

COPY

IN THE SUPREME COURT OF OHIO

U.S. BANK NATIONAL ASSOCIATION	:	
AS TRUSTEE	:	CASE NO. 2007-1144
	:	
Appellee,	:	On Appeal from the
	:	Stark County Court of Appeals
v.	:	Fifth Appellate District
	:	
GIUSEPPE GULLOTTA, et al.	:	
	:	
Appellant.	:	

**MERIT BRIEF
OF APPELLEE U.S. BANK NATIONAL ASSOCIATION**

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CERTIFIED ISSUE BEFORE THE 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).

STATEMENT OF THE FACTS

Appellee agrees with the Statement of Facts as presented by Appellant.

ARGUMENT

Proposition of Law No. 1:

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).

A. Introduction:

As posed by Appellant and designated by this Honorable Court, the query remains: 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). Appellee would submit that the answer, in this and similarly situated circumstances is “yes.” To arrive at this answer, Appellee would submit that a review of Civ. R. 41(A)(1), the doctrine of *res judicata*, relevant case law and the specific circumstances of this case are required.

B. Civ. R. 41:

Civ. R. 41 states, in relevant part:

(A) Voluntary dismissal: effect thereof.

(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:

(a) filing a notice of dismissal at any time before the commencement of trial ...

- (b) filing a stipulation of dismissal signed by all parties that 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.

As presented by Appellant, Civ. R. 41(A) makes no mention of its application to installment promissory notes, particularly those tied to mortgage deeds securing real property. As further presented by Appellant, it is the final sentence of Civ. R. 41(A) that establishes the “two-dismissal rule.” Simply stated, the second dismissal of a claim previously asserted by a party, and dismissed, operates as an adjudication on the merits, therefore precluding the party from reasserting the exact claim again.

As this very Court held in Grava v. Parkman Twp. (1995), 73 Ohio St. 3d 379, 653 N.E.2d 226, “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.” Further, this Court noted, “a transaction is defined as ‘a common nucleus of operative facts.’” The United States District Court, Southern District of Ohio, reiterating this Honorable Court in Ater v. Follrod (2002), 238 F. Supp. 2d 928, 2002 U.S. Dist. LEXIS 19145, stated, “In determining whether a subsequent complaint involves the “same claim” for purposes of the double dismissal rule, Ohio courts have adopted the claim preclusion standards set forth by the Ohio Supreme Court in Grava v. Parkman Township.” Additionally citing, Forshey v. Airborne Freight Corp. (2001), 142 Ohio App. 3d 404, 755 N.E.2d 969; Fouss v. Bank One, Columbus (1996), 1996 Ohio App. LEXIS 2761, 1996 WL 361969; Stewart v. Fifth Third Bank of

Columbus (2001), 2001 Ohio App. LEXIS 197, 2001 WL 58727; Farm Credit Serv. Of Mid-America v. Mikesell (1997), 1997 Ohio App. LEXIS 2325

Appellee would submit that the default date included in Appellee's Amended Complaint (Appellant's Supp. 73), and ultimately the default date Appellee was granted judgment upon, was a distinct claim separate and apart from the default date alleged in Appellee's First Complaint (Appellant's Supp.1) and Second Complaint (Appellant's Supp. 25) and, as such, the "two-dismissal rule" does not apply in this instance.

As stated previously, for Civ. R. 41(A)(1) to apply, the actions dismissed must be based on, or include, the same claim arising out of the same transaction. In determining whether or not two cases involve the same cause of action, or whether they arose out of the same transaction, the court must consider the facts that create the cause of action and the evidence needed to sustain each action. Federated Management Co. v. Latham & Watkins (2000), 138 Ohio App. 3d 815, 742 N.E.2d 684. Sections 24 and 25 of the Restatement of Judgments conclude, in part, that in determining whether two claims are the same, the court should consider the overlap of the facts and the witnesses necessary to sustain each claim. In this instance, the allegations as contained in Appellee's Amended Complaint are not based on the same claims as presented in Appellee's second foreclosure, subsequently dismissed and, as such, Appellee's Amended Complaint presented a new claim for relief.

