH 16258, wherein he denied Swilley's motion to vacate the sheriff's sale of the Luella Property and we remanded the matter back to the circuit court for further proceedings. *Swilley v. Builders Capital Corporation, Citibank, F.S.B.; and Michael F. Sheahan, Sheriff of Cook County*, No. 1-

00-2717 (September 30, 2002) (unpublished order under Supreme Court Rule 23).

¶ 21 In February 2003, the circuit court consolidated case numbers 00 L 10591 and 02 CH 4822, with case number 99 CH 16258. All of the cases involved the Luella Property.

¶ 22 On March 14, 2003, Swilley was granted leave to file an amended complaint in case No. 99 CH 16258, to include as additional party plaintiffs United Legal Foundation, Do-For-Self Foundation, and Taylor. Swilley also named Ms. Hall and Nationscredit as additional defendants. Swilley filed the amended complaint on April 7, 2003.

¶ 23 On April 9, 2003, United Legal Foundation moved for substitution of Judge Jaffe without cause as a matter of right. While the motion was pending, Hauselman moved to vacate Judge Jaffe's order of March 14, 2003, which had granted Swilley leave to amend the complaint to add the additional party plaintiffs. Hauselman argued, among other things, that it had failed to receive notice of the case management conference at which Judge Jaffe granted Swilley leave to amend the complaint.

¶ 24 On June 25, 2003, Judge Jaffe vacated the March 14th order. In so ruling, the judge determined that the motion for substitution of judge filed by United Legal Foundation had become moot since United Legal Foundation was no longer a party to the litigation. The judge subsequently denied United Legal Foundation's motion to reconsider the matter.

¶ 25 Swilley then petitioned the Illinois Supreme Court for a supervisory order directing that Judge Jaffe recuse himself. The petitioned was denied on March 23, 2004.

¶ 26 On August 3, 2004, Hall moved for substitution of Judge Jaffe without cause as a matter of right. The judge subsequently denied that motion as well.

¶ 27 On February 14, 2005, Swilley, Taylor, and Hall filed a joint answer, affirmative defense, and nine-count counterclaim in case No. 02 CH 4822, the Nationscredit foreclosure action. The counterclaim named as defendants all of the parties named as defendants in the consolidated cases. The defendants moved to dismissed the counterclaim.

¶ 28 After having their counterclaim dismissed on three occasions, plaintiffs filed a third amended counterclaim on January 11, 2008. On May 23, 2008, the circuit court granted the defendants' respective motions to dismiss the third amended counterclaim. Nationscredit was then directed to respond to the plaintiffs' affirmative defenses and to move for summary judgment within 21 days. After receiving extensions, Nationscredit moved for summary judgment.

¶ 29 On November 24, 2008, the circuit court granted summary judgment in favor of Citigroup, the successor in interest to Nationscredit, and directed Citigroup to prepare a judgment of foreclosure. On April 24, 2009, Judge James R. Epstein entered a judgment of foreclosure against Hall, Swilley, Taylor, unknown owners and non-record claimants, which the court certified pursuant to Supreme Court Rule 304(a). On May 22, 2009, plaintiffs filed a notice of appeal.

¶ 30 On May 26, 2009, Citigroup moved for the circuit court to clarify its judgment of foreclosure and to vacate the 304(a) finding. The motion was subsequently denied and thereafter plaintiffs filed a second notice of appeal. The two notices of appeal were consolidated for our review.

¶ 31 ANALYSIS

¶ 32 Plaintiffs first contend that the circuit court erred in denying the motions for substitution of judge as of right brought by United Legal Foundation and Ms. Hall. We must disagree.

¶ 33 In civil cases substitution of judge is governed by section 2-1001 of the Code (735 ILCS 5/2-1001 (West 2006)). A party is generally entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2006). The trial judge must grant such a motion if it is presented before a trial or hearing begins and before the judge has ruled on any substantial issue in the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2006). A substantial ruling is one that directly relates to the merits of the case. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004).

¶ 34 A petition for substitution of judge as of right is untimely if it is filed after the judge has ruled on a substantive issue in the case. *In re Austin D.*, 358 Ill. App. 3d 794, 800 (2005). The reason for this rule is that it prevents litigants from "judge shopping" after they have formed an opinion that the judge may be unfavorably disposed toward their cause. *In re Austin D.*, 358 Ill. App. 3d at 800.

