2019 IL App (1st) 182436-U

FOURTH DIVISION
June 28, 2019

No. 1-18-2436

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD F. PALIATKA, Plaintiff-Appellant, v. RJEM, LLC, an Illinois limited liability company, Defendant-Appellee, (Skyline 1, Inc., an Illinois corporation not in good standing, Defendant).	)	Appeal from the Circuit Court of Cook County No. 2016 CH 08101 Honorable Celia Gamrath, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County dismissing plaintiff's equitable subrogation claim.

¶ 2 Plaintiff Edward F. Paliatka (Paliatka) paid off a secured real estate loan made by Renovo Financial Loan Fund, L.L.C. (lender) to borrower Skyline 1, Inc. (Skyline), a corporation where the shares are owned by Lyle Anastos (Lyle). Paliatka is married to Lyle's grandmother. At the time of Paliatka's payment, Skyline had previously conveyed the underlying property to RJEM,

LLC (RJEM) by quitclaim deed in exchange for $160,000. In an effort to recover the amount he paid to the lender, Paliatka filed an action against RJEM and Skyline, which was already defunct by the time the cause of action was filed. The circuit court dismissed with prejudice Paliatka's complaint seeking declaratory relief based on equitable subrogation, concluding that RJEM would suffer an unjust result if Paliatka were permitted to step into the lender's shoes and enforce the mortgage. For the reasons discussed herein, we affirm.

¶ 3 BACKGROUND

¶ 4 Lyle was the president and sole shareholder of Skyline. He also directly or indirectly owned and managed S12, LLC (S12). Lyle's companies obtained financing for the purchase of various properties in the Chicago suburbs through various loans. The purchase and subsequent sale of real property in the 5300 block of Otto Place in Oak Lawn (Otto property) gave rise to this appeal.

¶ 5 The Original Otto Property Transactions

¶ 6 Skyline obtained $117,000 in loans from the lender to purchase the Otto property. Pursuant to a mortgage agreement dated as of August 30, 2013, and recorded with the Cook County Recorder of Deeds on October 21, 2013, Skyline granted the lender a security interest in the Otto property. The mortgage agreement referenced a note evidencing the debt with a maturity date of March 1, 2014. In an assignment signed and recorded on March 31, 2014, the lender assigned the mortgage to its affiliate RFLF 1, LLC (RFLF 1).

¶ 7 Prior to the assignment of the mortgage, RJEM paid $160,000 to Skyline for a deed to the Otto property on March 6, 2014. Skyline then executed a quitclaim deed on April 14, 2014, conveying the property to RJEM, which was recorded on July 8, 2014. According to RJEM, Lyle represented that the Otto property was being sold "free and clear" of any encumbrances.

Consistent with RJEM's understanding, a real estate transfer declaration filed on July 8, 2014, by Skyline's attorney reported an outstanding mortgage amount of "$0.00." Despite the foregoing representations, Skyline apparently had not used the funds from RJEM to pay off the mortgage. Because the Otto property was conveyed to RJEM by quitclaim deed, it remained subject to the mortgage. According to Paliatka, the RFLF 1 loan was in default and the entire remaining loan amount was due and payable at the time that the Otto property was conveyed to RJEM.

¶ 8 Paliatka's Involvement

¶ 9 While he has offered various reasons for doing so, Paliatka paid off the loan with respect to the Otto property, as well as other real estate loans from the lender or its affiliates to Skyline and S12. The payoff amount for the Otto property was $137,322.37.

