

FLORIDA NEW DEFAULT GIVES NEW RIGHT TO FORECLOSE

The Florida First District Court of Appeal recently affirmed a trial court's dismissal of a follow up foreclosure action based on res judicata to the extent the default date was the same as that in the first action, which had been dismissed for failure to prosecute.

However, the Court reversed the trial court's dismissal of the foreclosure action with prejudice and cancellation of the note and mortgage as a sanction because the trial court failed to make the requisite findings of fact.

In addition, the Court held that Florida law allows a subsequent foreclosure action based on subsequent and different failures to make mortgage payments.

A copy of the opinion is available at: https://edca.ldca.org/DCADocs/2013/6217/136217_1286_05082015_025410_i.pdf.

Two borrowers signed a promissory note and mortgage in 2008. The mortgagee sued to foreclose the mortgage in December 2010, alleging in the complaint that the borrowers defaulted by failing to make the payments due on June 1, 2010 and all payments coming due thereafter. The mortgagee failed to move the case forward, however, resulting in dismissal in July 2012 after the mortgagee's counsel failed to respond to a show cause order and attend the hearing.

Eight months later, in March 2013, the mortgagee filed a second and follow up foreclosure action. The complaint in the second action reflected the same default date as the first action.

The borrowers moved to dismiss on the basis of res judicata. In response, the trial court directed the mortgagee to show cause why the second and follow up foreclosure action should not be dismissed. Instead of responding to the order, however, the mortgagee filed a notice of voluntary dismissal.

The trial court was not satisfied with the mortgagee's voluntary dismissal. The trial court struck the mortgagee's voluntary dismissal, sanctioned the lender for willfully failing to file a written response to the show cause order and, for good measure, canceled the mortgage and note

and enjoined the lender from re-filing any action on the note without leave of court.

The trial court also entered a second order that denied the mortgagee's motion to re-file a foreclosure action with a different default date. The mortgagee appealed.

On appeal, the mortgagee stipulated that it was barred from bringing a second foreclosure action based on the same default date as the first dismissed action, but argued that the trial court's cancellation of the note and mortgage barred a subsequent foreclosure action altogether, regardless of the default date, and conflicted with the Florida Supreme Court's decision in *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla.1993).

In *Kozel*, the Florida Supreme Court set forth a six-part test requiring the trial court to make findings of fact before dismissing the case as a sanction. Subsequent decisions established clearly that the failure to make express findings of fact based on the *Kozel* test is an abuse of discretion.

In its dismissal order, the trial court neither made the express findings of fact required by *Kozel*, nor distinguished between wrongdoing by the mortgagee's counsel and the mortgagee itself, despite counsel admitting he was at fault for mistakenly believing a voluntary dismissal would suffice as a response to the first show cause order.

Given these facts, the First DCA reversed the dismissal with prejudice, cancellation of the debt, and the barring of the filing of a subsequent foreclosure action as a sanction.

The Appellate Court then separately addressed whether the lender could file a third foreclosure action, stressing that the 30-year mortgage involved in the case required the borrowers to make payments until 2038.

The First DCA held that the dismissal of the first foreclosure action, filed in 2010, did not absolve the borrowers of the obligation to make mortgage payments for the remaining 25 years. Instead, relying upon the Florida Supreme Court's seminal case of *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004) and its progeny, the Appellate Court concluded that if the borrowers continued to fail to make mortgage payments after the dismissal of the 2010 case, these subsequent and different missed payments could give rise to a new foreclosure action.

The First DCA ruled that, because the doctrine of res judicata, under Singleton, does not preclude a subsequent foreclosure action based on a subsequent, different default, the trial court's refusal to permit the filing of another foreclosure action was error.

Accordingly, the First DCA affirmed the trial court's dismissal order to the extent that the default dates between the first and second actions overlapped, but reversed the dismissal with prejudice, cancellation of the debt, and denial of leave to re-file a new foreclosure action, remanding with instructions to enter an order permitting the lender to re-file its foreclosure action based upon post-2010 defaults.