2015 IL App (1st) 140813-U

No. 1-14-0813

SIXTH DIVISION
June 30, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DLJ MORTGAGE CAPITAL, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
ROBERT LEE STONE II and CYNTHIA A. STONE	)	
	)	No. 05 CH 11143
Defendants-Appellants,	)	
	)	
(Robert L. Stone, The City of Chicago, Oral and Maxillofacial Surgery Associates, P.C., Unknown Owners, and Non-Record Claimants,	)	
	)	The Honorable
	)	LeRoy K. Martin, Jr.
Defendants).	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Presiding Justice Hoffman specially concurred.

O R D E R

¶1 *HELD*: The circuit court retained jurisdiction to consider plaintiff's motion for leave to file its fourth amended complaint despite defendant having filed a federal lawsuit. The circuit court did not abuse its discretion in denying defendants' untimely request for leave to file their

answer and affirmative defenses or in prohibiting defendants from attaching their affirmative defenses to their response to plaintiff's summary judgment motion. Summary judgment was properly entered on plaintiff's mortgage foreclosure claim.

¶2 Defendants, Robert Lee Stone II and Cynthia Stone, appeal a number of the circuit court's orders in favor of plaintiff, DLJ Mortgage Capital, Inc., related to mortgage foreclosure proceedings. Defendants contend the circuit court erred in allowing plaintiff to file its fourth amended complaint where exclusive jurisdiction over the property at issue rested with the federal court. Defendants additionally contend the circuit court abused its discretion in failing to consider their affirmative defenses either by granting an extension for time to file their answer to plaintiff's fourth amended complaint or by allowing them to attach the affirmative defenses to their response to plaintiff's motion for summary judgment. Finally, defendants contend summary judgment was improperly entered in favor of plaintiff. Based on the following, we affirm.

¶3 FACTS

¶4 This case has a long procedural past, the details of which are necessary to provide a complete picture of the case as it stands. In 2003, defendants obtained a loan for $1.4 million from Washington Mutual Bank, FA (Washington Mutual). The loan was memorialized with a promissory note and secured by a mortgage related to a property located at 5635 S. University Avenue in Chicago, Illinois. In July 2005, Washington Mutual filed a complaint seeking to foreclose on the mortgage as the result of defendants' default. Washington Mutual subsequently filed an amended complaint and a second amended complaint.

¶5 On March 22, 2007, Washington Mutual filed a motion to substitute the party plaintiff. In that motion, Washington Mutual stated that, subsequent to the filing of the complaint, the

underlying loan had been transferred to plaintiff and an assignment had been executed transferring all rights, title, and interest to the mortgage from Washington Mutual to plaintiff. Defendants filed a response, arguing there was no basis for substituting plaintiff as the party plaintiff because there was no evidence to support the alleged assignment of the loan from Washington Mutual to it. The circuit court granted Washington Mutual's motion, substituting plaintiff as the party plaintiff. Also on March 22, 2007, plaintiff filed a motion for summary judgment. On the same date, the circuit court granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale of the subject property.

¶6 On December 27, 2007, defendants filed an emergency motion to stay the sale of the property. The motion to stay the sale of the property was granted. Defendants requested and received additional stays of the sale until April 4, 2008. Then, on December 15, 2008, plaintiff filed a motion to vacate the sale of the subject property, claiming a judicial sale took place on April 7, 2008, but that defendants filed Chapter 13 bankruptcy on April 4, 2008. Plaintiff was unaware of the bankruptcy filing and, therefore, inadvertently violated an automatic bankruptcy stay by proceeding with the judicial sale. On December 15, 2008, the circuit court granted the motion to vacate the sale of the subject property. On January 7, 2009, plaintiff renoticed the sale of the subject property. On February 2, 2009, defendants filed another emergency motion to stay the sale, in combination with a motion to vacate the foreclosure judgment and to dismiss plaintiff's complaint. Thereafter, according to the record, the parties entered a settlement agreement.

