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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).

ARGUMENT

Proposition of Law No.1:

Each missed payment under a promissory note and mortgage does not yield a new claim and therefore successive actions on the same note and mortgage are not exempt from the 'two-dismissal rule' contained in Civ. R. 41(A)(1) where the holder of the note accelerates the future payments and makes a claim for the entire amount of principal under the note.

A. Civ. R. 41(A)(1) and Res Judicata.

Appellee admits the facts as set forth in the Merit Brief of Appellant. (Appellee's Brief, 1). Appellee agrees with the legal analysis required to determine the issue before the Court (Id., 1, 2) and agrees with the interpretation of the statutory and case law set forth in Appellant's Brief. (Id., 3, 4, 5, 6). Appellee admits it accelerated the promissory note upon Appellant's first missed installment payment, November 1, 2003, and that its first, second and third foreclosure complaints against Appellant "requested an identical principal balance." (Id., 7).

Appellee is in complete agreement with the facts, law, and analysis of Appellant's argument. Appellee does not set forth any argument or analysis in support of its proposition that each missed payment under an installment promissory note and mortgage is a new claim. Without any supporting legal analysis, Appellee merely asserts that its third claim against Appellant is not barred by *res judicata* and the 'two-dismissal rule' of Civ. R. 41(A)(1). Appellee fails to offer any facts or law in support of this conclusion.

Appellee states merely that “Appellee has definitively changed the claim by adjusting the default date, which substantially changed the amount of damages to which Appellee is entitled.” (Id.) Astonishingly, Appellee admits it “changed” its claim against Appellant, unilaterally, **“premiered upon the dismissal of its second foreclosure filing”**. (Id.) Appellee admits Appellant made no payments on the installment note after the original November 1, 2003 missed payment. Appellee admits the installment note and mortgage was accelerated as of November 1, 2003. Appellee admits it selected the date of default for its third claim against Appellant **PREMIERED** on the specific purpose of avoiding the implication of Civ. R. 41 and *res judicata* (not premiered upon a subsequent missed payment by Appellant).

Appellee does not address the issue before the Court and does not argue that each missed payment under an installment promissory note and mortgage yields a distinct claim. **Appellee argues its third complaint against Appellant is a distinct claim only because Appellee demands a lesser amount of interest than it demanded in its two previously filed and dismissed actions.** Appellee offers no reasoning, and more importantly offers absolutely no legal analysis, as to why a holder of an accelerated installment note can avoid implication of the law by choosing to “relinquish” a portion of its claim. An accurate illustration of Appellee’s argument is thus: the plaintiff files a personal injury claim for \$10,000.00; the plaintiff voluntarily dismisses its claim twice; the plaintiff then files the same personal injury claim for \$9,500.00; therefore, the plaintiff has filed a distinct claim which is not barred by the ‘two-dismissal rule’ and *res judicata*.

Appellee fails to set forth any sound analysis or reasoning in support of its proposition that each successive missed payment under an installment promissory note and mortgage yields a new claim. Appellee fails to set forth any sound analysis or reasoning in support of its conclusion. Thus, Appellee's argument fails.

B. A Holder of an Installment Promissory Note that Accelerates all Future Payments Upon Default and Declares the Entire Principal Immediately Due and Owing Cannot Subsequently Relinquish a Portion of its Claim to Avoid *Res Judicata*.

Appellee admits as "understandable" Appellant's analysis of an acceleration clause in an installment promissory note and mortgage and the conclusion that upon acceleration all future payments are merged. (Appellee's Brief, 9).

Appellee acknowledges the holding in *Johnson v. Samson Construction Corp.*, but claims merely that the decision of the Maine court in *Johnson* is not binding upon this Court and that a windfall to Appellant, by barring Appellee's third claim, is "clearly at odds with the equities of the situation." (Appellee's Brief, 8). The *Johnson* court noted this argument of a windfall and held:

Johnson cannot avoid the consequence of his procedural default...by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit.

Id. at 869. In a footnote to this holding, the Maine court writes:

Johnson argues that if the dismissal with prejudice of his first suit bars a subsequent action on the note, Samson will receive a windfall. Such a windfall may occur in any case where a party defaults on a procedural obligation.

Id. at Footnote 1.

This Court has long accepted the rationale behind *res judicata* and the 'two-dismissal rule'. See *Federated Dept. Stores, Inc. v. Moitie* (1981), 452 U.S. 394, 401,

101 S. Ct. 2424; *Fry Singer v. Leech* (1987), 32 Ohio St. 3d 38, 512 N.E.2d 337.

Whenever the 'two-dismissal rule' is applied to bar the filing of a third action, the plaintiff cannot pursue its claim and the defendant arguably will receive a windfall. Such is the reasonable, intended, and accepted, balance struck by the legislature in enacting the 'two-dismissal rule' of Civ. R. 41(A)(1).

Appellee's argument, that to rightly invoke *res judicata* in accordance with Civ. R. 41(A)(1) and bar its third action will result in a windfall to Appellant, is without merit.

Appellee argues it is Appellant's argument that gives a mortgage holder only "two bites at the apple". (Appellee's Brief, 10). It is the law that gives a plaintiff only two voluntary dismissals of the same claim, not Appellant. Appellee then presents a hypothetical situation which purportedly would violate fairness and public policy. In Appellee's hypothetical illustration, a separate and distinct claim is, in fact, raised by the third filing, to wit: if a note is re-instated and payments made subsequent to a second dismissal, a third foreclosure would be upon a new date of default, a new amount of principal and a novation of the original note. Once again, Appellee's argument fails.

Appellee's fiction of unilaterally declaring a new date of default, premised upon its own maneuvering around the law, is neither a reasoned nor legitimate exception to the 'two-dismissal rule' of Civ. R. 41(A)(1).

The arguments as set forth in Appellee's Brief are each without merit and must fail.

CONCLUSION

Appellee fails to set forth any reasoning as to how each missed payment under an installment promissory note and mortgage would yield a new claim. Instead, Appellee argues only that it created a new claim against Appellant by choosing to relinquish its demand for interest accrued up to the date of the voluntary dismissal of its second action against Appellant. A plaintiff cannot unilaterally choose a date a default and relinquish a portion of its claim purposefully to avoid the 'two-dismissal rule' of Civ. R. 41(A)(1).

The decision of the Fifth District Court of Appeals is wrong in its reasoning and must be reversed. When a plaintiff accelerates all installment payment obligations under an installment promissory note and files a claim for the entire balance of the note plus interest, a second voluntary dismissal of its claim is subject to the 'two-dismissal rule' of Civ. R. 41(A)(1).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of Appellant's Reply Brief was sent by regular U.S. Mail to counsel of record for appellees, John A. Polinko, 1500 West Third Street, Suite 400, Cleveland, Ohio 44113 and Katie Chawla, Stark County Prosecutor's Office, 110 Central Plaza South, Suite 510, Canton, Ohio 44702 on this 2nd day of January, 2008.



Timothy D. McKinzie