¶ 10 Pursuant to a demand note dated October 30, 2015, the makers – Lyle, his wife Kathryn Anastos (Kathryn), Skyline, and S12 – agreed to pay $880,000 plus interest to Paliatka, as payee. The demand note provided that its repayment was secured by collateral assignments of "Lessor's interest in Leases" covering 13 properties set forth in an exhibit; the terms "Lessor" and "Leases" are not defined.[1]

¶ 11 On November 4, 2015, Paliatka wired $912,645.25 to RFLF 1, which included $137,322.37 to pay off Skyline's debt on the Otto property. In a release deed executed on November 10, 2015, and recorded on December 18, 2015, the lender released the mortgage on the Otto property.[2] After the release deed was executed but prior to its recording, "Renovo Financial, L.L.C." executed a deed in trust on November 25, 2015, conveying the Otto property to Countryside Bank, as trustee under a trust agreement dated October 30, 2015, and known as

[1] Paliatka's counsel suggested during oral argument before this Court that the properties were being transferred to Paliatka as consideration for the loan.

[2] Although the release deed referenced the assignment to RFLF 1, the release deed was actually executed by the lender.

Trust No. 15-3324. The deed in trust, recorded on December 11, 2015, was prepared by Richard C. Jones, Jr. (Jones), Paliatka's attorney. Paliatka has represented that neither he nor the lender was aware that Lyle and Skyline had previously conveyed the Otto property to RJEM.

¶ 12 Jones subsequently sent correspondence to RJEM's counsel dated April 27, 2016. Jones asserted that his client Paliatka, the beneficiary of the trust at Countryside Bank, was entitled to subrogation because he had paid off the preexisting mortgage. Jones indicated that his client was willing to direct Countryside Bank, as trustee, to convey the Otto property to RJEM upon the receipt of $137,322.37, which was the amount paid by Paliatka. RJEM did not accept the offer.

¶ 13 Paliatka's Lawsuits

¶ 14 On June 9, 2016, Paliatka filed a confession of judgment complaint in the circuit court of Cook County (2016 L 050381) against the makers of the demand note: Lyle, Kathryn, Skyline, and S12. On June 13, 2016, the circuit court entered a judgment by confession in favor of Paliatka and against the makers in the amount of $908,127.72, which included the $880,000 principal, plus interest.

¶ 15 On June 16, 2016, Paliatka filed a two-count complaint in the Chancery Division of the circuit court of Cook County (2016 CH 08101) against RJEM, Skyline, unknown owners, and non-record claimants. Paliatka sought (i) an order declaring that Paliatka was entitled to an equitable lien and mortgage on the Otto property which would be prior to any rights or interests of RJEM and Skyline, and (ii) a foreclosure on the equitable mortgage. The complaint also alleged that Skyline was not a corporation in good standing.

¶ 16 RJEM filed a motion to dismiss the complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). In addition to various legal arguments, RJEM alleged that Lyle had been charged with four felony counts based on an alleged attempted

murder-for-hire scheme initiated in July 2016 related to systematic fraud perpetrated by Lyle against RJEM and other investors in properties being redeveloped by Skyline. The affidavit of a federal agent appended to the criminal complaint (which was attached to the motion to dismiss) strongly suggested that Paliatka and Jones were the targets of Lyle's murder-for-hire plot due, at least in part, to Paliatka's financial dealings with Lyle. In an order entered on June 13, 2017, the circuit court granted RJEM's motion to dismiss without prejudice.

¶ 17 Paliatka then filed a two-count amended complaint. In count I, he sought a declaratory judgment finding that he was subrogated to RFLF 1's rights under the mortgage assignment and that such lien was superior to any interests of Skyline or RJEM. Paliatka alleged, in part, that in consideration for his payment of the mortgage loan, Skyline had agreed that Paliatka would be subrogated to the rights and claims of RFLF 1 under the mortgage and loan. Paliatka sought to foreclose on the mortgage in count II. In its section 2-619 motion to dismiss, RJEM alleged that Paliatka did not attach a copy of a written agreement providing for subrogation and, in any event, Skyline possessed no interest in the Otto property at the time of the alleged agreement.