¶7 On January 7, 2010, the parties entered an agreed order wherein defendants withdrew their motion to vacate the foreclosure judgment and plaintiff was granted leave to file its third amended complaint. In plaintiff's third amended complaint, it presented a claim for breach of

contract against Cynthia only, alleging she breached the parties' agreement to sell the subject property in a short sale and to divide the profits between plaintiff and other creditors. The record contains a subsequent notice and a motion for summary judgment presented by plaintiff; however, neither document is file stamped. On March 22, 2010, defendants filed another emergency motion to stay the sale of the subject property, to vacate the March 22, 2007, foreclosure judgment, and to dismiss plaintiff's foreclosure complaint. The motion was denied. Then, on April 29, 2010, the circuit court entered an order staying plaintiff's motion for summary judgment as a result of another bankruptcy case filed by Cynthia. On May 14, 2010, the bankruptcy court entered an order lifting the automatic stay.

¶8 Then, on May 19, 2010, defendants filed a motion for leave to answer plaintiff's third amended complaint and to vacate the circuit court's March 22, 2007, foreclosure judgment, arguing plaintiff abandoned its foreclosure action by filing the new complaint and not including a count for mortgage foreclosure. On July 22, 2010, defendants also filed an emergency motion to stay the judicial sale of the subject property scheduled for July 30, 2010, arguing that a judicial sale was improper in light of the pending matters before the court. On July 29, 2010, the circuit court entered an order, in relevant part, granting defendants leave to answer plaintiff's third amended complaint. On August 11, 2010, defendants filed an answer, affirmative defenses, and a counterclaim seeking to quiet title to the subject property. In relevant part, defendants alleged that plaintiff lacked standing to bring the foreclosure suit where there was no evidence it owned the promissory note or mortgage in question.

¶9 On September 28, 2010, in a written order, the circuit court found that the March 22, 2007, foreclosure judgment was void due to plaintiff's failure to include a mortgage foreclosure claim in its third amended complaint. As a result, the circuit court found defendants' motion to

stay the sale of the subject property was rendered moot. The circuit court ordered that the case be transferred to the law division "because no mortgage foreclosure is pending before this court." Notwithstanding, on December 22, 2010, the circuit court entered an order granting plaintiff's motion to assign the case to the chancery division calendar because defendants' counterclaim to quiet title remained pending. Plaintiff subsequently filed a motion to dismiss defendant's quiet title counterclaim. On January 23, 2012, the circuit court entered an order granting plaintiff's motion to dismiss and dismissing defendants' quiet title counterclaim with prejudice.

¶10 On May 14, 2012, plaintiff filed a notice and motion for leave to file a fourth amended mortgage foreclosure complaint. The notice provided a hearing date of May 25, 2012. Notwithstanding, on May 24, 2012, Cynthia[1] filed an amended complaint in federal court against plaintiff, seeking to quiet title to the property and claiming: mortgage fraud; an antitrust violation; violations of the Illinois Uniform Deceptive Trade Practices Act; violations of the Illinois Fair Debt Collection Practices Act; and slander of the property title where title to the property was fraudulently assigned to defendant.[2] Then, on May 25, 2012, over defendants' objection that the circuit court lacked jurisdiction to consider the motion because of the federal lawsuit, the circuit court granted plaintiff leave to file its fourth amended complaint and ordered defendants to file their responsive pleading by June 22, 2012. Plaintiff filed its one-count complaint for mortgage foreclosure on May 25, 2012. Defendants did not file a responsive pleading.

¶11 On December 10, 2012, the federal court stayed defendants' lawsuit. Defendants later filed a notice of appeal from that order.

[1] The Children's Fund, Ltd. was also named as a plaintiff, but the company is not a party in the instant action. The amended federal complaint stated that the Children's Fund, Ltd. owned the subject property and Cynthia resided in the property and was responsible for the promissory note and mortgage.

[2] See *First State Bank of Princeton v. Leffelman*, 167 Ill. App. 3d 362, 367 (1988) (public documents that are included in the records of other courts may be the subject of judicial notice).

