IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
MORTGAGE FORECLOSURE/MECHANICS LIEN SECTION

Community Loan Servicing, LLC, f/k/a Bayview Loan Servicing, LLC, a Delaware limited liability company, as successor-in-interest to Silver Hill Financial, LLC, a Delaware limited liability company,

Plaintiff,

v.

West Suburban Bank, as trustee under trust agreement dated October 24, 1994, and known as trust number 10237; Gul Roney, an individual; Unknown Owners, Non Record Claimants; Unknown Tenants and Occupants,

Defendants.

Gul Roney; West Suburban Bank, as trustee under trust agreement dated October 24, 1994, and known as trust Number 10237,

Counter-Plaintiff,

v.

Community Loan Servicing, LLC, f/k/a Bayview Loan Servicing, LLC; M&T Bank, National Association,

Counter-Defendants.

Case Number: 2011 CH 42650

Calendar 60

Honorable William B. Sullivan, Judge Presiding

Property Address:
6307-6309 Roosevelt Road
Berwyn, Illinois 60402

MEMORANDUM OPINION AND ORDER

WILLIAM B. SULLIVAN, Circuit Judge:

Before the Court is Plaintiff/Counter-Defendant COMMUNITY LOAN SERVICING, LLC, f/k/a BAYVIEW LOAN SERVICING, LLC'S ("CLS") and Counter-Defendant, M&T BANK, NATIONAL ASSOCIATION's ("M&T Bank") Motion to Strike Defendants WEST SUBURBAN BANK ("WSB") and GUL RONEY's ("Roney") Third Amended Affirmative Defenses and Counterclaims pursuant to 735 ILCS 5/2-615 ("Motion"). For the following reasons, CLS and M&T Bank's Motion is hereby GRANTED and WSB and Roney's Third Affirmative Defense and Tenth Counterclaim are hereby STRICKEN with prejudice.

I. BACKGROUND

In December of 2007, Roney sought to refinance a loan with Mid America which was secured by a first mortgage lien over the property located at 6307-6309 Roosevelt Road in Berwyn, Illinois ("The Property"). This is the Property that is the subject of this litigation. Roney sought to refinance that loan with SILVER HILL FINANCIAL, LLC ("Silver Hill"). A month later in January of 2008, Roney and Silver Hill executed an Adjustable Rate Promissory Note in the amount of $202,500.00 that was secured by a mortgage over the Property.

Nearly four years later in December of 2011, Plaintiff BAYVIEW LOAN SERVICING LLC ("Bayview"), as successor-in-interest to Silver Hill, filed the present foreclosure action against Roney alleging a default under the loan. Defendant Roney subsequently filed an Answer on September 23, 2013 that pleaded no affirmative defenses or counterclaims. Sometime thereafter, Roney obtained new

counsel and was granted leave to file an Amended Answer. He did so on November 27, 2018, asserting nine separate counterclaims. This answer was jointly filed by both Roney and co-Defendant WSB. After conducting additional discovery, Defendants once again moved to amend their Answer which this Court granted on August 14, 2023. The next day, on August 15, 2023, Defendants filed their Second Amended Answer that contained three affirmative defenses and ten counterclaims. Thereafter, Plaintiff moved to strike these affirmative defenses and counterclaims. On April 4, 2024, this Court struck Defendants' first two Affirmative Defenses with prejudice, but struck the spoliation of evidence Affirmative Defense without prejudice. Additionally, this Court struck all but three counterclaims with prejudice. The Court declined to strike counterclaims 4 and 9 and struck counterclaim 10, spoliation of evidence, without prejudice. Defendants were then given twenty-eight days to replead their spoliation of evidence affirmative defense and counterclaim. This led to Defendants filing their Third Amended Answer that is the pleading currently at issue in this litigation.

The Motion was presented on August 5, 2024. On that same day, this Court entered an Order setting a briefing schedule. Defendants timely filed their Response on September 3, 2024. Thereafter, CLS and M&T Bank timely filed their Reply on September 24, 2024. The Court then heard oral argument from all parties via Zoom on October 8, 2024. Having read the Motion, the Response, the Reply, the Affirmative Defenses, the Counterclaims, and after having heard oral argument,

this Court took the Motion under advisement for the issuance of a written opinion. The Court's opinion follows.

II. LEGAL STANDARD

CLS and M&T Bank now move this Court to strike both the spoliation counterclaim and affirmative defense pursuant to 735 ILCS 5/2-615. A Section 2-615 motion attacks the legal sufficiency of a claim based on defects apparent on its face. *BMO Harris Bank v. Porter*, 2018 IL App (1st) 171308, ¶ 45. The Illinois Supreme Court has repeatedly noted that Illinois is a fact-pleading jurisdiction. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). Therefore, in order to state a cause of action, a counterclaim must be both legally and factually sufficient, setting forth a legally recognized claim as its basis for recovery, as well as pleading facts which bring the claim within the legally recognized cause of action alleged. *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 807 (1st Dist. 1998). While a plaintiff is not required to set forth evidence in the complaint, a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action, not "simply conclusions." *Porter*, 2018 IL App (1st) 171308, ¶ 46. Therefore, conclusory allegations unsupported by specific facts will not suffice. *Id.* When ruling on a Section 2-615 motion, a court must accept as true all well-pleaded facts in the complaint, as well as reasonable inferences that may be drawn from those facts. *Id.* ¶ 45. Furthermore, on a motion to dismiss a pleading, courts construe the allegations in the complaint in the light most favorable to the non-moving party. *Marshall,* 222 Ill. 2d at 429. However, this Court need not accept conclusions or

inferences that are not supported by specific factual allegations. *Rucker*, 295 Ill. App. 3d at 807. A trial court should only dismiss a count or cause of action if it is readily apparent from the pleadings that there is no possible set of facts that would entitle the plaintiff to the requested relief. *Marshall,* 222 Ill. 2d at 429.