¶ 35 However, even in the absence of a substantial ruling, a motion for substitution of judge as of right may still be denied if before filing the motion the movant had an opportunity to "test the waters" and form an opinion as to the judge's disposition toward the case. *Levaccare v. Levaccare*, 376 Ill. App. 3d 503, 508 (2007); *In re Estate of Gay*, 353 Ill. App. 3d at 343. Courts disfavor allowing a party to "judge shop" after the party has determined a judge's disposition toward the merits of the case. *Levaccare*, 376 Ill. App. 3d at 508; *In re Estate of Gay*, 353 Ill.

App. 3d at 343. We review a ruling of a motion for substitution of judge as of right *de novo*. *In re Estate of Gay*, 353 Ill. App. 3d at 343.

¶ 36 In the instant case, review of the record shows that by the time United Legal Foundation and Ms. Hall had filed their respective motions for substitution of Judge Jaffe as of right, the judge had already issued several rulings directly relating to the merits of the case. Furthermore, United Legal Foundation and Ms. Hall filed their respective motions long after they had opportunities to form opinions concerning Judge Jaffe's disposition toward the merits of their claims. For these reasons, the respective motions for substitution of Judge Jaffe as of right were not timely filed.

¶ 37 Plaintiffs alternatively argue that Judge Jaffe should have ruled on the motion for substitution of the judge brought by United Legal Foundation before ruling on Hauselman's motion to vacate the order of March 14, 2003, which granted Swilley leave to amend the complaint to add additional party plaintiffs. As previously mentioned, Judge Jaffe concluded that the motion for substitution of judge filed by United Legal Foundation had become moot after he granted Hauselman's motion to vacate the March 14th order which had added United Legal Foundation as an additional party.

¶ 38 Plaintiffs contend that Judge Jaffe should not have ruled on Hauselman's motion to vacate without first ruling on United Legal Foundation's motion for substitution of judge as of right, and therefore the mootness ruling was premature and in error. Again, we must disagree.

¶ 39 Plaintiffs might have a stronger argument if United Legal Foundation's motion for substitution of judge as of right had been filed prior to Judge Jaffe making substantial rulings or

prior to United Legal Foundation having had an opportunity to form an opinion concerning the judge's disposition towards its claims. Accordingly, we find that Judge Jaffe did not err in ruling on Hauselman's motion to vacate the March 14th order prior to ruling on United Legal Foundation's motion for substitution of judge as of right.

¶ 40 In sum, the judge did not err in denying the respective motions for substitution of judge as of right brought by United Legal Foundation and Ms. Hall.

¶ 41 We also find that Judge Jaffe did not err in granting Hauselman's motion to vacate the March 14th order since the record indicates that Hauselman did not receive notice of the case management conference at which the judge issued the March 14th order granting Swilley leave to amend the complaint to add additional party plaintiffs. An opponent must be given notice and an opportunity to present any objections to an application for leave to amend a pleading; this notice requirement extends to all amendments, even those that simply seek to add to or otherwise increase demands contained in the original complaint. *First Robinson Savings & Loan v. Ledo Construction Company, Inc.*, 210 Ill. App. 3d 889, 892 (1991).

¶ 42 Plaintiffs next contend that Judge Epstein, in his memorandum opinion and order entered on November 30, 2006, erred in finding that counts I and II of the first amended counterclaim failed to state causes of action. In count I, Hall alleged a cause of action against Nationscredit and Builders Capital for breach of contract and breach of the duty of good faith and fair dealing. In count II, Hall alleged a cause of action against Builders Capital and Marcus for breach of fiduciary duty.

¶ 43 Judge Epstein struck these two counts on the ground that Hall had failed to verify the

amended counterclaim as required by section 2-605(a) of the Code (735 ILCS 5/2-605(a) (West 2006)). The two counts were stricken with leave to refile.

¶ 44 In addition, in a footnote, Judge Epstein went on to find that even if the two counts had been verified he still would have dismissed them. In regard to count I, the judge stated that he would have dismissed this count because Hall failed to allege sufficient facts supporting her conclusion that Nationscredit owed her a contractual duty to ensure that she held good title to the Luella Property before it issued her the mortgage. In regard to count II against Builders Capital and Marcus for alleged breach of fiduciary duty, the judge stated that even if the claims in this count had been verified, he still would have dismissed them because Hall failed to adequately allege how defendants breached their fiduciary obligations with respect to Hall's purchase of the Luella Property.

