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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MIDWEST TOOL INVESTMENTS, on behalf of)	
themselves and all those similarly situated,)	Appeal from
)	the Circuit Court
Plaintiff-Appellant,)	of Cook County
)	
v.)	No. 09 CH 46965
)	
FIRST MERIT BANK, N.A., as successor in interest)	
to MIDWEST BANK AND TRUST COMPANY,)	Honorable
)	William Maki,
Defendant-Appellee.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

Held: Interest calculation on a 365/360 basis per annum does not violate the Illinois Interest Act, Consumer Fraud Act or common law fraud; Dismissal with prejudice affirmed where no amendment could cure defects in the pleadings.

¶ 1 This appeal arises from an order of the circuit court which granted defendant First Merit Bank's¹ (the Bank) motion to dismiss plaintiff Midwest Tool Investments' (Midwest Tool)

¹The original loan was made by Midwest Bank and First Merit Bank is its successor in interest; both will be collectively referred to as "the Bank."

claims with prejudice. On appeal, Midwest Tool contends that the trial court erred in dismissing its claims with prejudice without explanation. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 The record reveals that Midwest Tool obtained a loan from Midwest Bank on or before August 17, 2006. Prior to that date, Midwest Tool agreed to obtain the loan based on the Bank's representation that the initial interest rate on the note would be 10.250% per year, and the Bank prepared the necessary loan documents. The provisions contained in the promissory note that are relevant to this appeal are as follows:

**"Principal Amount: \$102,356.95 Initial
Rate: 10.250% Date of Note: August 17, 2006."**

"The index currently is 10.250% per annum.

The interest rate to be applied to the unpaid principal balance of this Note will be at a rate of 2.000 percentage points over the Index, rounded to the nearest 0.125 percent, resulting in an initial rate of 10.250% per annum."

"The annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the

principal balance is outstanding."

¶ 4 Midwest Tool subsequently filed a putative class-action suit against the Bank, asserting seven causes of action related to the Bank's alleged scheme to charge commercial borrowers a higher interest rate than the parties agreed to when they entered into the loan agreement: (1) the Bank breached the Promissory Note because when the Bank used the 365/360 method to calculate interest it charged Midwest Tool above the agreed-upon rate and above the rate required by the Illinois Interest Act (Interest Act) (815 ILCS 205/1 *et seq.* (West 2008)), the Promissory Note and Bank Holiday Act; (2) the Bank violated an oral loan preparation contract if the Promissory Note was interpreted to allow the Bank to charge interest at a higher interest rate than agreed upon; (3) the Bank's practice of charging interest on a 365/360 basis violated the Interest Act because of the Promissory Note's heading and the Interest Act's definition of the term "year;" (4) breach of the duty of good faith and fair dealing; (5) violation of the Illinois Consumer Fraud and Deceptive Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)); (6) the Bank committed common law fraud; and (7) Midwest Tool requested a declaratory judgment regarding the annual interest rate due under the Promissory Note. The Bank subsequently filed a motion to dismiss under sections 2-615, 2-619 and 2.619.1 of the Illinois Code of Procedure (Code) (735 ILCS 2-615, 2-619, 2-619.1 (West 2008)). Following oral argument on December 9, 2010, the trial court granted the Bank's motion and dismissed all of Midwest Tool's claims with prejudice. This timely appeal followed.

¶ 5 ANALYSIS

¶ 6 On appeal, Midwest Tool contends that the trial court erred in dismissing its claims with

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prejudice. Specifically, Midwest Tool maintains that: (1) because sections 9 and 10 of the Interest Act apply to the note, Counts 1, 3 and 7 should not have been dismissed; (2) because the note is ambiguous, Midwest Tool's breach of contract claim should not have been dismissed; (3) because the note is ambiguous and its meaning could not be ascertained by inspection of the note, Counts 5 and 6 should not have been dismissed; (4) the Bank's breach of the Note preexisted Midwest Tool's alleged breach; and (5) the National Bank Act does not preempt Midwest Tool's claims.

¶ 7 The Bank filed a section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) motion to dismiss Midwest Tool's complaint. Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2008)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2008)) motion to dismiss based on certain defects or defenses. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,], to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Edelman, Combs and Latturner*, 338 Ill. App. 3d at 164.

¶ 8 We begin by noting that the issues raised in this appeal have been considered by this court in two recent cases, *RBS Citizens, National Association v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183 (2011), and *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st)

103718,² both of which upheld the trial court's dismissal of all claims with prejudice.

¶ 9 In *RBS Citizens*, an interlocutory appeal challenged the trial court's orders striking and dismissing with prejudice certain affirmative defenses and counterclaims raised by defendants in response to an action to foreclose on a junior mortgage by the plaintiff bank. *RBS Citizens*, 407 Ill. App. 3d at 184. In response to the foreclosure action, defendants filed an answer containing affirmative defenses and counterclaims based on alleged violations of the Interest Act, the duty of good faith and fair dealing, the Consumer Fraud Act, and common law fraud. *RBS Citizens*, 407 Ill. App. 3d at 185. The allegations revolved around the general contention that RBS did not disclose its method of computing and charging interest, and unlawfully increased the amount of interest charged on the initial loan. *RBS Citizens*, 407 Ill. App. 3d at 185. The interest on the loan was computed using the 365/360 method. *RBS Citizens*, 407 Ill. App. 3d at 188.

