

IN THE SUPREME COURT OF OHIO

U.S. BANK NATIONAL ASSOCIATION :
AS TRUSTEE :

Appellee, :

v. :

GIUSEPPE GULLOTTA, et al :

Appellant. :

07-1144

On Appeal from
the Stark County
Court of Appeals,
Fifth Appellate District

Case No. 2006CA00145

NOTICE OF CERTIFIED CONFLICT

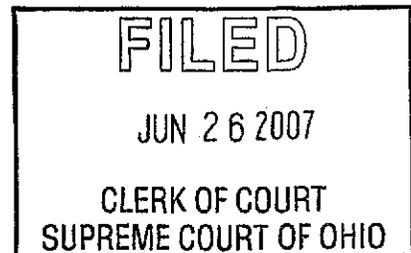
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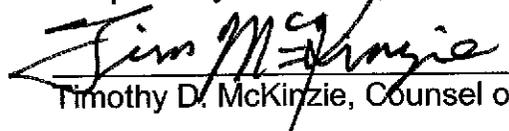
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NOTICE OF A CERTIFIED CONFLICT

Appellant Giuseppe Gullotta hereby gives notice to the Supreme Court of Ohio that the Stark County Court of Appeals, Fifth Appellate District, in Court of Appeals Case Number 2006CA00145 on June 6, 2007, has certified that there is a conflict between the court's decision in the case and the decision of the Tenth District Court of Appeals in *EMC Mortgage Corp. v. Jenkins*, 164 Ohio App. 3d 240, 841 N.E. 2d 855, 2005 Ohio 5799.

A copy of the Judgment Entry certifying a conflict is attached hereto as Exhibit A. A copy the conflicting Fifth District and Tenth District decisions are attached hereto as Exhibit B and Exhibit C, respectively.

Respectfully submitted,


Timothy D. McKinzie, Counsel of Record

COUNSEL FOR APPELLANT
GIUSEPPE GULLOTTA

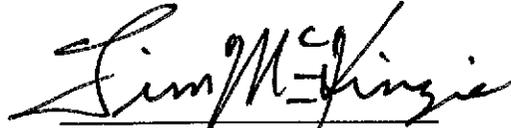
McKINZIE

PROOF OF SERVICE

I certify that a copy of the foregoing Notice of Certified Conflict of Appellant Giuseppe Gullotta was sent by regular U.S. Mail on this 15th day of June, 2007 to the following:

John A. Polinko
1500 West Third Street
Suite 400
Cleveland, Ohio 44113

Katie Chawla
Stark County Prosecutor's Office
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Timothy D. McKinzie
COUNSEL FOR APPELLANT
GIUSEPPE GULLOTTA

McKINZIE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

U.S. BANK, NATIONAL ASSOCIATION
AS TRUSTEE

Plaintiff-Appellee

-vs-

GIUSEPPE GULLOTTA, et al.

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2006CA00145

07 JUN -6 PM 1:37

PAUL G. GAVANIS
CLERK OF COURT OF APPEALS
STARK COUNTY OHIO

This matter comes before the Court on defendant-appellant Giuseppe Gullotta's May 9, 2007, Motion to Certify a Conflict. As of May 25, 2007, no response had been filed.

In order to qualify for certification to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, a case must meet the following three conditions:

"First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be 'upon the same question.' Second, the alleged conflict must be on a rule of law--not facts. Third, the journal entry or opinion of the certifying court must clearly set forth the rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis sic.) *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1034.

Defendant-appellant, in his motion, asks this Court to certify a conflict between our decision in the case sub judice and the decision of the Tenth District Court

A TRUE COPY TESTE:
PAUL G. GAVANIS, CLERK
Deputy
6-6-07

ENTERED BY 18
JUN 6 2007

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of Appeals in *EMC Mortgage Corp. v. Jenkins*, 164 Ohio App.3d 240, 841 N.E.2d 855, 2005-Ohio-5799.

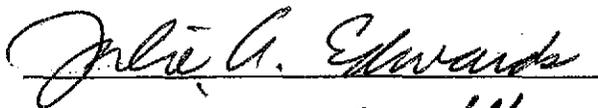
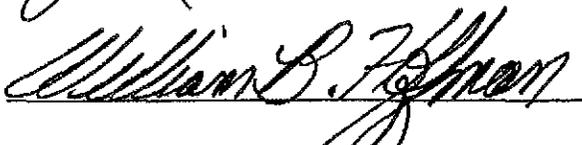
The Tenth District Court of Appeals, in *EMC Mortgage*, held that each payment under a promissory note and mortgage does not yield a new claim such that any successive actions on the same note and mortgage involve different claims and are exempt from the two dismissal rule of Civ. R. 41(A). In the case sub judice, this Court declined to follow *EMC*, finding that each missed payment constitutes a new claim.

We find, therefore, that there is a conflict between our decision in the case sub judice and the decision of the Tenth District Court of Appeals in *EMC Mortgage*. Defendant-appellant's motion is, therefore, granted.

The following issue is certified to the Ohio Supreme Court:

"Whether or not each missed payment under a promissory note and mortgage yields a new claim such that any successive actions on the same note and mortgage involve different claims and are thus exempt from the 'two-dismissal rule' contained in Civ. R. 41(A)(1)."

IT IS SO ORDERED.

JUDGES

JAE/dr/rmn



COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

U.S. BANK NATIONAL ASSOCIATION
AS TRUSTEE

Plaintiff-Appellee

-vs-

GUISEPPE GULLOTTA, et al.