¶ 45 Plaintiffs contend that Judge Epstein misstated the allegations in count I. Plaintiffs argue that count I actually alleges that the mortgage and note were contracts that "expressly excluded any responsibility on Hall's part for encumbrances of record, leaving to Nationscredit the obligation to [ascertain] and deal with such encumbrances." The paragraph in the mortgage upon which plaintiffs rely states:

> "Borrower covenants that Borrower is lawfully seised of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, and that the Property is unencumbered, except for encumbrances of record. Borrower covenants that Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to encumbrances of record."

¶ 46 Nothing in the plain language of this paragraph imposes an affirmative duty upon the lender to ascertain the interest of the person in possession of the Luella Property or to ensure that Hall had clear title to the property prior to issuing the loan.

¶ 47 A mortgage is a contract. *Resolution Trust Corp. v. Holtzman*, 248 Ill. App. 3d 105, 111 (1993). In construing a contract, the cardinal rule is to give effect to the intention of the parties, which is discerned from the plain and ordinary meaning of the language used in the contract. *Mountbatten Surety Co. v. Szabo Contracting, Inc.*, 349 Ill. App. 3d 857, 868 (2004). The rules of contract provide that the parties to a contract are presumed to have intended what their language clearly imports so that a court has no discretion to require parties to accept any terms other than those in their contract. *Resolution Trust Corp.*, 248 Ill. App. 3d at 111; *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 807 (1998).

¶ 48 Under the terms of the mortgage, Nationscredit's duty was to lend funds necessary to allow Hall to purchase the subject property. There is no provision in the mortgage where Nationscredit warrants to Hall that it will ascertain the person in possession of the property or ensure that Hall had clear title to the property prior to issuing the mortgage. Judge Epstein did not misstate the allegations in count I of the first amended counterclaim.

¶ 49 In regard to count II of the first amended counterclaim, we agree that Hall failed to allege sufficient facts establishing how Builders Capital and Marcus breached a fiduciary duty to her. Plaintiffs alleged that Builders Capital breached its fiduciary duty to her by failing to make full disclosure to her or to the circuit court regarding whom it represented and also failed to permit her to make decisions in her own interests as opposed to the interests of her "agent," Builders

Capital.

¶ 50 In order to plead a cause of action for breach of fiduciary duty, a plaintiff must allege and prove that: (1) a fiduciary duty exists; (2) the duty was breached; and (3) that such breach proximately caused the injury of which plaintiff complains. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 32 (2003). Here, count II of the first amended counterclaim fails to sufficiently allege facts establishing that a fiduciary duty existed between Builders Capital/Marcus and Hall.

¶ 51 Review of the record indicates that Builders Capital retained Marcus to prosecute the forcible detainer action. There are no facts alleged that Marcus owed a direct duty to Hall.

¶ 52 In addition, Hall did not purchase the Luella Property from Builders Capital, she purchased it from Suburban Bank and Trust Co., as Trustee. In the second amended counterclaim, Hall attached a Trustee's Deed recorded October 18, 1999, as document No. 09014849 given by Suburban Bank and Trust Co., as Trustee by which the Luella Property was quitclaimed to Hall. Also attached to the second amended counterclaim was a Trustee's Deed recorded October 8, 1999, as document No. 99955293, from Albany Bank & Trust Co., as Trustee to Suburban Bank and Trust Co., as Trustee u/t/a dated February 1, 1998, known as Trust No. 1-1737, which deed stated that it is "SUBJECT HOWEVER, to: liens of all trust deeds and/or mortgages upon said real estate, if any, of record in said county; all unpaid general taxes and special assessments and other liens and claims of any kind; pending litigation, of any affecting said real estate ***." And paragraph 39 of the second amended complaint goes on to allege that Swilley was in open, clear, and notorious possession of, and the occupant of, the subject property.

¶ 53 These documents and allegations should have put Hall on notice of the matters she now complains were not disclosed to her. A purchaser of real property having notice of facts that would put a prudent person on inquiry is chargeable with knowledge of other facts he or she might have discovered by diligent inquiry. *In re Application of the Cook County Collector*, 228 Ill. App. 3d 719, 734-35 (1991); *City of Chicago v. Cosmopolitan National Bank*, 120 Ill. App. 3d 364, 367-68 (1983) (purchaser of real property at sheriff's sale was bound to inquire into nature and extent of owner's interest in the property where record showed that owner was in open, visible, exclusive, and unambiguous possession of the property).