¶ 18 The Operative Complaint and RJEM's Motion to Dismiss

¶ 19 With leave of court, Paliatka filed a single-count second amended complaint for declaratory judgment on February 21, 2018. Paliatka alleged that, in order to "preserve and protect" Lyle's financial interests, Paliatka agreed to pay off the loan from the lender, with the understanding and based on the condition that he would be subrogated to the lien position of RFLF 1. The complaint further alleged that, in consideration for his payment of the loan, Skyline acknowledged and agreed that Paliatka was thereby subrogated to the rights and claims of RFLF 1 under the terms of the loan and mortgage. Paliatka sought a declaratory judgment finding that he was subrogated to the prior mortgage lien position of RFLF 1 in the Otto property

and that his subrogated mortgage lien was to be considered prior to RJEM's interest.

¶ 20 In its memorandum in support of its motion to dismiss the second amended complaint under section 2-619, RJEM claimed that on January 25, 2018, it paid $26,367.31 to extinguish a tax lien filed on the Otto property due to Skyline's failure to pay its 2013 real estate taxes. The payment was made before RJEM's purchase of the Otto property, and as a result it was entitled to an equitable lien for such amount. RJEM also argued that Paliatka lacked standing and that the judgment against the makers of the demand note had a *res judicata* effect.

¶ 21 RJEM further argued that Paliatka was not entitled to any form of subrogation because it would further the fraud committed by Skyline and Lyle on RJEM, an innocent party. RJEM claimed Paliatka would be unjustly enriched by allowing him to recover twice on the same debt from the makers of the note and from RJEM. RJEM also claimed that Paliatka paid the debt voluntarily to protect his grandson's financial interests and failed to provide evidence of a subrogation agreement. Finally, RJEM claimed that Paliatka was not entitled to a declaratory judgment because such remedy does not create substantive rights and duties but merely affords an additional procedural method for judicial determination.

¶ 22 In support of the section 2-619 motion, RJEM submitted the affidavit of its manager, Joseph Duffy (Duffy). Duffy averred that Lyle/Skyline agreed to transfer the subject property to RJEM "free and clear," with good title not subject to any mortgage. Duffy further averred that Lyle, Skyline, and Skyline's attorney failed to disclose the existence of the outstanding mortgage on the Otto property. Upon discovery of the mortgage, RJEM demanded immediate payment.

¶ 23 In his response to the motion to dismiss the second amended complaint, Paliatka argued that his rights under the demand note and the mortgage were cumulative and that judgment entered on the demand note did not preclude him from pursuing other claims, including

subrogation claims. He also contended, in part, that RJEM improperly used section 2-619 as a "shortcut to resolve factual issues about the veracity" of Paliatka's allegations. RJEM replied that Paliatka failed to submit a counteraffidavit or otherwise refute RJEM's contentions.

¶ 24 The Circuit Court's Ruling

¶ 25 The circuit court entered a final order and memorandum opinion granting the motion to dismiss on October 17, 2018. The circuit court initially questioned whether the second amended complaint even stated a cause of action for equitable subrogation and opined that dismissal under section 2-615 could have been pursued. The circuit court found that the complaint on its face demonstrated that Paliatka's payment was purely voluntary "for neither he nor [Lyle] was under a legal obligation to pay the mortgage to save the property from potential foreclosure."

¶ 26 Turning to the merits of the section 2-619 motion, the circuit court rejected RJEM's claim that Paliatka lacked standing but granted the motion to dismiss with prejudice because the complaint was barred as a matter of law. Although the circuit court noted that both Paliatka and RJEM were apparently deceived by Lyle, the court found that equitable subrogation could not provide relief for Paliatka while RJEM would be treated unjustly. While Paliatka suggested that he saved RJEM from a potential foreclosure action on the mortgage, the circuit court found that Paliatka and RJEM "stood as strangers," and that Paliatka had no right to be equitably subrogated for "voluntarily and unilaterally paying off a mortgage that ran with RJEM's property." The circuit court also discussed *Paliatka v. Bush*, 2018 IL App (1st) 172435 (*Bush*), a recent First District decision involving a similar scheme perpetrated by Lyle. The appellate court in *Bush* rejected Paliatka's claim that by equitable subrogation he was entitled to an equitable mortgage or lien.