Defendant-Appellant

JUDGES:

William B. Hoffman, P.J.

Sheila G. Farmer, J.

Julie A. Edwards, J.

Case No. 2006CA00145

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Stark County Court Of
Common Pleas Case No. 2005 CV 3684

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

April 30, 2007

APPEARANCES:

For Defendant-Appellant

For Plaintiff-Appellee

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Edwards, J.

{¶1} Defendant-appellant Guiseppe Gullotta appeals from the March 13, 2006, and May 11, 2006, Judgment Entries of the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} On or about June 18, 2003, appellant executed and delivered to MILA, Inc. an adjustable rate note and a mortgage in the amount of \$164,900.00. The note was subsequently assigned to appellee U.S. Bank National Association.

{¶3} On October 26, 2005, appellee filed a foreclosure complaint against appellant, alleging that appellant had defaulted on the note. Appellee specifically sought judgment against appellant in the amount of \$164,390.91 plus interest at the rate of 7.35% per annum from November 1, 2003.

{¶4} Subsequently, on January 4, 2006, appellant filed a Motion to Dismiss for Failure to State a Claim pursuant to Civ.R. 12(B)(6). Appellant, in his motion, argued that appellee's claims were barred by the doctrine of res judicata. Appellant noted that appellee had previously filed two foreclosure actions against him in the Stark County Court of Common Pleas (Case Nos. 2004 CV 01259 and 2004 CV03013) and that appellee had voluntarily dismissed its complaint against him without prejudice in Case No. 2004 CV 01259 on June 8, 2004, and had voluntarily dismissed its complaint against him without prejudice in Case No. 2004 CV 03013 on March 16, 2005. Both voluntarily dismissals were pursuant to Civ. R. 41(A). Copies of both Notices of Dismissal were attached to appellant's Motion to Dismiss. Appellant, in his Motion to Dismiss, argued that the "two-dismissal" rule set forth in Civ.R. 41(A) barred appellee's

claims in the case sub judice since "the latest dismissal by US Bank was an adjudication on the merits."

{¶5} On February 6, 2006, appellee filed a Motion for Leave to File an Amended Complaint to modify the prayer for relief to reflect a new date of default. On the same date, appellee filed a response to appellant's Motion to Dismiss. Appellee, in its response, argued, in relevant part, as follows:

{¶6} "Defendant in his Motion to Dismiss claims the subject matter of the litigation is exactly the same as the first two cases that were filed in the Court of Common Pleas, Stark County, Ohio. However, should the court allow Plaintiff to amend its Complaint, Defendant's Motion to Dismiss would become moot. It is true that Plaintiff has brought these proceedings in this Court based upon the default of the note and mortgage that were the subject of the previous two case.[sic] It is also true that the two previous actions were dismissed voluntarily under Rule 41(A). Nevertheless, the instant proceedings would represent a new and different cause of action and, therefore, res judicata would not apply."

{¶7} Pursuant to a Judgment Entry filed on February 10, 2006, the trial court converted appellant's Motion to Dismiss to a Motion for Summary Judgment because it was based on matters outside of the pleadings. The trial court granted both parties additional time to brief the issues.

{¶8} As memorialized in a separate order filed on the same date, the trial court granted appellee leave to file an amended complaint to change the date of default. Appellee, in its February 10, 2006, Amended Complaint, sought judgment against appellant in the amount of \$164,390.91 plus interest at the rate of 7.35% per annum

from December 1, 2003. In the alternative, appellee sought judgment against appellant in the amount of \$164,390.91 plus interest at the rate of 7.35% per annum from April 1, 2005, such date is after the Notice of Dismissal was filed in Case No. 2004 CV 03013.

{¶9} Pursuant to a Judgment Entry filed on March 13, 2006, the trial court overruled appellant's Motion for Summary Judgment. The trial court, in its entry, stated, in relevant part, as follows:

{¶10} "Plaintiff's first two Complaints sought the sum of \$164,390.91 plus interest thereon at the rate of 7.35% per annum from November 1, 2003. Plaintiff has amended the third Complaint to include two alternative theories of recovery and prayers for relief. First, Count One moves the default date to December 1, 2003 and seeks the sum of \$164,390.91 plus interest thereon at the rate of 7.35% per annum from that date. Alternatively, Count Three moves the default date to April 1, 2005, and seeks the sum of \$164,390.91 plus interest thereon at the rate of 7.35% per annum from April 1, 2005.

{¶11} "The April 1, 2005 default date is after the second dismissal on March 13, 2005 and, therefore, could not have been included in either of the first two actions. Because the second dismissal is an adjudication on the merits, Defendant was at that time no longer in default and the note would be decelerated. However, Defendant's obligation to continue making payments would begin again in April of 2005. The current action covers months not litigated in the first two foreclosure actions and relates to a later delinquency in payments. Thus, because the subsequent action is based upon a demand and cause of action, res judicata does not apply." (footnote omitted)

{¶12} Thereafter, on April 18, 2006, appellee filed a Motion for Summary Judgment. As memorialized in a Judgment Entry filed on May 11, 2006, the trial court granted appellee's motion.