¶ 54 Moreover, even if we found that a fiduciary duty existed between Builders Capital/Marcus and Hall, count II of the amended counterclaim still fails to sufficiently allege that the breach of such duty proximately caused the injuries of which Hall complains.

¶ 55 Hall complained that she was injured because she would not have engaged in litigation designed to defeat Swilley's claims and her mortgage would not have become irretrievably delinquent during such litigation thereby damaging her reputation and credit standing if Builders Capital or Marcus had fully disclosed Builders Capital's interest in the Luella Property. Hall complained that rather than resolving the issue with Swilley and pursuing her own interests, she became involved in litigation carried on in the name of Builders Capital as her agent by Marcus without full disclosure and in the presence of a clear conflict of interest.

¶ 56 We do not believe Hall can establish that the conduct of Builders Capital or Marcus were proximate causes of her mortgage delinquency and damaged credit rating. Hall became delinquent on her mortgage because she failed to timely make her monthly mortgage payments.

Hall did not establish a causal connection between the conduct of Builders Capital/Marcus and her failure to timely pay her monthly mortgage payments. Therefore, Judge Epstein properly dismissed count II of the first amended counterclaim against Builders Capital and Marcus.

¶ 57 We also find that Judge Epstein properly dismissed counts III, IV, VI and IX of the first amended counterclaim. The respective allegations in these counts were originally alleged in counts III, II, V and I of the complaint in case No. 00 L 10591, filed on September 15, 2000. On January 15, 2002, after various motions to dismiss case No. 00 L 10591 were granted, Swilley filed an amended complaint.

¶ 58 On September 18, 2002, Judge Peter Flynn dismissed much of the amended complaint in case No. 00 L 10591. Counts I, II, III, and IV were dismissed as to Citibank and Hauselman pursuant to Supreme Court Rule 103(b), on the ground that plaintiffs had failed to exercise due diligence in effecting service of process. Count V as to Builders Capital and Marcus was dismissed pursuant to section 2-615 of the Code.

¶ 59 In February 2003, the circuit court consolidated case numbers 00 L 10591 and 02 CH 4822, with case number 99 CH 16258. Swilley filed an amended complaint in the consolidated cases on April 7, 2003, which was subsequently dismissed on June 25, 2003.

¶ 60 On February 14, 2005, Swilley, Taylor, and Hall filed a joint answer, affirmative defense, and nine-count counterclaim in case No. 02 CH 4822, the Nationscredit foreclosure action. The counterclaim named as defendants all of the parties named as defendants in the consolidated cases. The defendants moved to dismissed the counterclaim.

¶ 61 The counterclaim was subsequently dismissed and plaintiffs filed their first amended

counterclaim on November 30, 2005, and a second amended counterclaim on July 12, 2007. After having their counterclaims dismissed on three occasions, plaintiffs filed a third amended counterclaim on January 11, 2008.

¶ 62 Plaintiffs now contend that Judge Epstein, in his memorandum opinion and order filed on November 30, 2006, erred in dismissing counts III, IV, VI and IX of the first amended counterclaim. In count III, Swilley alleged that the sheriff, Citibank, and Citibank's attorney Hauselman were willfully negligent in their handling of the sheriff's sale. In count IV, Swilley brought a class action against the sheriff, Citibank, and Hauselman for allegedly violating his due process rights by selling the Luella Property without serving him with notice of the sheriff's sale. In count VI, Swilley and Taylor alleged that Builders Capital and Marcus engaged in fraud by conveying a fee interest in the Luella Property despite the fact that Citibank only foreclosed on a half interest in the property. And in count IX, Swilley brought a class action against Citibank for allegedly engaging in racial discrimination in electing to foreclose on his property.

¶ 63 Judge Epstein dismissed counts III, IV and IX of the first amended counterclaim on statute of limitations grounds.[1] And the judge dismissed count VI of the first amended

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[1] Judge Epstein dismissed these counts on the basis that after their counterpart counts were dismissed by Judge Flynn on September 18, 2002, pursuant to Supreme Court Rule 103(b) for failing to exercise due diligence in effecting service of process, plaintiffs subsequently failed to timely refile these claims under section 13-217 of the Code.