¶ 27 Because Lyle, not RJEM, benefitted unjustly from the double payment, the circuit court

determined that to allow Paliatka to enforce the mortgage would create an unjust result for RJEM. The circuit court concluded that subrogation would not be equitable where RJEM did not know of or agree to Paliatka's payoff and Lyle's agreement to allow Paliatka to step into the shoes of RFLF 1. The circuit court granted the motion to dismiss with prejudice and denied RJEM's request for sanctions under Illinois Supreme Court Rule 137.[3]

¶ 28 ANALYSIS

¶ 29 Paliatka argues that the circuit court erred in dismissing the second amended complaint with prejudice. According to Paliatka, if he had not paid the outstanding loan balance, RFLF 1 could have enforced the mortgage against RJEM because the Otto property had been conveyed subject to the mortgage by virtue of the quitclaim deed. Having paid the debt, Paliatka claims that he should step into the shoes of the lender vis-à-vis RJEM. RJEM argues that it paid $160,000 for the Otto property, with the fraudulent representation of Lyle and Skyline that the property would be conveyed free and clear of any mortgages. According to RJEM, Lyle was the beneficiary of the windfall, not RJEM, as Lyle's company received the funds from RJEM but never used those funds to pay the mortgage debt.

¶ 30 Motion to Dismiss – Section 2-619

¶ 31 RJEM filed its motion to dismiss under section 2-619 of the Code. The motion relies upon at least two subsections of section 2-619: sections 2-619(a)(4) and 2-619(a)(9). Section 2-619(a)(4) provides for dismissal because "the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2016). According to RJEM, the *res judicata* effect of the

[3] After Paliatka timely filed a notice of appeal, RJEM filed a motion for leave to file a counterclaim for quiet title claiming that the deed in trust was a cloud on title – and to disqualify attorney Jones. In his motion to strike RJEM's motion, Paliatka argued, in part, that the circuit court was divested of jurisdiction by the filing of his notice of appeal. RJEM responded that the circuit court retained jurisdiction to determine matters which are collateral or incidental to the judgment. Although the order is not included in the record on appeal, the circuit court docket reflects that RJEM's motion was denied.

judgment against the makers of the demand note precludes the relief requested by Paliatka in the instant action. RJEM also relies on section 2-619(a)(9), which provides for dismissal when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016). RJEM contends that section 2-619(a)(9) dismissal is proper because subrogation is not available to Paliatka for a number of reasons. As discussed herein, we are persuaded by certain of RJEM's arguments regarding subrogation and thus need not address its contentions based on *res judicata*. We review a section 2-619(a)(9) dismissal *de novo*. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 115 (2008). Under a *de novo* standard of review, we perform the same analysis that a trial judge would perform; we need not defer to the trial court's reasoning or judgment. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 20.

¶ 32 Motion to Dismiss – Section 2-619(a)(9)

¶ 33 Dismissal pursuant to section 2-619(a)(9) is appropriate when an affirmative matter defeats or bars the plaintiff's claim. *Smith*, 231 Ill. 2d at 120. An "affirmative matter" means "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action.' " *Id.* at 120-21, quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993).

¶ 34 A proper section 2-619 motion admits that the complaint states a cause of action and its allegations are true, but argues that some other defense which exists defeats the claim nevertheless. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 40. When ruling on a section 2-619 motion, a court must interpret the pleadings and supporting documents in the light most favorable to the nonmovant. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003).

¶ 35 "On a motion to dismiss pursuant to section 2-619(a)(9) of the Code, the defendant, as the movant, 'has the burden of proof on the motion, and the concomitant burden of going forward.' " *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 22, citing 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed. 2011). When a motion to dismiss is based on facts not apparent from the face of the complaint, the movant must support its motion with an affidavit or other evidence. *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22. If the defendant can carry the burden going forward, then the burden shifts to the plaintiff, who must establish that the affirmative defense is either unfounded or requires the resolution of an essential element of material fact before it is proven. *Id.* The plaintiff may establish this by presenting "affidavits or other proof." *Id.*; 735 ILCS 5/2-619(c) (West 2016). "The plaintiff's failure to properly contest the defendant's affidavit by submitting a counteraffidavit may be fatal to his cause of action, as the failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the fact stated therein." *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22.