{¶13} Appellant now raises the following assignment of error on appeal:

{¶14} "THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT."¹

{¶15} This matter reaches us upon a grant of summary judgment. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. Therefore, we must refer to Civ.R. 56(C), which provides the following: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶16} Pursuant to the above rule, a trial court may not enter summary judgment if it appears that a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion

¹ We find this assignment implicitly challenges the granting of summary judgment to the plaintiff.

and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. "[B]are allegations by the moving party are simply not enough." *Vahila v. Hall*, 77 Ohio St.3d 421, 430, 674 N.E.2d 1164, 1997- Ohio-259. The moving party must specifically point to some evidence that demonstrates that the moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material fact for trial. *Id.* at 429, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264, 1996-Ohio-107.

{¶17} Furthermore, trial courts should award summary judgment with caution. "Doubts must be resolved in favor of the non-moving party." *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 359, 604 N.E.2d 138, 1992-Ohio-95.

{¶18} It is pursuant to this standard that we review appellant's assignment of error.

I

{¶19} Appellant, in his sole assignment of error, argues that the trial court erred in overruling his Motion for Summary Judgment. We disagree.

{¶20} Appellant, in the case sub judice, specifically contends that the trial court should have considered appellant's second dismissal pursuant to Civ.R. 41(A), which was in Case No. 2004 CV 03013, to be a dismissal on the merits, which appellant maintains would have had "res judicata effect on a third filing of foreclosure."

{¶21} Civ.R. 41 states, in relevant part, as follows: "(A) Voluntary dismissal: effect thereof

{¶22} "(1) By plaintiff; by stipulation. Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

{¶23} "(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;...

{¶24} "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as adjudication upon the merits of any claim that the plaintiff has once dismissed in any court."

{¶25} "The final sentence of Civ.R. 41(A)(1) sets forth the 'two-dismissal rule,' pursuant to which a plaintiff may voluntarily dismiss a claim by notice only once without prejudice." *EMC Mortgage Corp. v. Jenkins*, 164 Ohio App.3d 240, 246, 841 N.E.2d 855, 2005-Ohio-5799. "Civ.R. 41(A) is clear that a second dismissal by a written notice * * * operates as an adjudication on the merits and prohibits the plaintiff from pursuing that claim again." *Fouss v. Bank One, Columbus, NA* (June 27, 1996), Franklin App. No. 96APE01-57, 1996 WL 361969 at 2.

{¶26} "Civ.R. 41 speaks to the effect of the second dismissal, rather than directly barring a third filing of the same action. The rule does not provide an independent mechanism for dismissal of a third filing.Because Civ.R. 41 provides that the second voluntary dismissal has the effect of adjudicating the claim on the merits, the third filing of the same action would be barred by *res judicata*." *Byler v. Hartville Auction, Inc.* (Sept. 26, 1994), Stark App. No. 1994CA00081, 1994 WL 530817 at 2.

{¶27} As is stated above, in the case sub judice, appellee filed a foreclosure action against appellant (Case No. 2004 CV 01259) and then voluntarily dismissed the same without prejudice pursuant to Civ.R. 41(A) via a Notice of Dismissal filed on June 3, 2004. Appellee then filed another action against appellant (Case No. 2004 CV 03013) and then voluntarily dismissed the same without prejudice pursuant to Civ.R. 41(A) via a Notice of Dismissal filed on March 16, 2005. Appellee then filed the complaint in this case on October 26, 2005.

{¶28} However, appellant did not attach copies of the complaints filed in Case Nos. 2004 CV 01259 and 2004 CV03013 to his Motion for Summary Judgment. The same are not part of the trial court's record.² Without copies of the two complaints, this Court is unable to determine whether the claims asserted in the two previous cases are the same as the claims asserted in the case sub judice.³ We cannot, therefore, determine whether the doctrine of res judicata might apply to bar appellee's third complaint.

{¶29} However, we note that appellee, in its response to appellant's Motion to Dismiss, states that "[i]t is true that Plaintiff has brought these proceedings in this Court based upon the default of the note and mortgage that were the subject of the two previous case (sic)." In short, appellee admits that the three actions are based on the same note and mortgage. For such reason, we shall, in the alternative, also address the merits of this appeal.

² Appellant did attach copies of the complaints to his brief. However, App.R. 9(A) limits our consideration to "original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court * * *." This Court, therefore, cannot consider the complaints since they are not part of the record on appeal.

³ In *EMC*, supra., the Court compared the claims set forth in the second complaint for foreclosure, which was voluntarily dismissed pursuant to Civ. R. 41(A), with the claims set forth in the third complaint for foreclosure, in determining that the doctrine of res judicata barred the third complaint.

{¶30} The trial court found that appellee's first two complaints sought the amount of \$164,390.91 plus interest at the rate of 7.35% per annum from November 1, 2003. Appellee voluntarily dismissed the first complaint. Appellee filed the second complaint on September 9, 2004. Appellee then voluntarily dismissed such complaint on March 13, 2005. The second dismissal was, as noted by the trial court, an adjudication on the merits to the extent that appellant was no longer in default and the note would be decelerated. However, we disagree with appellant's contention that such an adjudication on the merits means that the note does not exist. We note that appellant cites no case law in support of such an assertion.

{¶31} On October 26, 2005, appellee filed a foreclosure action against appellant requesting judgment against appellant in the amount of \$164,390.91 plus interest at the rate of 7.35% per annum from November 1, 2003. Subsequently, the trial court, pursuant to an entry filed on February 10, 2006, granted appellee leave to file an amended complaint to change the date of default. Appellee, in its February 10, 2006 Amended Complaint, set forth an April 1, 2005 default date.