Section 13-217 of the Code provides that when an action is dismissed for want of prosecution, the plaintiff may commence a new action within one year of the dismissal or within

counterclaim on the ground that plaintiffs failed to seek leave to amend the count after it was dismissed pursuant to section 2-615 of the Code for failing to state a cause of action.

¶ 64 Plaintiffs have waived their arguments regarding the dismissal of these counts by filing subsequent amended counterclaims containing essentially the same allegations and counts as the previous counterclaims. See *W.W. Vincent and Company v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 756 (2004) ("[a] party who files an amended pleading waives any objection to the circuit court's ruling on a former complaint"); *Ottawa Savings Bank v. JDI Loans, Inc.*, 374 Ill. App. 3d 394, 400 (2007) ("[o]nce an amended pleading has been filed, allegations of error in dismissing a prior pleading are waived").

¶ 65 Plaintiffs next contend that Judge Epstein, in his memorandum opinion and order filed on November 16, 2007, erred in dismissing counts III, IV and V of the second amended counterclaim as against the Sheriff. We must disagree.

¶ 66 In regard to counts III and V of the second amended counterclaim, the negligence claims against the Sheriff in these counts are based upon the Sheriff's alleged failure to notify Swilley of the February 3, 1998 sale of the Luella Property (count III), and the Sheriff's alleged failure to accurately reflect Swilley's ownership interest in the certificate of sale and sheriff's deed (count V). We believe that Judge Epstein properly dismissed these two counts as being time-barred by

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the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217 (West 2006). In the instant case, Judge Epstein dismissed counts III, IV, and IX of the first amended counterclaim on the ground that these counts were filed beyond the catchall five-year statute of limitations for all civil actions "not otherwise provided for." 735 ILCS 5/13-205 (West 2006).

the one-year statute of limitation found in section 8-101(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101(a) (West 2008)).

¶ 67 The purpose of the one-year limitation period in section 8-101(a) of the Tort Immunity Act is to encourage early investigation into a claim against a local governmental entity when the matter is still fresh, witnesses are available, and conditions have not materially changed. *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 279 (2010). Such an investigation permits prompt settlement of meritorious claims and allows governmental entities to plan their budgets in light of potential liabilities. *Id.*

¶ 68 In the second amended counterclaim, Swilley acknowledges that he learned of the February 3, 1998 sale of the Luella Property "when he received a letter (Exh. E-1) dated September 4, 1998 from Martin Hauselman, counsel for Citibank, informing him that, as a result of his failure to redeem, Citibank had deposited with the sheriff funds satisfying Swilley's homestead interest." After receiving the letter, Swilley contacted his attorneys at Cook & Revak to determine why he allegedly had not received notice of the sale until after expiration of the redemption period.

¶ 69 On September 16, 1998, counsel from Cook & Revak called and wrote to Hauselman inquiring as to why Swilley had not received notice of the sale and requesting a copy of the notice. Swilley claimed that a member of Hauselman's firm forwarded several documents to Cook & Revak, but that none of the documents included the requested copy of the notice of sale.

¶ 70 Section 8-101(a) of the Tort Immunity Act (745 ILCS 10/8-101(a) (West 2008)) provides

that civil actions against a local government entity must be brought within one year of the time at which a cause of action accrues. *Ts-Ai Lin v. City of Chicago*, 276 Ill. App. 3d 13, 13-14 (1995). Under the discovery rule, a cause of action accrues when a plaintiff knows or reasonably should know of an injury and that the injury was wrongfully caused. *Stewart v. County of Cook*, 192 Ill. App. 3d 848, 851 (1989); *Herman v. Power Maintenance & Constructors*, 388 Ill. App. 3d 352, 362 (2009).

¶ 71 We believe that Swilley's cause of action accrued on September 4, 1998, when he claims he first became aware of the sheriff's sale, and that the one-year statute of limitation in section 8-101(a) of the Tort Immunity Act then began to run. Accordingly, Swilley had until September 4, 1999, within which to file his negligence claims against the Sheriff seeking to set aside the sale based upon lack of notice and alleged inaccuracies in the sale documents.