¶12 On December 12, 2012, plaintiff filed a motion for summary judgment, arguing there were no genuine issues of material fact preventing the entry of a foreclosure judgment for the subject mortgage in its favor. In its motion, plaintiff noted that defendants failed to file any responsive pleading to its fourth amended complaint and, therefore, the allegations of the complaint were admitted.

¶13 On December 24, 2012, defendants requested leave to file an answer to plaintiff's fourth amended complaint, along with ten affirmative defenses. Following extensive oral argument spanning two dates, on January 18, 2013, the circuit court instead ordered defendants to reply to plaintiff's motion for summary judgment. Prior to issuing its ruling, the circuit court stated:

> "Well, let me comment if I may for a moment, gentlemen. I'm a little troubled, Mr. Stone, by some of the things that you've put forth and what has occurred here. Inasmuch as you have contended in both your papers and in your argument if not today then the last time that you gentlemen were here that you were prohibited by the Colorado River case from participating in this action while the federal case pended. ***. I would note, quite frankly, that the Colorado River case I don't see why it would prohibit you from having participated in this lawsuit as a defendant, but nonetheless that notwithstanding it would seem to me that once the defendant *** in this lawsuit was ordered to answer that you either would have answered or you would have renewed your motion here for a stay. But to simply do nothing is troubling and that's in effect what you've done. ***.
>
> And so we now find ourselves here, gentlemen, in January of 2013. The answer or responsive pleading to the fourth amended complaint having been *** ordered to be filed or responded to by June of 2012 and it seems to me, Mr. Stone,

> at this point what you *** in effect [have] done is you've gotten a stay without having gotten a stay. ***. And the failure to participate I think it has to come with some consequences."

On January 28, 2013, defendants filed a response to plaintiff's motion for summary judgment, which included their ten affirmative defenses.

¶14 Then, on March 20, 2013, the circuit court entertained extensive oral argument regarding whether it was proper for defendants to include their affirmative defenses in their response to plaintiff's summary judgment motion. In addition, defendants argued for the first time that, without having timely filed an answer to plaintiff's fourth amended complaint, its answer to the third amended complaint served as an answer to the fourth amended complaint because it had not been stricken by the court. In response, the circuit court stated:

> "Never, never, never, Mr. Stone, in my years as a judge whenever I have allowed an amendment to a complaint have I ever stricken the answer. One simply files a new answer to the new complaint unless one asks for—I have seen this from time to time because there are times when the amended complaint adds another party or does some other such thing that doesn't materially affect the answer of that responding defendant, and that defendant asks then, and we put in the order that that answer stands in response to the new complaint.
>
> But that's not the case here.
>
> * * *
>
> Mr. Stone, I'm troubled by how this has been managed. Then to come here before me today and make an argument about the other answer serving as the

answer to the – even under those circumstances, one asks for that to happen because you have a right to respond. ***.

That isn't what happened. Furthermore, Mr. Stone, you said to me, you asserted to me, as I recollect, and I'll have to paraphrase, that your reason for not responding as ordered or as allowed by the order was, one, you were depending upon—you thought counsel was going to continue the case, and, two, you believed that this Colorado River case prevented you from litigating the matter here. ***.

So to hear this now for the first time just this whole—the whole way this thing has gone just really—in all honest [*sic*], it just doesn't sit well with me. It's just not the way—it's just not the way to do things.

* * *

[The Colorado River Abstention Doctrine] stands for the propositions of prosecuting both claims so that they shouldn't be prosecuting a claim there and a claim here at the same time.

As I pointed out when this issue first arose in this case, at least for the purposes of the amended complaint, the Stones weren't prosecuting the case. They were responding to—they were defendants in this lawsuit.

And if the Stones reasonably believed that that doctrine prevented them from responding to the complaint here, that's an issue that should have been brought before the Court. You move, Judge, stay the action. You have the Court make some ruling. ***.

Chaos ensues if parties begin on their own volition to decide I won't follow the orders of the Court because I've decided that the way I interpret the law is the proper way, and I don't have an obligation to follow the orders of the Court. Clearly, one doesn't have to file an answer. That's one's prerogative.