{¶32} We concur with the trial court that the April 2005 default date "is after the second dismissal on March 13, 2005 and, therefore, could not have been included in either of the first two actions." As noted by the trial court, the current foreclosure action covers months not litigated in the first two complaints and different dates of default. The April 2005 default date was not included in the first two complaints. We find, therefore, that the trial court did not err when it overruled appellant's Motion for Summary Judgment. We agree that the doctrine of res judicata did not bar appellee's third foreclosure complaint.

{¶33} We acknowledge that the Tenth District Court of Appeals, in *EMC Mortgage Corp. v. Jenkins*, 164 Ohio App.3d 240, 841 N.E.2d 855, 2005-Ohio-5799, which is cited by appellee in his brief, has held that each missed payment under a promissory note and mortgage does not yield a new claim such that any successive actions on the same note and mortgage involve different claims and are exempt from the two-dismissal rule.⁴ The court, in the *EMC* case, held that to rule otherwise “would render the Civ. R. 41(A)(1) two dismissal rule meaningless in the context of foreclosure actions because every successive attempt to foreclosure a mortgage could be considered as a new claim.” *Id.* at paragraph 23.

{¶34} We, however, decline to follow such case. We find that each new missed payment on an installment note is a new claim. Two rule 41(A) dismissals of complaints, which allege the same default dates, would not be an adjudication that the note (debt) is no longer in existence because it has been paid. Rather, it would be an adjudication that the obligor is no longer in default under the terms of the note as of the date alleged and that the entire balance of the note is not due and payable immediately. The balance would still be due per the installment payment arrangements in the note.

{¶35} In addition, the application of Rule 41(A) per the *EMC* case would discourage a lender, such as appellant, from working with a borrower, such as appellee, when the borrower defaults on a mortgage. Frequently, after filing a foreclosure action, a lender will work with the buyer so that the buyer can retain his or her property. The lender will then dismiss the foreclosure action. A lender would not be inclined to do so if a dismissal precluded a bank from eventually foreclosing on a borrower’s property after

⁴ Despite the fact that the complaint and the second complaint contained almost identical allegations, the appellee, in *EMC*, had argued that its claims were based on different acts of default from the claims previously asserted in the earlier complaint.

a default. As a result, the number of foreclosures would increase as would the number of individuals losing their homes.

{¶36} Appellant’s sole assignment of error is therefore, overruled.

{¶37} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.
Hoffman, P.J. and
Farmer, J. concur

JUDGES



IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

EMC Mortgage Corporation et al.,	:	
Appellees,	:	
v.	:	No. 04AP-1319
Jenkins,	:	(C.P.C. No. 02CVE12-14140)
Appellant.	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on November 1, 2005

Lerner, Sampson & Rothfuss and Thomas L. Henderson;
McDonald, Frank, Hitzman & Holman and Robert Holman,
for appellee.

Paul S. Kormanik, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, Judge.

{¶1} In this appeal from a final judgment entry and decree of foreclosure entered by the Franklin County Court of Common Pleas on November 8, 2004, defendant-appellant, Otis L. Jenkins, assigns as error the trial court's denial of his

motion to dismiss the underlying action initiated by plaintiff-appellee, EMC Mortgage Corporation ("EMC"). For the following reasons, we reverse the trial court's judgment.

{¶2} The underlying action is the third successive foreclosure action initiated against appellant in the Franklin County Court of Common Pleas, arising out of an adjustable rate note (the "note") and open-end mortgage (the "mortgage") that appellant allegedly executed on May 12, 2000, through a power of attorney. The Chase Manhattan Bank ("Chase") commenced the first two such actions, whereas EMC commenced the third action, from which appellant presently appeals.

{¶3} Chase filed the first foreclosure action against appellant on August 29, 2001, and dismissed that action by filing a notice of dismissal of its claims without prejudice on October 9, 2001. Chase refiled its claims against appellant on November 13, 2001. On December 16, 2002, the date scheduled for trial of its refiled claims, Chase filed a second notice of dismissal, pursuant to Civ.R. 41(A), purporting to dismiss its refiled claims without prejudice.

{¶4} On December 19, 2002, EMC filed the third foreclosure action against appellant. In its complaint, EMC sought recovery on the same note and foreclosure of the same mortgage that formed the basis of Chase's prior cases. EMC became the holder of the note and mortgage by assignment while Chase's second foreclosure action was pending. Even though Chase and EMC were represented by the same counsel, EMC was not substituted as the plaintiff in the second foreclosure action, which remained pending in Chase's name until Chase voluntarily dismissed it on the date of trial.

{¶5} On April 24, 2003, appellant moved the trial court to dismiss EMC's complaint. Appellant argued that the court lacked jurisdiction over the matter because, pursuant to the two-dismissal rule set forth in Civ.R. 41(A)(1), Chase's voluntary dismissal of its second complaint constituted an adjudication on the merits of the claims now asserted by EMC. EMC opposed appellant's motion to dismiss.¹ After a hearing on appellant's motion, the trial court denied the motion to dismiss and proceeded to trial on EMC's claims, after which the court entered judgment in EMC's favor.

{¶6} The trial court filed its final judgment entry and decree of foreclosure on November 8, 2004. Appellant timely appealed. Interlocutory orders, including the court's denial of appellant's motion to dismiss, are merged into the final judgment; thus, an appeal from the final judgment includes all interlocutory orders merged with it. *Shaffer v. OhioHealth Corp.*, Franklin App. No. 04AP-236, 2004-Ohio-6523, at ¶ 12. Appellant asserts the following assignment of error:

The court below erred when it denied the motion of Otis Jenkins' motion [sic] to dismiss as plaintiff had filed the action twice previously and dismissed both prior actions pursuant to Civ.R. 41(A).