III. ANALYSIS

The Court would like to begin by emphasizing it has no issue with Defendants pleading spoliation of evidence as both a counterclaim and an affirmative defense. There is ample precedent in the State of Illinois supporting the use of spoliation of evidence as an affirmative defense despite it not being formally recognized via statute. *See Jones v. O'Brien Tire & Battery Serv. Ctr.*, 322 Ill. App. 3d 418 (2001); *see also Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543. Additionally, courts in Illinois have regularly recognized spoliation of evidence as a cause of action. *See Wofford v. Tracy*, 2015 IL App (2d) 141220, *Dardeen v. Kuehling*, 213 Ill. 2d 329 (2004). Taken together, the case law makes clear both the affirmative defense and counterclaim require pleading the same elements. *Id.* Given the substantial similarities between Defendants' spoliation of evidence affirmative defense and counterclaim, either both or neither were properly pleaded.

Under Illinois law, spoliation of evidence falls under the umbrella of negligence. *See Martin v. Keeley & Sons, Inc.* 2012 IL 113270. The party claiming spoliation of evidence bears the burden of proving four elements: (1) the opposing party owed the claimant a duty to preserve the evidence; (2) the opposing party breached that duty by losing or destroying the evidence; (3) the loss or destruction

of the evidence was the proximate cause of the claimant's inability to prove an underlying lawsuit; and (4) as a result, the claimant suffered actual damages. *Id.* The Court would normally address each element in kind; however, in this case, it is unnecessary to do so as Defendants failed to properly plead the very first element.

Under Illinois law, there is a strong presumption that no duty exists to preserve evidence. This presumption may be rebutted by satisfying a two prong test articulated by the Illinois Supreme Court in *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188 (1995). The first prong, often referred to as the "relationship" prong, requires the claimant to show an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the non-claimant. *Id.* The second prong, often referred to as the "foreseeability" prong requires the claimant to show that the duty extends to the specific evidence at issue by demonstrating that a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action. *Id.*

Despite this being Defendants' second attempt at pleading spoliation of evidence, they still failed to properly meet this two prong test. While Defendants plead a rather compelling case for the "relationship" prong, they fail to provide any evidence or concrete arguments to prove the "foreseeability" prong. Defendants' Third Amended Answer, simply states "[a] reasonable person in Plaintiff's position would have known that preservation of the business records was crucial to a civil case such as this foreclosure action." (Defs' 3d Am. Ans., ¶ 18.) After stating this, Defendants' Third Amended Answer offers no corresponding facts or arguments and

instead moves on to elements three and four of spoliation of evidence. The Court would also like to note that these elements also were pleaded as conclusory statements without any supporting facts. Taken together, it is quite clear Defendants have once again failed to sufficiently plead spoliation of evidence as an affirmative defense or counterclaim. While this current attempt at pleading spoliation of evidence included more facts than the previous attempt, it still did not do so to the level required to survive a Motion to Strike under Section 2-615.

IV. CONCLUSION

Accordingly, for the aforementioned reasons, CLS and M&T Bank's Motion to Strike is hereby GRANTED and Defendants' Third Affirmative Defense and Tenth Counterclaim are hereby STRICKEN with prejudice. Counter-Defendants shall have twenty-eight days to answer Counterclaims 4 and 9, including filing any affirmative defenses thereto. Additionally, given that this case is approximately thirteen years old, all discovery shall be completed on or before three months after the date of entry of this Order, and all dispositive motions brought by any party shall be filed on or before two months after the close of discovery.

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ACCORDINGLY, FOR THE AFOREMENTIONED REASONS, THE COURT HEREBY ORDERS AS FOLLOWS:

(1) CLS and M&T Bank's Motion to Strike WSB and Roney's Third Amended Affirmative Defenses and Counterclaims pursuant to 735 ILCS 5/2-615 is hereby GRANTED;

(2) Defendants' Third Affirmative Defense for spoliation of evidence is hereby STRICKEN with prejudice;

(3) Defendants' Tenth Counterclaim for spoliation of evidence is hereby STRICKEN with prejudice;

(4) CLS and M&T Bank shall have twenty-eight days (on or before November 28, 2024) to answer Counterclaims 4 and 9, including filing any affirmative defenses thereto;

(5) All discovery shall be completed on or before three months after the date of entry of this order (on or before January 31, 2025); and

(6) All dispositive motions brought by any party shall be filed on or before two months after the close of discovery ordered in (5) *supra* (on or before March 31, 2025).

IT IS SO ORDERED.

Date: October 31, 2024

ENTERED:

William B. Sullivan

Honorable William B. Sullivan
Cook County Circuit Judge

ORDER PREPARED BY THE COURT
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