¶ 72 However, Swilley did not file suit against the Sheriff until November 9, 1999, in case No. 99 CH 16258, more than one year after acknowledging being aware of the sale proceedings. As a result, we find that Judge Epstein properly dismissed counts III and V of the second amended counterclaim as against the Sheriff as being time-barred by the one-year statute of limitation found in section 8-101(a) of the Tort Immunity Act.

¶ 73 We also find that Judge Epstein properly dismissed count IV of the second amended counterclaim as against the Sheriff. In this count, Swilley brought a class action against the Sheriff for allegedly violating his due process rights by selling the Luella Property without serving him with notice of the sheriff's sale.

¶ 74 Section 15-1507(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1507(c) (West

2006)) sets forth the notice requirements governing a judicial sale. Section 15-1507(c) requires the mortgagee, or such other party designated by the court, to give public notice of a judicial sale of real property subject to a judgment of foreclosure. 735 ILCS 5/15-1507(c) (West 2006). And section 15-1507(c)(4) provides for additional public notice where a sale is postponed. 735 ILCS 5/15-1507(c)(4) (West 2006). Contrary to plaintiffs' contentions, neither of these provisions imposes a statutory duty upon the Sheriff to give public notice of a pending judicial sale or a judicial sale that has been postponed.

¶ 75 Moreover, contrary to plaintiffs' contentions, Circuit Court Rule 7.1(c) of the Cook County Circuit Court does not impose a duty upon the Sheriff to certify that service of notice was effected prior to the sale of real estate. Circuit Court Rule 7.1(c)(iii) provides in relevant part that "the attorney for the plaintiff shall, prior to the date of sale, supply the selling official with *** [a] certificate showing mailing of copies of notice of sale to parties to the action, where applicable." Cir. Ct. R. 7.1(c)(iii) (eff. March 1, 1995).

¶ 76 We also find that Judge Epstein did not err in dismissing count VI of the second amended counterclaim against Builders Capital and Marcus for constructive fraud. In this count Swilley and his sister Jeanette Taylor alleged that Builders Capital and Marcus committed constructive fraud in claiming a one-hundred percent interest in the Luella Property despite their knowledge that Citibank had only bid on and purchased a fifty percent interest in the property.

¶ 77 Count VI was properly dismissed pursuant to section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2006)) for failing to state a cause of action for constructive fraud. Constructive fraud can only arise when there is a confidential or fiduciary relationship between the parties.

Maguire v. Holcomb, 169 Ill. App. 3d 238, 243-44 (1988); *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 726 (2003). Count VI of the second amended counterclaim does not allege any facts establishing a confidential, fiduciary or any other type of relationship between Builders Capital/Marcus and Swilley/Taylor.

¶ 78 We also believe that Judge Epstein properly dismissed count VII of the third amended counterclaim. In this count, Swilley and Taylor sought to quiet title to the Luella Property in their names. "An action to quiet title in property is an equitable proceeding in which a party seeks to remove a cloud on his title to the property." *Gambino v. Boulevard Mortgage Corp.*, 393 Ill. App. 3d 21, 52 (2009).

¶ 79 In this case, plaintiffs alleged that Nationscredit's mortgage on the Luella Property constituted a cloud on Swilley and Taylor's interest in the property. In October 1999, Ms. Hall purchased the Luella Property through a loan secured by a mortgage on the property executed by Nationscredit. Nationscredit eventually filed suit against Ms. Hall in case No. 02 CH 4822 seeking to foreclose the mortgage on the ground that Ms. Hall had failed to make timely mortgage payments. Swilley and Taylor intervened in the lawsuit, each claiming an interest in the Luella Property.

¶ 80 In this case, it is undisputed that Ms. Hall received the mortgage loan, was granted the mortgage, and subsequently defaulted on the loan. Swilley and Taylor have offered no valid ground for a judgment invalidating the mortgage as a lien on the Luella Property. As such, it would be inequitable to quiet title in their names. "It is a cardinal principal that equity will not aid a party in doing that which is not equitable." *Barbour v. Handlos Real Estate and Bldg.*

Corp., 152 Mich. App. 174, 184, 393 N.W.2d 581 (1986) (quoting *Goodenow v. Curtis*, 33 Mich. 505, 509 (1876)).

¶ 81 Accordingly, we affirm the orders of the circuit court.

¶ 82 Affirmed.