{¶7} Civ.R. 41(A) governs voluntary dismissals of civil actions. Civ.R. 41(A)(1) provides for voluntary dismissal by the plaintiff and provides as follows:

(1) * * * Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

¹ In addition to opposing appellant's motion to dismiss, EMC moved the trial court, pursuant to Civ.R. 60(B), for relief from the judgment of dismissal entered in the second foreclosure action, relying on *Andy Estates Dev. Corp. v. Bridal* (1991), 68 Ohio App.3d 455. In *Andy Estates*, this court recognized a trial court's jurisdiction to rule on the merits of a Civ.R. 60(B) motion for relief from a second Civ.R. 41(A)(1) voluntary dismissal. The trial court denied EMC's Civ.R. 60(B) motion on August 30, 2004, and EMC did not appeal that disposition.

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

The final sentence of Civ.R. 41(A)(1) sets forth the "two-dismissal rule," pursuant to which a plaintiff may voluntarily dismiss a claim by notice only once without prejudice.

"Civ.R. 41(A) is clear that a second dismissal by a written notice * * * operates as an adjudication on the merits and prohibits the plaintiff from pursuing that claim again."

Fouss v. Bank One, Columbus, NA (June 27, 1996), Franklin App. No. 96APE01-57.

{¶8} Rather than providing an independent mechanism for dismissal of a third filing, Civ.R. 41(A)(1) describes the effect of a second dismissal. *Stewart v. Fifth Third Bank of Columbus, Inc.* (Jan. 25, 2001), Franklin App. No. 00AP-258, citing *Byler v. Hartville Auction, Inc.* (Sept. 26, 1994), Stark App. No. 1994CA00081. Once a claim has been dismissed under Civ.R. 41(A)(1)(a), a second dismissal becomes an adjudication on the merits of the claim, barring a third filing of the claim under the doctrine of res judicata. *Farm Credit Serv. of Mid America, ACA v. Mikesell* (May 14, 1997), Coshocton App. No. 96 CA 11, citing *Byler*. The claim-preclusive effect of res judicata provides, " 'A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.' " *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381, quoting

Norwood v. McDonald (1943), 142 Ohio St. 299, paragraph one of the syllabus. The procedural mechanism for asserting that the third filing of a claim is barred by the two-dismissal rule and the doctrine of res judicata is to file a motion to dismiss under Civ.R. 12 or a motion for summary judgment under Civ.R. 56. *Stewart*.

{¶9} In response to EMC's complaint, appellant filed a motion to dismiss, citing no section of Civ.R. 12, arguing that the trial court lacked jurisdiction over the subject matter of EMC's claims based on the Civ.R. 41(A)(1) two-dismissal rule. Despite appellant's phrasing of his argument in jurisdictional terms, it is clear from the record that appellant based his motion on the res judicata effect of Chase's prior dismissals and not on lack of subject-matter jurisdiction. A court does not lack jurisdiction over the subject matter of a lawsuit simply because the affirmative defense of res judicata may apply. See *Gahanna v. Petruziello*, Franklin App. No. 03AP-360, 2004-Ohio-2133, at ¶ 14. Thus, it appears that appellant sought relief pursuant to Civ.R. 12(B)(6), which authorizes a court to dismiss a complaint for failure to state a claim upon which relief can be granted.

{¶10} A motion to dismiss, pursuant to Civ.R. 12(B)(6), is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 548. The movant may not rely on allegations or evidence outside the complaint in support of a motion to dismiss for failure to state a claim upon which relief can be granted, and the court is likewise confined to the averments set forth in the complaint. *Id.* at 548; *Shockey v. Wilkinson* (1994), 96 Ohio App.3d 91, 94. Pursuant to Civ.R. 12(B)(6):

When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such

matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. * *

* All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

Thus, a court may consider matters outside the face of the complaint only if the court converts a Civ.R. 12(B)(6) motion into a motion for summary judgment and notifies the parties of its intention to do so.

{¶11} In his motion to dismiss, appellant referred the trial court to matters beyond the face of EMC's complaint, including Chase's dismissal of its second action against him. In fact, appellant premised his entire motion on the records of Chase's prior actions against him. In its memorandum in opposition, EMC likewise relied on matters outside its complaint and attached evidentiary material for the court's consideration. In its decision and entry denying appellant's motion, the trial court referred to the record of Chase's second foreclosure action and acknowledged its consideration of "the motions, memorand[a], arguments of counsel and the evidence presented[.]" Because the trial court considered matters beyond the face of EMC's complaint, the court, in effect, converted appellant's motion into a motion for summary judgment.

{¶12} The record contains no indication that the trial court gave the parties notice of its intention to convert appellant's motion into a motion for summary judgment. While a failure to give such notice of conversion constitutes error, any such error was not prejudicial because both parties had the opportunity to present evidence in support of their respective positions. See *Reynolds v. Morris* (Sept. 28, 1999), Franklin App. No. 99AP-64, citing *Ins. Co. of N. Am. v. Reese Refrig.* (1993), 89 Ohio App.3d 787, 793.