C. Res judicata:

It is Appellant's position that Appellee's dismissal of its Complaint in Foreclosure, designated case number 2004 CV 03013 and dismissed on March 16, 2005 (Appellant's Supp. 47), acted as an adjudication on the merits, therefore precluding

Appellant from ever again pursuing Appellee for default. To construe the situation as presented by Appellee would ultimately limit a mortgagee, such as Appellant, to two foreclosure complaint filings; no matter how many times mortgagors fall into default. Appellee submits that Appellant has misinterpreted the case law underlying *res judicata* under these circumstances:

“With regard to the claim-preclusive effect of the doctrine of *res judicata*, 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. A judgment or decree in a former action does not bar a subsequent action where the causes of action are not the same, even though each action relates to the same subject matter. To determine whether a second action was barred by this rule of law, one of the primary considerations was the identity of the evidence necessary to sustain each action.” *Grava v. Parkman Twp* (1995), 73 Ohio St. 3d 379, 653 N.E.2d 226.

The Twelfth District Court of Appeals found in *Midfed Savings Bank v. Ruby G. Martin* (1992), 1992 Ohio App. LEXIS 3677, when determining whether or not the doctrine of *res judicata* operated to preclude a complaint in foreclosure, one must look to the subsequent filing and whether it related to a later delinquency in payments, which could not have been litigated in the first filing, therefore determining whether it was a distinct claim and not barred by the doctrine of *res judicata*. In *Midfed*, plaintiff filed foreclosure proceedings against defendant in 1984. Shortly before the judgment was executed, the defendant became current on the loan and the plaintiff dismissed the case with prejudice. The defendant remained current on the loan until 1991 when the defendant again defaulted on the loan. The plaintiff filed a second foreclosure action with the trial court. The plaintiff was granted summary judgment and the defendant appealed. On appeal, the defendant argued that the second foreclosure action was barred by *res judicata*. The issue

that the court had to resolve was “whether the claim decided in the 1984 foreclosure action was identical to the claim raised in the 1991 action.” Id. at 6. The court concluded that the two claims were distinct. The court held that the 1991 foreclosure action related to a later delinquency in payments:

“This delinquency in payments, which was entirely distinct from the first delinquency sued upon, formed the basis of the 1991 action. The later delinquency was not, and could not have been, litigated in the first suit. As such, the claim was not barred by *res judicata*.” Id. at 7 (emphasis added).

Consequently, the appellate court affirmed the trial court’s judgment for the plaintiff.

The Ninth District Court of Appeals, in *Ames Capital Corporation v. Wells* (2002), 2002 Ohio 1498, was faced with a similar situation. In *Ames*, plaintiff filed a complaint for foreclosure against defendant in February 1997. The trial court entered judgment for the defendant in March 1998 ordering the plaintiff to reinstate the mortgage and pay the defendant’s court costs. Thereafter, the defendant refused to make any further payments on the loan due to the plaintiff’s refusal to pay the judgment rendered against it at the trial. The original loan remained in default and, as a result, the plaintiff filed a second complaint for foreclosure in August 1998. The defendant did not answer in the second case and default judgment was rendered against him in November 1998 granting relief prayed for in the complaint and interest on the judgment back to November 1996, the date of the original default. The defendant appealed. Among his contentions was that the issues raised in the second complaint were *res judicata* based upon the March 1998 judgment. The court held that the second complaint was not barred by *res judicata*.

As discussed..., the first foreclosure action was based upon [the defendant’s] alleged failure to make the required monthly payments prior to February 1997 when [the plaintiff’s] first complaint for foreclosure was filed. The current action, on the other hand, covers

months not litigated in the first foreclosure action. As the bases for the two complaints were different, the present action is not barred by *res judicata*. Id. at 13-14.

Accordingly, the ruling of the trial court was affirmed.