¶ 36 Subrogation

¶ 37 In the second amended complaint, Paliatka sought a declaratory judgment that he was subrogated to the mortgage lien position of RFLF 1 and that his subrogated mortgage lien was prior to RJEM's interest in the Otto property. Subrogation is an equitable principle whereby one who involuntarily pays the debt of another succeeds to the rights of the original creditor with respect to the debt paid. *Bush*, 2018 IL App (1st) 172435, ¶ 16. "In Illinois, subrogation is often applied to substitute one party to the lien priority of another." *Id*. A lien is a claim or hold that one party has on the property of another for a debt. *Id*. The lien recorded first in time generally has priority and is entitled to satisfaction by the property it binds prior to other claims. *Id*. See

also *Aames Capital Corp. v. Interstate Bank of Oak Forest*, 315 Ill. App. 3d 700, 704 (2000) (noting that a presumption exists that the first mortgage recorded has priority). Subrogation allows for an exception to the first-in-time priority rule. *Bush*, 2018 IL App (1st) 172435, ¶ 16. Accord *Union Planters Bank, N.A. v. FT Mortgage Companies*, 341 Ill. App. 3d 921, 925 (2003).

¶ 38 Illinois courts have recognized two types of subrogation: (i) contractual or conventional subrogation and (ii) common law or equitable subrogation. *Bush*, 2018 IL App (1st) 172435, ¶ 17. "Conventional subrogation arises where there is an express agreement between the parties to the effect that the party paying the debts on behalf of the third party will be able to assert the rights of the original creditor." *Id*. In the context of lien priorities, conventional subrogation is often found in modern refinancing transactions. *Id.*; *Union Planters*, 341 Ill. App. 3d at 926. Paliatka alleged in the second amended complaint that, in consideration of his payment of the loan to the lender, Skyline "acknowledged and agreed" that Paliatka was subrogated to the rights and claims of RFLF 1. Despite his reference to an agreement, the record does not include any evidence of an express written agreement providing for subrogation, and on appeal Paliatka limits his arguments to equitable subrogation.

¶ 39 "In contrast to the formalities of conventional subrogation, equitable subrogation typically arises simply as a result of payment on behalf of another." *Bush*, 2018 IL App (1st) 172435, ¶ 18. Because the right of equitable subrogation depends on the balancing of the equities of each case, there is no general rule to determine whether such right exists. *Id*. See also *Aames*, 315 Ill. App. 3d at 706 (describing equitable subrogation as "elusive"). "Nonetheless, it requires a showing that one has involuntarily paid a debt of another and is seeking to assert the rights of the original creditor against the one whose debt was absolved by the payment." *Bush*, 2018 IL App (1st) 172435, ¶ 18.

¶ 40 The second amended complaint, on its face, set forth the basic elements of an equitable subrogation claim: Paliatka alleged that he involuntarily paid off the mortgage debt and was seeking to assert the rights of RFLF 1 against RJEM. As discussed below, however, his allegation of "involuntariness" was not well-pleaded. Furthermore, the affidavit filed in support of RJEM's section 2-619 motion raises affirmative matters precluding equitable subrogation, which Paliatka failed to refute by counteraffidavit or otherwise.