{¶13} " 'The primary vice of unexpected conversion to summary judgment is that it denies the surprised party sufficient opportunity to discover and bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal, context.' " *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 155, quoting *Portland Retail Druggists Assn. v. Kaiser Found. Health Plan* (C.A.9, 1981), 662 F.2d 641, 645, analyzing comparable provisions of Fed.R.Civ.P. 12(b). The purpose of providing the parties with notice of a court's conversion of a motion to dismiss to a motion for summary judgment is to afford the parties a reasonable opportunity to submit evidence. *Dietelbach v. Ohio Edison Co.*, Trumbull App. No. 2004-T-0063, 2005-Ohio-4902, at ¶ 12. Unexpected conversion may leave the non-moving party at the disadvantage of being unprepared to reply. *Petrey*, 4 Ohio St.3d at 155.

{¶14} In this case, EMC had a reasonable opportunity to, and in fact did, present evidence outside its complaint in opposition to appellant's motion. In response to appellant's motion, EMC submitted an affidavit from its counsel, as well as copies of relevant documents from the prior foreclosure actions, in support of its position that Chase's second dismissal had no effect on EMC's claims. The trial court also conducted a hearing on appellant's motion, at which both parties were represented by counsel. When a party opposing a motion to dismiss based on matters outside the face of its complaint submits evidence outside the complaint in opposition to the motion, the need for notice of the court's conversion of the motion to one for summary judgment no longer exists. *Dietelbach*, 2005-Ohio-4902, at ¶ 12. Therefore, the trial court's failure to give the parties notice of its conversion of appellant's motion from a motion to dismiss into a motion for summary judgment was harmless and does not require reversal where,

as here, all parties had a reasonable opportunity to present relevant evidence in support of their respective positions.

{¶15} In its decision and entry denying appellant's motion, the trial court found the two-dismissal rule, and thus the doctrine of res judicata, inapplicable based on its finding that the claims set forth in Chase's second complaint were not dismissed by the same plaintiff as the claims set forth in Chase's first complaint. The parties do not dispute the underlying facts. Rather, the only disputed issues concern whether the two-dismissal rule rendered Chase's second dismissal an adjudication on the merits and whether the doctrine of res judicata therefore bars EMC's claims. The applicability of res judicata is a question of law, which this court reviews de novo. *Prairie Twp. Bd. of Trustees v. Ross*, Franklin App. No. 03AP-509, 2004-Ohio-838, at ¶ 12.

{¶16} EMC raises various arguments as to why the two-dismissal rule does not preclude its claims. EMC argues that the two-dismissal rule is inapplicable because the first two actions against appellant were dismissed by Chase, a different plaintiff. EMC also argues that its claims differ from those alleged in the prior complaints. Lastly, EMC argues that the two-dismissal rule is inapplicable because appellant consented to the second dismissal. We will address each of EMC's arguments in turn.

{¶17} EMC first argues that the two-dismissal rule does not apply because EMC has not previously dismissed any claim against appellant. While we agree that EMC itself has not previously dismissed any claim against appellant, we disagree with EMC's contention that such fact renders the two-dismissal rule and the doctrine of res judicata inapplicable to its claims. Pursuant to Civ.R. 41(A)(1), "a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in

any court." Civ.R. 41(A)(1) focuses on the plaintiff in the dismissed actions. It is undisputed that Chase filed and, by notice, voluntarily dismissed its claims against appellant for recovery on the note and mortgage in the first foreclosure action. It is further undisputed that Chase refiled those claims in the second action and again filed a notice of voluntary dismissal of such claims. Thus, the plain language of Civ.R. 41(A)(1) suggests that Chase's second notice of voluntary dismissal operated as an adjudication upon the merits of Chase's claims against appellant, including claims for breach of the note and foreclosure of the mortgage now held by EMC.

{¶18} Nothing in Civ.R. 41(A) limits the preclusive effect of a second voluntary dismissal solely to the *plaintiff* who has twice dismissed. Rather, Civ.R. 41(A)(1) simply deems the *claim* twice dismissed adjudicated on the merits. If the adjudicated claim is again refiled, principles of res judicata take over to determine whether the adjudication on the merits bars the refiled claim.

{¶19} The Eighth District Court of Appeals has applied the two-dismissal rule and the doctrine of res judicata to bar a subrogee's claim after the subrogor twice dismissed its claims against a tortfeasor. See *Ohio Dept. of Human Serv. v. Kozar* (1995), 99 Ohio App.3d 713. In *Kozar*, the state, as subrogee of the estate of a deceased moped rider, brought an action against the driver of the automobile that fatally injured the rider, seeking to recover Medicaid benefits expended on behalf of the rider prior to his death. The rider's estate had previously commenced and voluntarily dismissed several actions against the driver for the rider's injuries and wrongful death. In the last of such cases, the court granted summary judgment in favor of the driver based on the two-dismissal rule. Although the state, as subrogee, was not a party to

the previous actions initiated by the estate, the court held that because the estate-subrogor's claims were barred by res judicata under the two-dismissal rule, there was an adverse final judgment binding against the state. *Id.* at 717.

{¶20} Ohio courts do not limit application of the doctrine of res judicata to cases where the parties to the later action are identical to those in the earlier action. Rather, res judicata also applies where there is privity between the parties in the two cases. *Johnson's Island v. Bd. of Twp. Trustees* (1982), 69 Ohio St.2d 241, 244; *Grava*, 73 Ohio St.3d at 381. EMC obtained its interest in the underlying note and mortgage by assignment. "An assignee 'stands in the shoes of the assignor * * * and succeeds to all the rights and remedies of the latter.'" *Siebert v. Columbus & Franklin Cty. Metro. Park Dist.* (Dec. 28, 2000), Franklin App. No. 00AP-583, quoting *Inter Ins. Exchange v. Wagstaff* (1945), 144 Ohio St. 457, 460. An assignee of an interest in a promissory note and mortgage is in privity with its assignor for purposes of res judicata. See *Diversified Financial Serv., Inc. v. Wood* (Sept. 26, 1996), Lawrence App. No. 96 CA 9.