¶ 10 The court concluded that the interest provision contained in the loan clearly communicated "that the interest rate would be 'computed' on a 360-day year, while interest 'charged' would be based on the number of actual days that occurred (*i.e.*, based on a 365-day year)." *RBS Citizens*, 407 Ill. App. 3d at 189. The court further noted that the phrase *per annum* did not appear in the interest provision, and concluded that the language was not ambiguous. *RBS Citizens*, 407 Ill. App. 3d at 189. The court further concluded that the unambiguous interest terms were set out in the first paragraph of the Note and nothing in the record indicated that the terms were concealed from defendants or that they were somehow improperly induced into signing the Note. *RBS Citizens*, 407 Ill. App. 3d at 190. Additionally, the court concluded

²We note that Midwest Tool's counsel also represented the plaintiffs in *Asset Exchange*.

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because the duty of good faith and fair dealing does not arise out of precontractual actions and is only applicable to the conduct of parties to an existing contract, any allegations relating to the formation of the Note did not implicate the duty of good faith and fair dealing. *RBS Citizens*, 407 Ill. App. 3d at 191. Further, the court found that defendants' fraud claims, which were predicated upon an assertion that the interest calculation method employed was deceptive and based on misrepresentations and false statements made by RBS, failed because the court had already determined that the Note's interest provision was unambiguous, and an examination of the interest charged by RBS indicated no deviation from the terms of the loan. *RBS Citizens*, 407 Ill. App. 3d at 192. Finally, the court concluded that defendants' claims were properly dismissed with prejudice because they were all based on a claim that the interest provision in the Note was ambiguous, while it was clear from a "cursory reading" that the terms were not ambiguous, and this defect could not be cured by amendment of the pleadings. *RBS Citizens*, 407 Ill. App. 3d at 193.

¶ 11 A similar set of facts were presented in *Asset Exchange*. Asset Exchange was a limited liability company that entered into a commercial loan agreement with the Bank which calculated interest on a 365/360 basis. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 4. Specifically, just as in the case at bar, the payment section provided that:

"The annual interest rate for this Note is computed on a 365/360 basis; that is, by applying the ratio of the annual interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the

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principal balance is outstanding." *Asset Exchange*, 2011 IL App

(1st) 103718, ¶ 4.

Plaintiff alleged that the Bank acted deceptively used a 360-day year to calculate interest despite allegedly conflicting provisions mandating the use of a "per annum" interest rate. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 19.

¶ 12 The court first noted that the Interest Act does not apply to transactions involving corporations. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 21. The court further noted that even if the Interest Act did apply, section 4(5) of the Interest Act was recently amended to clarify the issue of whether the 365/360 interest calculation was illegal or improper. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 22. The amendment states, " '[f]or purposes of item[] (a) * * * of subsection (1) of this Section, a rate or amount of interest may be lawfully computed when applying the ration of the annual interest rate over a year based on 360 days.' " *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 22, quoting 815 ILCS 205/4(5) (West 2010) (added by Pub. Act 96-1421 (eff. Aug. 3, 2010)). The court further concluded that even if section 9 and 10 of the Interest Act applied, the result would be the same because the payment section of the Note provided the time period for calculation of interest and defined a year as 360 days, so sections 9 and 10 does not apply. *Asset Exchange*, 2011 IL App (1st) 103718, ¶¶ 28, 34. Additionally, the court found that there was no breach of contract because the Bank complied with the unambiguous terms of the Note and the record did not indicate that the terms of the Note were concealed from the plaintiff or that plaintiff was improperly induced into signing the Note. *Asset*

Exchange, 2011 IL App (1st) 103718, ¶39. Finally, regarding plaintiff's common law fraud allegation, the court noted that plaintiff had an opportunity to read the Note prior to signing and again that the terms of the Note were unambiguous. *Asset Exchange*, 2011 IL App (1st) 103718, ¶¶ 43, 44. The court ultimately affirmed the trial court's dismissal of plaintiff's complaint. *Asset Exchange*, 2011 IL App (1st) 103718, ¶ 46.

¶ 13 The same result is warranted here. Each of the arguments advanced by Midwest Tool in this appeal have been raised and previously considered by this court. Initially, as noted in *Asset Exchange*, the Interest Act does not apply to corporate loan transactions, thus Midwest Tool's contention that the Note violated sections 9 and 10 of the Interest Act is without merit.

Moreover, as previously determined by this court, the terms of the Note related to interest calculations on a 365/360 basis are not ambiguous and do not violate the Interest Act, Consumer Fraud Act nor common law fraud. Additionally, Midwest Tool had the opportunity to review the Note prior to executing it and there is no allegation of inducement by the Bank for Midwest Tool's agreement to the Note's terms.

¶ 14 As Midwest Tool has raised no new arguments for the court's consideration, we uphold this court's decisions in *RBS Citizens* and *Asset Exchange*. As we have previously concluded that dismissal with prejudice is warranted where no amendment to the pleadings could cure any defects (*RBS Citizens*, 407 Ill. App. 3d at 193), we find that the trial court properly dismissed the complaint with prejudice.

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

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¶ 17 Affirmed.