NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

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| NATIONSTAR MORTGAGE, LLC,<br><br>Appellant,<br><br>v.<br><br>EARNEST EDWARD GLISSON a/k/a Earnest E. Glisson; STACEY NICHOLE GLISSON a/k/a Stacey N. Glisson; and VALENCIA OF HILLSBOROUGH HOMEOWNERS ASSOCIATION, INC.,<br><br>Appellees. | ) | Case No. 2D18-686 |

Opinion filed December 27, 2019.

Appeal from the Circuit Court for Hillsborough County; Rex Barbas, Judge.

Jason R. Bowyer, Sara F. Holladay-Tobias, and Emily Y. Rottmann of McGuireWoods LLP, Jacksonville, for Appellant.

Lee Segal of Segal & Schuh Law Group, P.L., Clearwater, for Appellees Earnest Edward Glisson and Stacey Nichole Glisson.

No appearance for Appellee Valencia of Hillsborough Homeowners Association, Inc.

BLACK, Judge.

Nationstar Mortgage, LLC, challenges the final judgment dismissing its foreclosure lawsuit against Earnest and Stacey Glisson. The trial court granted the Glissons' day-of-trial motion for judgment in their favor, finding that the resolution of a prior foreclosure action on the same property required Nationstar to mail a new, postdismissal default notice in order to satisfy paragraph 22 of the mortgage and maintain the new action. Nationstar contends that the prior foreclosure action was not resolved on the merits but was only dismissed without prejudice and therefore that a new paragraph 22 notice was not required. We agree and reverse the judgment.

Prior to the day of trial, both Nationstar and the Glissons had asked the trial court to take judicial notice of portions of the record in a prior foreclosure action which had been filed by Nationstar against the Glissons (the 2012 case). Those record documents establish that the Glissons had filed a "motion to dismiss and for summary judgment." The requested relief was entry of summary judgment or an order dismissing the case with prejudice. The order in the 2012 case, titled "Order of dismissal," reflects that "the motion" was granted and that the foreclosure lawsuit was "dismissed without prejudice to [Nationstar] filing a new lawsuit."

On the morning of trial in this case, and before the presentation of any evidence, the Glissons moved for judgment in their favor and dismissal of the complaint. The Glissons relied upon two documents from the 2012 case: their motion to dismiss or for summary judgment and the order granting the motion. The Glissons contended that in granting their motion in the 2012 case the court had entered a judgment in their favor and that Nationstar was therefore required to have mailed a new paragraph 22 notice of

default. Nationstar was relying on the notice mailed prior to the filing of the 2012 case and had not mailed a second paragraph 22 default notice. Thus, the Glissons argued that the court was required to enter judgment in their favor based on Schindler v. Bank of New York Mellon Trust Co., 190 So. 3d 102 (Fla. 4th DCA 2015).

In opposition to the Glissons' motion, Nationstar argued that the 2012 case order was not an adjudication on the merits; rather, it was a dismissal without prejudice. And, as argued by Nationstar, a dismissal without prejudice of a prior foreclosure action does not require the mailing of a new, postdismissal paragraph 22 default notice. Nationstar relied upon the holding in Sill v. JPMorgan Chase Bank, National Ass'n, 182 So. 3d 851 (Fla. 4th DCA 2016).

The trial court granted the Glissons' motion, finding that Schindler controlled and that Nationstar was required to have mailed a new paragraph 22 default notice in order to have complied with the terms of the mortgage and to maintain the second foreclosure action. A judgment was entered in favor of the Glissons, and it is from that judgment that Nationstar appeals.

Consistent with its argument below, Nationstar contends on appeal that the trial court should not have granted the Glissons' motion and entered judgment in their favor because a new paragraph 22 notice is not required where the prior lawsuit had been dismissed without prejudice and not adjudicated on its merits.