{¶21} EMC accepted assignment of the note and mortgage after Chase had voluntarily dismissed a foreclosure action based on the note and mortgage and had refiled those claims against appellant. When Chase again voluntarily dismissed those claims, that dismissal constituted an adjudication of the claims on the merits in appellant's favor and a dismissal with prejudice. The doctrine of res judicata would bar any further attempt by Chase to recover on the note or to foreclose the mortgage. Because EMC is in privity with Chase and stands in Chase's shoes, res judicata likewise bars any attempt by EMC to recover on those claims.

{¶22} EMC next argues that the two-dismissal rule is inapplicable because its claims differ from the claims previously asserted by Chase. Comparison of EMC's complaint with Chase's second complaint suggests otherwise. With the exception of one additional sentence, which incorporates documents evidencing the assignment of the note and mortgage to EMC, the first two counts of EMC's complaint are identical to the claims Chase alleged in its second complaint. Likewise, EMC's prayer for relief is identical to the prayer for relief in Chase's second complaint. Like Chase, EMC asserts claims for breach of the note and foreclosure of the mortgage. Also like Chase, EMC seeks recovery of the entire principal balance because appellant has not made a single payment on the note.

{¶23} Despite the almost identical allegations in its complaint and Chase's prior complaint, EMC argues that its claims are based on different acts of default from Chase's prior claims. EMC claims that because the note imposed on appellant a continuing obligation to make monthly payments, each failure to pay constituted a separate event of default, giving rise to a new cause of action. EMC's position would render the Civ.R. 41(A)(1) two-dismissal rule meaningless in the context of foreclosure actions because every successive attempt to foreclose a mortgage could be construed as a new claim. EMC cites no legal authority in support of its attempt to distinguish its claims from the claims twice previously asserted and dismissed by Chase.

{¶24} Although Ohio courts have been known to distinguish between claims arising from different events of default in successive foreclosure actions based on the same note and mortgage, the factual scenarios in which courts have done so are distinguishable. In *Aames Capital Corp. v. Wells* (Apr. 3, 2002), Summit App. No.

20703, a mortgagee argued that the doctrine of res judicata barred a second foreclosure action on the same underlying note and mortgage. In the first foreclosure action against Wells, the court entered judgment against Aames and required Aames to reinstate the underlying note and mortgage. Aames filed the second foreclosure action after Wells failed to make required payments on the reinstated note and mortgage. The Ninth District Court of Appeals rejected Wells's res judicata defense, finding that the claims in the second action differed from those asserted in the first action. Likewise, in *Midfed Sav. Bank v. Martin* (July 13, 1992), Butler App. No. CA91-12-202, the Twelfth District Court of Appeals rejected a mortgagee's argument that the doctrine of res judicata barred a second foreclosure action. In that case, the defendant-mortgagee brought her loan current before execution of the judgment entered in the first foreclosure action. The plaintiff filed the second foreclosure action after the defendant-mortgagee again became delinquent on her loan. The court noted that the judgment entry in the first action explicitly stated that the claim related only to the delinquency that had arisen up to the date of judgment. The court thus found that the later delinquency was "entirely distinct" from the first delinquency. *Id.*

{¶25} Relying on *Wells* and *Martin*, the First District Court of Appeals held that a Civ.R. 41(A)(1) dismissal by the assignee of a note and mortgage is not a second dismissal where the assignor had previously dismissed a foreclosure action voluntarily. See *Homecomings Financial Network, Inc. v. Oliver*, Hamilton App. No. C-020625, 2003-Ohio-2668, at ¶ 7. However, like in *Wells* and *Martin*, the court was able to differentiate the claims asserted in the second action from those asserted previously. In *Oliver*, the First District noted that the assignee's claims differed from the assignor's

previously asserted claims because the assignee's claims involved different rates of interest and different amounts of principal owed. *Id.* In the case presently before us, no such differences distinguish EMC's claims from Chase's previously dismissed claims.

{¶26} Appellant has not made the first payment on the note. Thus, appellant has continually remained in default since his first missed payment and throughout the three foreclosure actions commenced against him. At no time has appellant cured his default or had his loan reinstated. All three foreclosure complaints have sought judgment for the entire amount of principal due under the note, with accrued interest, late charges, advances for taxes and insurance, and costs. Unlike the scenarios in *Wells* and *Martin*, neither of the previous foreclosure actions against appellant dealt exclusively with previous amounts due. Rather, in each of the three cases against appellant, the plaintiff has sought the same relief. *Oliver* does not stand for the broad proposition that each missed payment under a promissory note and mortgage yields a new claim, such that any successive actions on the same note and mortgage involve different claims and are, thus, exempt from the two-dismissal rule.

