

SECOND FORECLOSURE ACTION NOT BARRED, DESPITE FIRST ACTION DISMISSED WITH PREJUDICE

The Wisconsin Supreme Court recently held that a mortgage servicer was not barred from bringing a second foreclosure action after the first action was dismissed with prejudice. See Federal Nat'l Mortg. Ass'n v. Thompson, 2018 WI 57 (Wis. 2018). In the case, a mortgage servicer brought a foreclosure action against the defendant borrower in November 2010, alleging that the borrower defaulted on his April 2009 loan payment. As part of the lawsuit, the servicer accelerated the debt. In the August 2012 trial, the trial court dismissed the action with prejudice, finding that the servicer did not produce evidence that it possessed the original note or that it had sent the proper notice of intent to foreclose. In December 2014, the new loan servicer brought a second action based on the borrower's missed September 2009 payment. The court found that the doctrine of claim preclusion barred any claim based on a default that occurred before the original trial, **BUT THAT A POST-TRIAL DEFAULT COULD GIVE RISE TO A VIABLE CAUSE OF ACTION.** The servicer then amended the complaint to allege a post-trial default, and the court awarded plaintiff final judgment. The borrower appealed, and the court of appeals certified the question to the Wisconsin Supreme Court.

On appeal, the Wisconsin Supreme Court affirmed the lower court judgment. The parties agreed that two of the three elements of claim preclusion had been met: the identity of the parties in the two actions effectively was the same and there was a final judgment in the first action. However, they disagreed on whether the case met the third element of claim preclusion: an identity between the issues in the two lawsuits. The borrower argued that the lawsuits brought the same cause of action and sought the same relief—that is, because the servicer sought the entire accelerated debt in the first lawsuit and lost, it was barred from seeking that same debt in the second. The Supreme Court disagreed. It held that, because the court dismissed the first lawsuit with prejudice, “it had the legal effect of conclusively establishing that [the borrower] was not in default for having missed installment payments due on the note up until the date of trial in the 2010 lawsuit (i.e., August 16, 2012). Thus, because it was never proved in the 2010 lawsuit that [the borrower] was in default, the entire balance of the note was never validly accelerated.” As such, **“[t]he borrower’s default resulting from the borrower’s failure to make an installment payment due after dismissal of the first lawsuit was not and could not have been**

litigated in the first lawsuit. Thus, the failure of the borrower to pay an installment after the termination of the first lawsuit created a new set of operative facts upon which the lender could base a subsequent foreclosure action.”

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