Of quite some consequence, and what has prompted the instant proceeding before this Honorable Court, is the Tenth District Court of Appeals decision in EMC Mortgage Corp. v. Jenkins (2005) 2005 Ohio 5799, 2005 Ohio App. LEXIS 5226. Stated simply, Chase Bank, the prior holder of the promissory note and mortgage deed at issue, filed two foreclosure actions based upon defendant's first-payment default. Both actions were subsequently dismissed. The promissory note and mortgage deed were thereafter assigned to EMC. EMC initiated a third foreclosure action based upon defendant's first-payment default. Ultimately, the Tenth District held that Chase Bank's second dismissal acted as an adjudication on the merits and, therefore, EMC's third foreclosure filing was *res judicata*.

The Tenth District found that EMC's allegations were identical to the allegations presented by Chase Bank in the previous two foreclosure actions. Specifically, the Tenth District found that EMC sought relief based upon the exact default date and requesting recovery of the identical principle balance, including interest from the original default date, as Chase Bank has done on two previous occasions. Further, the Tenth District rejected the argument presented by EMC that each event of default gave rise to a new cause of action. As Appellant has presented, the Tenth District distinguished its decision from Midfed Savings Bank v. Ruby G. Martin (1992), 1992 Ohio App. LEXIS 3677 and Aames Capital Corporation v. Wells (2002), 2002 Ohio 1498. In summary, the Tenth District determined that as defendant (Jenkins) did not cure the first-payment default, and as

each complaint filed requested the same judgment on the entire principal due, including accrued interest and advances, Chase Bank and EMC each requested the identical relief, premised upon identical claims; they did not deal with previous amounts due. That is not the case in the instant matter.

Admittedly, Appellee, within its first, second and third foreclosure filings, including Appellee's Amended Complaint, requested an identical principal balance. Appellee's first and second foreclosure action demanded judgment against Appellant in the sum of \$164,390.91 at 7.35% interest from November 1, 2003, with advances made pursuant to the terms of the mortgage. Appellee's third foreclosure action, however, demanded judgment against Appellant, alternatively, in the sum of \$164,390.91 at 7.35% interest from April 1, 2005, with advances made pursuant to the terms of the mortgage. It was upon this alternative demand that the trial court granted judgment, for which the Fifth District affirmed. Unlike *EMC*, in which Chase Bank and EMC demanded the identical principle balance and advances from the date of defendant's first-payment default, Appellee in the instant matter, with its alternative demand, did not revert back to the November 1, 2003 default date, but rather relinquished that demand premised upon the dismissal of its second foreclosure filing.

Appellee has definitively changed the claim by adjusting the default date, which substantially changed the amount of damages to which Appellee is entitled. Specifically, Appellee must relinquish its ability to collect 17 monthly payments from Appellant which, roughly, equates to over \$17,000.00 in interest. Additionally, Appellee must relinquish its ability to collect on advances made on behalf of Appellant, including taxes and insurance, equating to roughly \$4,000.00. Appellee would further state that

Appellant, upon Appellee's dismissal of its second foreclosure filing, would have had every opportunity to begin making payments, beginning April 1, 2005, secure in the belief that Appellee could not attempt to collect for those payments and advances from November 1, 2003 through March 1, 2005. As admitted, the principle balance did not change, but the entire judgment, including accrued interest and advances, was reduced significantly premised upon the April 1, 2005 default date. In that, Appellee would submit this Honorable Court can distinguish, in part, EMC from the Fifth District's decision in this matter. Converse to Appellant's statement, the claim against Appellant did, in fact, change.

D. Acceleration of the promissory note:

It is Appellant's contention that promissory note securing the mortgage deed in this matter is an installment contract that, upon default, was accelerated, therefore merging all payments in arrears, and all future payments, into one. Further, Appellant submits that once a promissory note is accelerated and a claim for the entire balance of the note is made, a second voluntary dismissal of the claim is subject to the "two-dismissal rule" and any future claim is barred by *res judicata*. In support of this contention, Appellant provides case law from the Supreme Judicial Court of Maine, Johnson v. Samson (1997), 1997 ME 220, 704 A.2d 866. A review of Johnson reveals that the facts are similar to the instant matter, however, it is not precedent in this state, nor is Johnson wholly consistent with relevant case law in Ohio. The Court in Johnson awarded a complete windfall to defendant; a result clearly at odds with the equities of the situation.