Nationstar's argument requires this court to determine whether the order entered in the 2012 case was an adjudication on the merits or a dismissal without prejudice before determining whether the trial court correctly entered judgment in reliance on Schindler. We note that although the Glissons represented to the trial court

and to this court that their motion in the 2012 case was a motion for summary judgment which was granted, the motion was in fact a motion to dismiss or for summary judgment and sought relief in the form of a dismissal or summary judgment. We do not have—nor did the trial court have—a transcript from the hearing presumably held on the Glissons' motion in the 2012 case. However, the order disposing of the 2012 case is clear. The order does not dismiss the 2012 case with prejudice nor does it enter judgment in the Glissons' favor. Rather, the "Order of dismissal" unequivocally dismisses the action without prejudice to the filing of a new lawsuit.

"The dismissal of a cause of action can either be with prejudice, same being an adjudication on the merits, or without prejudice, which is not an adjudication on the merits and is no bar to a subsequent suit on the same cause of action." Drady v. Hillsborough Cty. Aviation Auth., 193 So. 2d 201, 205 (Fla. 2d DCA 1966). In that regard, "[i]t is well-established that a 'dismissal without prejudice will not support a claim of res judicata,' as it does not constitute an adjudication on the merits." PNC Bank, N.A. v. Otero, 277 So. 3d 199, 200 (Fla. 3d DCA 2019) (quoting Froman v. Kirland, 753 So. 2d 114, 116 (Fla. 4th DCA 1999)). Moreover, "[t]he focus is on 'what a court order does' and not 'how the order is labeled,' " but here they are one and the same: the order dismisses the 2012 case without prejudice and it is titled "order of dismissal." See Bank of N.Y. Mellon for Certificateholders of CWABS, Inc. v. Swain, 217 So. 3d 226, 227 (Fla. 5th DCA 2017) (quoting Boyd v. Goff, 828 So. 2d 468, 469 (Fla. 5th DCA 2002)); cf. Fla. R. Civ. P. 1.420(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an

indispensable party, operates as an adjudication on the merits."). The order upon which the Glissons based their motion for judgment in this case was not an adjudication on the merits. See HSBC Bank USA, N.A. for Registered Holders of Renaissance Equity Loan Asset-Backed Certificates, Series 2007-3 v. Leone, 271 So. 3d 172, 176 (Fla. 2d DCA 2019) ("[T]he dismissal was without prejudice and was, therefore, not an adjudication on the merits."); see also Otero, 277 So. 3d at 200 ("[H]ere, the initial order of dismissal specified it was indeed without prejudice.").

Having concluded that the order in the 2012 case was a dismissal without prejudice and not an adjudication on the merits in the Glissons' favor, we now consider whether such a dismissal requires the mailing of a new paragraph 22 notice of default. At the time of the trial court's ruling in the Glissons' case this court had not addressed the issue; however, it has since held that where the dismissal of a prior foreclosure action is without prejudice "the Bank [is] not required to send a new default notice prior to filing the second foreclosure action." Leone, 271 So. 3d at 176. In so concluding, we distinguished the Fourth District's Schindler opinion based on the prior dismissal in that case being an adjudication on the merits. We also agreed with the Fourth District's Sill opinion: "A new default notice is not required before the filing of the second complaint when the dismissal of the first complaint was without prejudice and thus not an adjudication on the merits." Leone, 271 So. 3d at 176. Moreover, "nothing in paragraph 22 requires the lender to send a new default notice prior to filing a second foreclosure action based on the same default." Id. at 175; see also Sill, 182 So. 3d at 853 ("The mortgage does not require that a new notice of default be sent, and we find that requiring a second notice of default would serve no practical purpose.").

The trial court erred when it determined that the order dismissing the 2012 case was an adjudication on the merits, in therefore determining that the 2012 case order precluded the filing of the second lawsuit in the absence of the mailing of a new paragraph 22 default notice, and in entering judgment in the Glissons' favor. Given this conclusion we need not address the second issue raised by Nationstar.

Reversed and remanded for further proceedings.

MORRIS and LUCAS, JJ., Concur.