¶ 41 The second amended complaint also alleges that Paliatka "did not act as a mere volunteer in paying the Renovo Loan" and that he agreed to pay off the loan "to preserve and protect the financial interests of his grandson." As a preliminary matter, we observe that Paliatka's stated motivation for paying off the loan has shifted throughout the course of this litigation. While on appeal he contends that he "paid the Renovo loan balance in order to preserve the lien priority of the Renovo Mortgage and protect the title interest acquired by [Paliatka's] Land Trust," no such allegation is included in the second amended complaint. See *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002) (arguments not raised in the trial court are waived).[4]

¶ 42 In any event, a section 2-619 motion "admits well-pleaded facts, but does not admit conclusions of law and conclusory factual allegations unsupported by allegations of specific facts." *Better Government Ass'n v. Illinois High School Ass'n*, 2017 IL 121124, ¶ 21. In the instant case, Paliatka's allegation that he did not act as a volunteer is wholly unsupported by any allegations of specific facts and not supported by any affidavits. The second amended complaint did not allege that *Lyle* owned the Otto property or guaranteed the debt owed to the lender.[5] As stated in the second amended complaint, Paliatka paid the debt to protect "the financial interests

[4] Paliatka also contends on appeal that Lyle's murder-for-hire scheme suggests that Paliatka did not act as a "volunteer." We note, however, that Paliatka paid the debt to the lender months before Lyle initiated his murder-for-hire scheme.

[5] During oral argument before this Court, Paliatka's attorney referenced Lyle's guaranty of the loan. Neither the operative complaint nor the appellate briefs, however, refer to such guaranty.

of his grandson," which is indicative of a quintessentially "voluntary" act. Furthermore, Paliatka has no connection to RJEM, which would have presumably been sued in a foreclosure action in the event the debt was not paid. Vis-à-vis RJEM, Paliatka again was a volunteer. *Ohio National Life Insurance Co. v. Board of Education of Grant Community High School District No. 124*, 387 Ill. 159, 178 (1944) (noting that "[a]nyone, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, a mere volunteer").

¶ 43 Even assuming *arguendo* that the "involuntariness" element of Paliatka's equitable subrogation claim was well-pleaded, RJEM submitted an affidavit raising affirmative matters not apparent from the face of the second amended complaint. In his affidavit, RJEM's manager Duffy averred: RJEM wired $160,000 for the purchase of the Otto property; Lyle/Skyline agreed to transfer the property "free and clear" with good title and not subject to any mortgage; Lyle, Skyline, and Skyline's attorney failed to disclose the existence of any outstanding mortgage; Lyle and Skyline perpetuated a real estate fraud pyramid scheme on RJEM and others; and RJEM paid $26,367.31 in January 2018 for property taxes dating back to 2013.

¶ 44 RJEM thus presented an adequate affidavit supporting its asserted defense that equitable subrogation is unavailable because, among other things, it would further the fraud committed by Skyline and Lyle on RJEM, an innocent party. Equitable subrogation will only be recognized where an equitable result will be reached. *Bush*, 2018 IL App (1st) 172435, ¶ 18. It is applied to "hold the one, who in good conscience should be held accountable, responsible for the debt." *Id.* ¶ 17. Accord *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319 (1992) (providing that subrogation is "allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so"). Duffy's affidavit established that, in good conscience, RJEM should not be held responsible for the debt.

¶ 45 The burden then shifted to Paliatka. *Kedzie & 103rd Currency Exchange*, 156 Ill. 2d at 116. Paliatka was required to establish that RJEM's defense to equitable subrogation was unfounded or required the resolution of an essential element of material fact before it is proven. See *id.* Paliatka did not submit a counteraffidavit or otherwise refute the evidentiary facts asserted by RJEM. Based on the foregoing, we find that the circuit court properly dismissed the second amended complaint with prejudice.

¶ 46 Sanctions

¶ 47 RJEM contends that sanctions against Paliatka and his counsel (Jones and another attorney) are appropriate under Rule 137 and Rule 375 of the Illinois Supreme Court Rules. RJEM further asserts that Paliatka's counsel violated Rule 3.3 of the Illinois Rules of Professional Conduct by "feign[ing] ignorance" of the First District decision in *Bush*. Paliatka's reply brief does not directly address the request for sanctions. He instead distinguishes *Bush* and includes an attachment which sets forth "itemized responses" to the alleged misstatements. As discussed below, despite our concerns regarding certain conduct of Paliatka and/or his counsel, we do not find a violation of the Supreme Court Rules cited by RJEM.