But if you do not file an answer, you must suffer the consequences.

* * *

Whether or not to allow the filing of an answer that is late is within the discretion of the Court. ***.

Well, I tend to be a rather liberal fellow in allowing litigants who aren't exactly in line with the rules and with the orders to get themselves up to speed. That is normally my habit. However, I am troubled, disturbed about how this lawsuit has proceeded in this regard.

* * *

Defending a lawsuit, one *** always [has] a right to defend oneself. Again, you assert, Judge, this same lawsuit is pending in another jurisdiction. That happens. It can operate as an affirmative defense even.

*** I believe it is proper for this Court to exercise its discretion and deny the defendant an opportunity to answer the fourth amended complaint for the reasons articulated earlier.

Additionally, another reason why I believe that the proper use of the Court's discretion is that I am troubled and disturbed not only that would the defendant not answer or otherwise plead or bring to the Court's attention in a timely fashion why the defendants don't believe they should answer or otherwise

plead but that the defendants didn't even show up. Court date after court after court date passed. I see order after order here setting it for status, for status, for status. No one ever showed up.

At any time you could have come in and raised this issue. We could have had a discussion. I would have made a ruling. And knowing me as I do, I probably would have allowed you at that time an opportunity but to do nothing to me is unacceptable. Then to wait until the plaintiff does something that potentially could affect defendant adversely before the defendant timely has [a] Eureka moment to me just is not how we do things. So I believe for those reasons that's a proper exercise of the Court's discretion.

* * *

It's my determination then that the fourth amended complaint stands unanswered because I don't accept the idea that an answer to the third amended complaint can be used as an answer to the fourth amended complaint.

So in that event, then it would seem to me that it would be proper and it will be the order of the Court that the motion for summary judgment *** brought by plaintiff be sustained. I further note just for purposes of the record *** that the rules provide that if one doesn't answer, then all well-pled allegations in the complaint are taken as true."

¶15 On April 2, 2013, defendants filed a motion requesting the entry of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) language on the court's summary judgment order. On April 24, 2013, the circuit court denied defendants' motion for Rule 304(a) language, finding it

would "result in piecemeal appeals." Also, on April 24, 2013, the circuit court entered a judgment of foreclosure and sale of the subject property.

¶16 On August 15, 2013, plaintiff filed an amended motion to approve the report of sale and the distribution of the subject property. On September 10, 2013, defendants voluntarily dismissed their federal appeal. On the same date, defendants filed a motion in opposition to plaintiff's amended motion to approve the report of sale and distribution of the subject property. In that motion, defendants argued, in relevant part, that the circuit court did not have jurisdiction to allow plaintiff to file its fourth amended complaint and did not have jurisdiction to grant summary judgment and enter the foreclosure judgment where Cynthia's filing of her lawsuit in federal court on May 24, 2012, exclusively vested jurisdiction with the federal court.

¶17 On December 2, 2013, less than two hours prior to the hearing scheduled on plaintiff's amended motion to approve the report of sale and the distribution of the subject property, defendants filed yet another bankruptcy petition with the federal bankruptcy court. As a result, the circuit court entered an order on December 2, 2013, staying plaintiff's amended motion for the sale and the distribution of the property. On January 8, 2014, the bankruptcy court lifted the automatic stay. On January 22, 2014, defendants filed a motion to dismiss plaintiff's fourth amended complaint for lack of jurisdiction. On the same date, the circuit court entered an order confirming the report of sale and the distribution of the subject property. With regard to defendants' jurisdictional argument, the circuit court stated:

> "*** [t]hat issue was pending before this Court. So I don't know that I buy into the idea then that this—that there was no jurisdiction ***. ***. And it seems to me once that motion was filed that issue was before the Court. Whether the Court had decided it or not, nonetheless, that issue remained pending before the Court

