

Voluntary Dismissal of Mortgage Foreclosure Case May Preclude Subsequent Action on Promissory Note

By Peter E. Cooper

INTRODUCTION

Under Illinois law, a plaintiff who voluntarily dismisses its claim may refile that same claim within one year. Yet, the state's "single refiling rule" prohibits a party from refiling the same cause of action more than once. The Illinois Supreme Court recently confirmed that a foreclosure action on a mortgage and underlying promissory note that sought a deficiency judgment and a subsequent action on the promissory note, alone, were functionally the same for the purpose of the refiling rule, regardless of whether they assert different theories of relief. This decision may have a substantial impact on future actions filed by lenders to enforce notes and mortgages.

CASE SUMMARY

In *First Midwest Bank v. Andres Cobo, et al.*, 2018 IL 123038, Waukegan Savings and Loan, a predecessor of plaintiff First Midwest, lent the defendants \$227,500, secured by a mortgage on their Maywood home. When the defendants went into default on the loan, Waukegan commenced proceedings against the defendants, in which it sought to foreclose on and sell the property securing the loan and to recover a deficiency judgment for the remainder of the debt. First Midwest subsequently acquired Waukegan's interest in the note and mortgage, and on April 2, 2013, voluntarily dismissed the foreclosure suit. Two weeks later, First Midwest filed a new suit against the defendants for breach of the promissory note, but did not seek foreclosure. On April 3, 2015, before the case had gone to trial, First Midwest voluntarily dismissed its suit against the defendants, which it subsequently refiled three months later, on July 30, 2015.

Defendants moved to dismiss the refiled complaint, claiming that First Midwest Bank or its predecessor had already filed two lawsuits against them for the same breach (the first time in a foreclosure suit and the second in a breach of promissory note). The defendants asserted that 735 ILCS 5/13-217 prohibits someone from refiling the same cause of action more than one time. First Midwest Bank countered that the first two lawsuits sought distinct relief. The first was a claim for mortgage foreclosure, while the subsequent suit was for breach of a promissory note. The Circuit Court agreed and denied defendants' motion to dismiss. On appeal, however, the Appellate Court vacated the Circuit Court's order and dismissed First Midwest's complaint.

The plaintiff appealed the Appellate Court's holding, and the Supreme Court affirmed the Appellate Court's ruling in favor of the Defendants. Citing to its prior decision in *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991), the Court confirmed that §13-217 allowed "one, and only one, refiling of a claim" that a party had voluntarily dismissed. The Court held, however, that whether two complaints state the same claim does not depend on how the plaintiff labels the complaint. *First Midwest*, 2018 IL 123038 ¶18. Rather, claims should be deemed the same cause of action "if they arise from a single group of operative facts." *Id.*, citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). The Court concluded:

[T]wo later suits for breach of a promissory note asserted the same cause of action as First Midwest's predecessor's first suit under the mortgage and the note. Both breach of promissory note complaints alleged the same default date, July 1, 2011, as the foreclosure complaint. All three complaints alleged that [defendants] were personally liable for the same \$214,079.06 principal. Most importantly, in the foreclosure complaint from 2011, First Midwest's predecessor expressly sought a deficiency judgment under the note. Although that complaint had only one count, for "FORECLOSURE," it requested as a remedy "a personal judgment for deficiency, if sought." For practical purposes, the request for a deficiency judgment asserted a second claim, this one under the note. *Id.* ¶20.

The Court affirmed that a plaintiff may pursue remedies under a mortgage and a note either consecutively or concurrently. However, a lender may not assert a claim under the mortgage and the note concurrently by seeking a foreclosure and a deficiency judgment and later assert a claim under the note consecutively twice more. *Id.* ¶37.

KEY TAKE-AWAYS

A plaintiff who voluntarily dismisses a claim still only has one opportunity to refile the same claim in Illinois. The determination of whether multiple lawsuits assert the "same claim" rests on an analysis of whether they arise from a single group of operative facts and not merely the plaintiff's characterization. Significantly, foreclosure cases, which sound in equity, may be deemed the "same claim" as subsequent actions on the underlying promissory note if the foreclosure action seeks a deficiency judgment.

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