¶ 48 Rule 137 provides, in part, that the signature of an attorney or party constitutes a certificate: that he has read the pleading, motion, or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Ill. S. Ct. R. 137(a) (eff. Jan. 1, 2018). RJEM does not argue that the circuit court erred in denying its request for sanctions; RJEM asks that this Court impose sanctions. The Illinois Appellate Court has found,

however, that Rule 137 governs proceedings in the trial court, whereas Rule 375 "is the appropriate basis for sanctions in the appellate court for improper conduct on appeal." *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 580 (2000). See also *Kennedy v. Miller*, 197 Ill. App. 3d 785, 788 (1990) (finding that Rule 375(b), not Rule 137, applied to a motion seeking sanctions for the filing of a frivolous appeal).

¶ 49 Rule 375(b) provides that a sanction may be imposed on a party or the party's attorney if it is determined that an appeal or other action is frivolous or "was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting or defending the appeal or other action is for such purpose." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). See also *Sterling Homes, Ltd. v. Rasberry*, 325 Ill. App. 3d 703, 709 (2001) (noting that "[t]he purpose of Rule 375(b) is to condemn and punish the abusive conduct of litigants and their attorneys who appear before us"). A reviewing court applies an objective standard when determining whether an appeal is frivolous, *i.e.*, an appeal is considered frivolous if it would not have been brought by a reasonable, prudent attorney. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 87.

¶ 50 In support of its request for sanctions, RJEM points to numerous misstatements in Paliatka's initial brief, including references to inaccurate dates and incorrect entities. Paliatka characterizes many of these misstatements as "irrelevant" and/or "obvious typographical error[s]." Rule 375 imposes a good-faith duty on appellate counsel to "thoroughly investigate the trial record and to refrain from making arguments before this court that are clearly contradicted by that record." *Sacramento Crushing*, 318 Ill. App. 3d at 581. Illinois Supreme Court Rule 341 also requires, in part, that the statement of facts contain the "facts necessary to an understanding of the case, stated accurately and fairly." Ill. S. Ct. R. 341(h)(6) (eff. May 25,

2018). We are troubled by the efforts of Paliatka and his counsel to downplay the significance of the admitted errors in his initial brief. See *Travaglini v. Ingalls Health System*, 396 Ill. App. 3d 387, 405 (2009) (noting that "it is the responsibility of the parties to conform to the requirements of the supreme court rules and ascertain the accuracy of their facts and statements before presenting argument to this court"). We observe that the *Bush* appellate court also noted inconsistencies between Paliatka's complaint and the supporting documentation therein. *Bush*, 2018 IL App (1st) 172435, ¶ 5, n. 1, 2.

¶ 51 One purported misstatement in Paliatka's brief before this Court warrants specific discussion. The statement of facts included the following: "On October 29, 2015, Plaintiff paid the balance of the Renovo Mortgage loan to RFLF 2, LLC in the amount of $137,322.37 (R.C. 2), and Renovo executed a Warranty Deed conveying title to the Property to Countryside Bank, as Trustee under Trust Agreement dated October 30, 2015 and known as 15-3324 ('Plaintiff's Land Trust') (R.C. 200, 908-V3)." Under RJEM's interpretation, the above-quoted sentence inaccurately stated the date of the execution of the deed in trust, as the record indicates that the deed in trust was signed on November 25, 2015. We do not share RJEM's view that Paliatka misrepresented the date of the deed in trust.[6] As discussed below, however, the quoted sentence is illustrative of the imprecision of Paliatka's briefs and – perhaps more significantly – the opacity of the underlying transactions.

¶ 52 We initially observe that the quoted sentence includes a series of errors. First, Paliatka did not pay the loan balance on October 29, 2015. After the submission of his reply brief, we granted Paliatka's motion to clarify the record to reflect that the payoff date was actually November 4, 2015. Also, Paliatka did not pay "RFLF 2, LLC," as was represented in his initial

[6] Nevertheless, we note that Paliatka stated in his reply brief that he had required that the lender deliver a deed in trust, with warranty of title, as a "condition precedent" to paying off the loan balance. This statement arguably suggests that the deed in trust preceded the payoff.

brief; he actually paid RFLF 1. Paliatka then claimed that "Renovo" executed a warranty deed. However, the deed in trust was not executed by "Renovo," as defined in his brief, *i.e.*, Renovo Financial Loan Fund, L.L.C.; the document was signed by another Renovo-related entity.