{¶27} EMC also argues that its claims differ from those asserted by Chase because its complaint contains a claim for unjust enrichment, which Chase did not plead. The addition of an unjust enrichment claim does not save EMC's complaint from application of *res judicata*. In order for *res judicata* to bar a subsequent action, the claims asserted therein need not be identical to the claims asserted in the prior action. Rather, "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava*, 73 Ohio St.3d 379, syllabus. The fact that a

number of different legal theories may cast liability on an actor arising out of a given episode does not create multiple transactions or claims. *Id.* at 382, citing Comment c to 1 Restatement of the Law 2d, Judgments (1982), Section 24(1), at 200. EMC's claim for unjust enrichment arises out of the same transaction or occurrence as the claims for breach of the note and foreclosure asserted in Chase's previous complaints and reasserted by EMC herein. EMC's unjust-enrichment claim is based on the allegation that appellant was enriched by the proceeds of the loan underlying the note and mortgage and that such enrichment would be unjust in the absence of payment by appellant. Because EMC's unjust-enrichment claim arises out of the same transaction or occurrence as the foreclosure claims previously asserted against appellant, the doctrine of *res judicata*, if otherwise applicable, bars litigation of EMC's unjust-enrichment claim as well as its other claims.

{¶28} In its final argument, EMC suggests that at the time of Chase's second dismissal, both appellant and the trial court understood that the action would be refiled. Therefore, EMC argues that the second dismissal does not implicate the two-dismissal rule. Civ.R. 41(A) provides for three types of voluntary dismissals: (1) by notice, (2) by stipulation, and (3) by court order. For the two-dismissal rule to apply, both dismissals must be Civ.R. 41(A)(1)(a) dismissals by notice. *Internatl. Computing & Electronic Eng. Corp. v. Ohio Dept. of Adm. Serv.* (May 9, 1996), Franklin App. No. 95API11-1475. The two-dismissal rule does not apply where the second dismissal is made by stipulation of the parties or by court order. Rather, Ohio courts have held that the rule applies only to unilateral notices of dismissal filed by the plaintiff. *Luciani v. Schiavone* (C.A.6, 2000), 210 F.3d 372 (unpublished opinion, 2000 WL 331974).

{¶29} In support of its argument that the second dismissal was not a unilateral dismissal by notice, EMC points to the affidavit filed in opposition to appellant's motion to dismiss. EMC's counsel, Thomas L. Henderson, who represented Chase in the second foreclosure action and whose law firm represented Chase in the first foreclosure action, executed the affidavit. In his affidavit, Mr. Henderson states, "Based upon representations made during the in chambers conference [on the scheduled trial date], I believed that counsel for [appellant] agreed to the dismissal of the Complaint[.]" Mr. Henderson also stated that "[c]ounsel for [appellant] walked with me to the Clerk's office to file the Notice of Dismissal, at which time we discussed how the case would proceed either in Probate Court or in Common Pleas upon a re-filing. I believed that both counsel for [appellant] and the Court were in agreement as to the dismissal."

{¶30} The document dismissing the second foreclosure action is entitled "NOTICE OF DISMISSAL" and reads: "Now comes the Plaintiff, by and through counsel, pursuant to Rule 41(A) of the Ohio Rules of Civil Procedure, to hereby give NOTICE [o]f dismissal of Plaintiff's Complaint, without prejudice." The notice of dismissal is signed only by Chase's counsel and contains no signature line for either appellant's counsel or the trial court. The unambiguous language of the notice of dismissal, coupled with the lack of signature lines for opposing counsel and the court, demonstrates that Chase dismissed the second foreclosure action by notice pursuant to Civ.R. 41(A)(1)(a). See *Internatl. Computing*, Franklin App. No. 95API11-1475. The fact that appellant's counsel and the court participated in discussions regarding the case immediately prior to dismissal and did not object to appellant's stated intention to dismiss the case does not alter the inescapable conclusion that Chase's voluntary

dismissal was unilaterally accomplished by notice pursuant to Civ.R. 41(A)(1)(a). *Id.*, distinguishing *Graham v. Pavarini* (1983), 9 Ohio App.3d 89, 94.

{¶31} In *Internatl. Computing*, Franklin App. No. 95AP111-1475, the plaintiff made a similar argument that a second dismissal was not a dismissal by notice under Civ.R. 41(A)(1)(a) but, rather, a stipulation of dismissal. Therein, the plaintiff filed a document entitled "NOTICE OF VOLUNTARY DISMISSAL," which cited Civ.R. 41(A)(1) and utilized language ostensibly in the plaintiff's voice. Plaintiff's counsel signed the notice of dismissal. Additionally, at the bottom of the page, defense counsel also signed the notice of dismissal. This court found that defense counsel's signature, appearing at the bottom of the page and not accorded status equal to the signature of plaintiff's counsel, was merely an acknowledgment rather than a stipulation. Thus, we concluded that the dismissal was made by notice, pursuant to Civ.R. 41(A)(1)(a), and implicated the two-dismissal rule. In this case, we likewise find that dismissal of the second foreclosure action was accomplished by notice and not by stipulation of the parties. The belief of Chase's counsel, who now represents EMC, that appellant's counsel was unopposed to the second dismissal does not alter that conclusion. Therefore, the two-dismissal rule renders that dismissal an adjudication on the merits.

{¶32} Chase voluntarily dismissed its second foreclosure action by notice, pursuant to Civ.R. 41(A)(1)(a), having previously dismissed its claims in the first foreclosure action in the same manner. Pursuant to Civ.R. 41(A), its second dismissal constituted an adjudication on the merits of the claims asserted therein. Upon review, we conclude that the doctrine of *res judicata* bars EMC's claims and that the trial court erred by failing to dismiss EMC's claims. Therefore, we sustain appellant's assignment

of error, reverse the judgment of the Franklin County Court of Common Pleas, and remand this matter with instructions to dismiss EMC's claims.

Judgment reversed
and cause remanded.

PETREE and TRAVIS, JJ., concur.