> for the Court to make a ruling upon. Perhaps this discussion would be different were the motion not filed. And then this action in federal court was filed and then we get the motion. But the motion was pending. That issue was before this Court. ***. Once you filed that motion you set that motion for hearing before the Court. That issue is now pending before the Court. ***And so now I don't know that then filing over there we now say, well, no this court doesn't have jurisdiction to make a ruling on this issue when this issue was pending before the Court, barring some statute telling me—the bankruptcy statute, or one comes in, Judge, there's been a removal. Here's an order. It's been removed. You don't need to make any more rulings. But that wasn't what we had here. And so with the motion pending before me, to do otherwise I think courts chaos. It would encourage a party, once you put a motion before the Court, I don't like the motion that's pending before the Court. Eureka. I have an idea. I'll go file the same action in federal court and now tell the state court you've been [di]vested of jurisdiction while it's pending before you."

On February 5, 2014, defendants filed a motion to reconsider the January 22, 2014, order. On March 14, 2014, the circuit court denied defendants' motion to reconsider. This appeal followed.

¶18 ANALYSIS

¶19 I. Jurisdiction

¶20 Defendants contend the circuit court erred in granting plaintiff leave to file its fourth amended complaint where the court lacked jurisdiction as a result of Cynthia having filed a federal lawsuit concerning the subject property. Defendants argue that, on September 28, 2010, the circuit court relinquished jurisdiction over the subject property when it voided the judgment

of foreclosure as a result of plaintiff's abandonment of its foreclosure claim in its third amended complaint. Defendants maintain that plaintiff's May 14, 2012, request for leave to file its fourth amended complaint did not commence any action in the circuit court; therefore, defendants' filing of the federal case on May 24, 2012, vested exclusive jurisdiction with the federal court. Accordingly, the circuit court was without jurisdiction to grant plaintiff's request for leave and to allow the filing of its fourth amended complaint on May 25, 2012. In fact, defendants maintain the circuit court was without jurisdiction to enter any orders related to the subject property until May 24, 2013, when the federal case was dismissed; therefore, according to defendants, all orders entered by the circuit court between May 24, 2012, and May 24, 2013, were void.

¶21 The question of jurisdiction may be raised at any time and cannot be waived. *O'Neill v. Director of Illinois Department of State Police*, 2015 IL App (3d) 140011, ¶ 16. We consider the question of jurisdiction *de novo*. *Id*.

¶22 We conclude the circuit court had jurisdiction to grant plaintiff leave to file its fourth amended complaint. As of May 14, 2012, the circuit court had before it plaintiff's motion for leave to file its fourth amended complaint. While the complaint itself had not been filed, a motion was pending as of that date; a motion that involved the subject property. Plaintiff's May 14, 2012, motion was not a precursor to the filing of a complaint for the first time where section 2-201(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-201(a) (West 2004)) requires that "[e]very action *** shall be commenced by the filing of a complaint." Instead, the foreclosure action involving the subject property had commenced nearly seven years prior. As a result, the circuit court's jurisdiction over the subject matter, namely, the property at issue, initially commenced with the filing of the complaint for foreclosure in July 2005. Plaintiff's May 14, 2012, motion for leave to file its fourth amended complaint was a continuation of the same

action. The motion was filed and was under the circuit court's consideration when Cynthia filed her federal lawsuit. We, therefore, conclude the circuit court retained jurisdiction to consider plaintiff's motion for leave to file its fourth amended complaint despite the federal filing.

¶23 Our decision is further supported by the fact that the *quasi in rem* quiet title action included in Cynthia's May 24, 2012, federal lawsuit had already been adjudged by the circuit court and denied when the court dismissed her previously filed quiet title counterclaim with prejudice. Jurisdiction for that claim, and the execution thereof, therefore, had been established by the circuit court. Moreover, the federal court was not considering plaintiff's mortgage foreclosure claim at issue here in Cynthia's federal suit. In addition, after the time defendants contend the circuit court lost jurisdiction, namely, on September 28, 2010, the circuit court continued to consider *defendants'* counterclaim for quiet title. Defendants did not challenge the circuit court's jurisdiction while their counterclaim was before the court.