Appellant's argument concerning the acceleration of a promissory note, in which all payments in arrears and all future payments are merged, is entirely understandable. In circumstances surrounding a promissory note secured by a mortgage deed, however, there must be some differentiation. Appellee can envision a rather simple example in which Appellant's argument is entirely inequitable and simply does not conform to public policy.

The environment today is ensnared in what many consider a foreclosure dilemma, with the state of Ohio being one of the worst affected. At times, once a foreclosure is filed, the matter is dismissed by plaintiff for a variety of things, including, but not limited to, procedural grounds. Envisioning such a scenario, in which the first foreclosure is voluntarily dismissed, the assumption is that the likelihood is rather high that a second foreclosure will be filed. In both instances, pursuant to Appellant's reasoning, the promissory note securing the mortgage deed has been accelerated and, as such, the second filing is plaintiff's last bite at the apple. Assuming further, for the sake of argument, that pursuant to the second foreclosure proceeding, plaintiff and defendant agree on reinstatement of defendant's obligation. As a result, defendant does, in fact, reinstate the obligation and the matter is, again, voluntarily dismissed by plaintiff. The result, according to Appellant's reasoning, is that the two foreclosures, both demanding judgment on the entire debt and both dismissed, constitute plaintiff's sole remedies on defendant's default. To clarify, if defendant in the hypothetical situation above were to fall into default following reinstatement and dismissal of the second foreclosure, could plaintiff, once again, accelerate the debt and pursue foreclosure? According to Appellant's reasoning, that answer is "no" as plaintiff already accelerated the note,

demanding all future payments in the earlier foreclosure actions. Any future default by the hypothetical defendant, even if it were 5 years subsequent to the second, dismissed foreclosure, would be *res judicata*. How is that situation equitable? Appellant states that “where the lender has not accelerated the installment payments and/or the debtor has cured the default, a different conclusion may be reached.” (Appellant’s Brief, 20). Acceleration clauses are standard in mortgage loans, and have been for quite some time. Further, and in this matter, Appellant’s default was “cured,” though, admittedly, through no affirmative steps taken by Appellant. As of April 2005, Appellant was current and he failed to submit any further payments upon his obligation.

Appellee would submit that the particular circumstances of this action are unique, as are the hypothetical circumstances as referenced above. Appellee could understand Appellant’s stance in this matter if Appellee had been granted judgment reaching back to November 1, 2003. That is not the case, however. Once Appellee’s second foreclosure action was voluntarily dismissed, Appellant was realistically current on his mortgage loan obligation from the date of that voluntary dismissal. In fact, pursuant to Appellee’s alternative demand, Appellant was deemed current as of April 1, 2005. As such, Appellant could have resumed his payments in April of 2005 without fear that he could be held responsible for November 2003 through March 2005. Appellant, however, presumably in pursuit of the “dead mortgage” argument made before the trial and appellate court, consciously decided not to continue to perform his obligations.

As the Fifth District held, two voluntary dismissals would not be an adjudication that the debt is “no longer in existence,” but rather that the mortgagor 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.” (Appellant’s Brief, App. 15). In the instant matter, the original date alleged (November 1, 2003) was no longer the default date and the entire balance, from November 1, 2003, was not due; rather, the default date, upon Appellant’s failure to submit payment after the second, voluntary dismissal, was April 1, 2005 and the entire balance, excepting the interest and advances that accrued from November 1, 2003 through March 1, 2005, was due. To find otherwise would be to deem Appellant’s obligation released, the mortgage deed subsequently invalid, and, further, provide a inequitable windfall to Appellant for clearly and admittedly failing to abide by the obligations he entered into when purchasing his home.

CONCLUSION

The Fifth District Court of Appeals decision and reasoning, under the circumstances, was entirely correct. To find otherwise would be inequitable and provide a rather unique, but entirely plausible, avenue for mortgagor’s to evade their obligations under a promissory note securing a mortgage deed, resulting in the invalidation of a lender’s future right to enforce the obligation upon default.

Respectfully submitted,



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PROOF OF SERVICE

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