¶ 53 In his motion to clarify, Paliatka asserted that the five-day difference between the incorrectly-stated payoff date (October 29) and the actual payoff date (November 4) is "not material to the issue of equitable subrogation." While this assessment is superficially accurate, we find the error to be troublesome. The record reflects that a number of key events occurred on October 30, 2015, *e.g.*, the execution of the trust agreement with Countryside Bank (apparently with Paliatka as the beneficiary), and the execution of the demand note by the makers – Skyline, S12, Lyle, and Kathryn – in favor of Paliatka, as payee. Based on the record presented, however, we are unable to assess the significance of Paliatka's error regarding the timeline of events.

¶ 54 As noted above, Rule 375(b) provides sanctions for frivolous appeals not taken in good faith. *Parkway Bank*, 2013 IL App (1st) 130380, ¶ 87. Despite the concerns we have articulated herein, we cannot conclude that this appeal was frivolous, not taken in good faith, or for an improper purpose. RJEM's request for sanctions is hereby denied.

¶ 55 RJEM also asserts that Paliatka's counsel violated Rule 3.3 of the Illinois Rules of Professional Conduct. Ill. R. Prof'l Conduct R. 3.3 (eff. Jan. 1, 2010). Rule 3.3(a)(2) provides that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." *Id.* According to RJEM, Paliatka's counsel feigned ignorance of the *Bush* ruling, ignored precedential case law, and failed to provide legal support for his client's claims during the hearing on the motion to dismiss the second amended complaint. We note that the opinion in *Bush* was filed on July 18, 2018, approximately three months prior to the

hearing on RJEM's motion to dismiss. Paliatka was represented by the same attorneys in *Bush* as in the instant case, including Jones.

¶ 56 The facts and arguments in *Bush* were similar, although not identical, to the instant case. In *Bush*, after Lyle (through S12) conveyed property to a purchaser through a quitclaim deed, Paliatka paid off the balance on the mortgage loan to an affiliate of the lender. *Bush*, 2018 IL App (1st) 172435, ¶ 6. The purchaser subsequently sold the property to John and Joanna Bush; Paliatka sued the Bushes and their lender. *Id.* ¶ 3. The circuit court dismissed Paliatka's amended complaint with prejudice pursuant to section 2-615 of the Code. *Id.* ¶ 1. The appellate court affirmed, finding that (i) Paliatka could not plead a cause of action for an equitable mortgage because there was no written instrument, and (ii) Paliatka could not state a claim for an equitable lien because the Bushes owed him no debt, duty, or obligation. *Id.* ¶¶ 25, 33. While the appellate court discussed equitable subrogation principles, it ultimately concluded that "a finding of equitable subrogation would not suffice to demonstrate all the elements of an equitable mortgage or an equitable lien." *Id.* ¶ 19. The appellate court thus declined to engage in a balancing of the equities. *Id.*

¶ 57 While *Bush* is instructive for our analysis here, only the Illinois Supreme Court may discipline an attorney found guilty of ethical misbehavior. *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 229 (2000) (explaining that the Illinois Supreme Court has delegated the authority to investigate and prosecute claims of attorney misconduct to the Illinois Attorney Registration and Disciplinary Commission (ARDC), but only the Illinois Supreme Court possesses the inherent power to discipline attorneys who have been admitted to practice in this state).

¶ 58 CONCLUSION

¶ 59 For the reasons discussed above, RJEM's request for sanctions is denied and the judgment of the circuit court of Cook County dismissing with prejudice Paliatka's second amended complaint is affirmed.

¶ 60 Affirmed.