¶24 Simply stated, the circuit court's jurisdiction over the subject property had been established in 2005 with the filing of the first mortgage foreclosure complaint. When plaintiff requested leave to file its fourth amended complaint to foreclose on the subject property, the circuit court retained jurisdiction over the *res* despite Cynthia's federal lawsuit.

¶25 We note that defendants' reliance on *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976), is misplaced. In *Colorado River Water Conservation District*, the Supreme Court provided the parameters for when a federal court should abstain from hearing a case while a parallel action is pending in a state court. *Id*. The Supreme Court did not speak to any obligations of the state court.

¶26 II. Denial of Defendants' Requests for Leave to Respond to Plaintiff's Fourth Amended Complaint

¶27 Defendants contend the circuit court abused its discretion in denying their requests for leave to respond to plaintiff's fourth amended complaint. More specifically, defendants argue the circuit court abused its discretion in forcing them to "suffer" for failing to answer plaintiff's fourth amended complaint when they believed doing so would threaten the federal court's jurisdiction over Cynthia's federal suit. In addition, defendants argue the circuit court abused its discretion in failing to allow them to include their affirmative defenses in their response to plaintiff's motion for summary judgment.

¶28 Turning first to defendants' untimely request for leave to answer plaintiff's fourth amended complaint, Illinois Supreme Court Rule 183 (eff. Feb. 16, 2011) provides: "[t]he court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time." The crucial wording is "good cause," in that the movant must demonstrate "good cause" for requiring an extension. *Heritage Pullman Bank & Trust Co. v. Carr*, 283 Ill. App. 3d 472, 482 (1996). "Inadvertance, mistake, or absence of prejudice to the opposing party or inconvenience to the circuit court does not constitute 'good cause.' " *Id.* Instead, in order to demonstrate "good cause," the movant has the burden to show "clear, objective reasons why it was unable to meet the deadline and why any extension of time should be given." *Vision Point of Sale Inc. v. Haas*, 226 Ill. 2d 334, 348 (2007). Whether to grant an extension of time to file a pleading is within the sound discretion of the trial court. *Carr*, 283 Ill. App. 3d at 482.

¶29 We conclude that defendants failed to demonstrate good cause for their requested extension to file an answer to plaintiff's fourth amended complaint. On May 25, 2012, when the

circuit court allowed plaintiff's fourth amended complaint, the court instructed defendants to file their responsive pleading by June 22, 2012. Defendants failed to comply with the court's order. Instead, defendants did not file their request for leave to file an answer along with their affirmative defenses until six months later, on December 24, 2012, which was 12 days after plaintiff filed its motion for summary judgment. Defendants' argument that plaintiff would not have been inconvenienced by the delinquent responsive pleading does not constitute "good cause" (*Hass*, 226 Ill. 2d at 348) nor does their reliance on the fact that they surreptitiously filed a federal lawsuit one day before plaintiff's motion to file its fourth amended complaint was scheduled to be heard. In fact, the circuit court repeatedly considered defendants' argument regarding the alleged conflict between Cynthia's federal lawsuit and their ability to file a responsive pleading as instructed by the court. The circuit court allowed the parties extensive arguments on the topic on multiple dates. The court even referenced its discretion and that it did not take the matter lightly; however, when considering defendants' complete failure to abide by the court's order to respond to plaintiff's fourth amended complaint without having filed an objection to the order imposing the responsive date or having filed a motion requesting a stay, which defendants clearly knew how to do since they filed multiple stay requests with regard to the judicial sale, we find the circuit court did not abuse its discretion in denying defendants' request to file an answer and affirmative defenses. We conclude that the record firmly supports our determination.

¶30 We further find the circuit court did not err in failing to consider defendants' answer to the third amended complaint as a standing answer for plaintiff's fourth amended complaint. Section 2-610(b) of the Code (735 ILCS 5/2-610(b) (West 2004)) provides that: "[e]very allegation, except allegations of damages, not explicitly denied is admitted, unless the party

states in his or her pleading that he or she has no knowledge thereof sufficient to form a belief *** or unless the party has had no opportunity to deny." Where defendants did not file an answer to the fourth amended complaint, and there is no question that they were provided an opportunity to do so, the allegations in the fourth amended complaint were admitted.

¶31 Defendants rely on *American National Bank & Trust Co. v. City of Chicago*, 4 Ill. App. 3d 127 (1971), to support their argument that it was unnecessary for them to file an answer to plaintiff's fourth amended complaint. Defendants' reliance is misplaced. In *American National Bank & Trust Co.*, this court held that the defendant could stand on its prior filed answer to the original complaint despite the plaintiff having filed an amended complaint where the facts dictated that the answer remained sufficient. 4 Ill. App. 3d at 130-31. In that case, the plaintiff amended its complaint on the eve of trial and merely changed the number of apartment units involved in the underlying claim otherwise "the allegation in question was exactly the same in both the original and amended complaint." *Id*. at 131. Because the plaintiff's amended complaint was "virtually a verbatim recitation of the original complaint," the trial court could have considered the defendant as having stood on its original answer. *Id*.

¶32 In contrast, the facts of our case do not support defendants' standing on their answer to the third amended complaint. Plaintiff's third amended complaint was completely different from its fourth amended complaint. The third amended complaint included only a breach of contract claim against defendants for breaching the parties' settlement agreement. The fourth amended complaint, however, included one claim for mortgage foreclosure. Accordingly, defendants' answer to a breach of contract claim could not serve as a sufficient answer to a completely different claim for mortgage foreclosure.

¶33 Turning next to defendants' argument related to the circuit court denying their request to raise their affirmative defenses in their response to plaintiff's motion for summary judgment, we conclude the court did not abuse its discretion. Simply put, defendants attempted to get their affirmative defenses before the circuit court in order to avoid the result of their failure to file their responsive pleading in a timely manner, namely, the unopposed admission of the allegations in plaintiff's fourth amended complaint. However, attaching their affirmative defenses to their response to plaintiff's motion for summary judgment was improper.

¶34 Pursuant to section 2-613(d) of the Code (735 ILCS 5/2-613(d) (West 2004)), "the facts constituting any affirmative defense ***, which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise, must be plainly set forth in the answer." However, in *Strzelcyk v. State Farm Mutual Automobile Insurance*, 138 Ill. App. 3d 346, 349 (1985), this court noted that numerous Illinois cases had held that a defendant could raise an affirmative defense in a motion for summary judgment even though not raised in an answer because a defendant is permitted to file a motion for summary judgment at any time, even before an answer. See also *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, (2003); 735 ILCS 5/2-1005(c) (West 2004).

¶35 The reasoning in *Strzelcyk* does not apply to the case before us. Defendants were not attempting to include their affirmative defenses in their motion for summary judgment. Instead, they were attempting to include their affirmative defenses in their *response* to *plaintiff's* summary judgment motion. Accordingly, section 2-613(d) applied to this case, such that defendants were required to include their ten affirmative defenses in their answer, which they failed to file. We, therefore, find the record supports our conclusion that the circuit court did not abuse its discretion.

¶36 III. Summary Judgment in Favor of Plaintiff

¶37 Defendants argue that "[i]f the trial court erred in ruling on any of the above-listed issues of law, then there *** is a genuine unresolved issue of material fact."

¶38 Summer judgment is proper only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2004). The trial court must view these documents and exhibits in a light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision whether to grant summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶39 As stated, pursuant to section 2-610(b), the allegations in plaintiff's fourth amended complaint were admitted because defendants failed to file a timely responsive pleading. As a result, there were no genuine issues of material fact preventing the entry of summary judgment.

¶40 IV. Illinois Supreme Court Rule 341(c)

¶41 Contrary to plaintiff's argument, we find defendants' brief complied with Illinois Supreme Court Rule 341(c) (eff. Feb. 6, 2013).

¶42 CONCLUSION

¶43 In sum, we affirm the judgment of the circuit court.

¶44 Affirmed.

¶45 PRESIDING JUSTICE HOFFMAN, specially concurring:

¶46 I concur in result only.