FIRST DIVISION
Order filed August 10, 2015
Modified Upon Denial of Rehearing September 21, 2015

No. 1-14-2978
2015 IL App (1st) 142978-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

METROBANK, successor by merger with CHICAGO COMMUNITY BANK, Plaintiff-Appellee, v. JORGE RODRIGUEZ; PATRICIA A. RANGEL, of the Law Firm of RANGEL, RANGEL & ASSOCIATES, and unknown owners and nonrecord claimants, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County 13 CH 10900 Honorable Anthony C. Kyriakopoulos, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

Held: Trial court did not err in finding that complaint was not barred by *res judicata* where trial judge in 2011 case dismissed complaint for lack of subject matter jurisdiction.

¶ 1 Defendant Jorge Rodriguez appeals the denial of his motion to dismiss a complaint for mortgage foreclosure. Plaintiff, Metrobank, successor by merger with Chicago Community

Bank, originally brought a foreclosure action against defendant in 2011 after defendant failed to pay his mortgage on a mixed residential and commercial building. The case was dismissed with prejudice. Thereafter, Metrobank brought the current foreclosure action against defendant. Defendant moved to dismiss the case, arguing that the prior dismissal barred the current action based on *res judicata*. The trial court denied the motion to dismiss and granted plaintiff's motion to appoint a receiver. Defendant now appeals.

¶ 2 On July 3, 2007, Chicago Community Bank gave defendant a commercial loan in the amount of $450,000. To memorialize the loan, defendant executed a promissory note payable to Chicago Community Bank in the principal amount of $450,000, a mortgage granting Chicago Community Bank a security interest in the subject property, located at 3613-3617 W. North Avenue in Chicago, and an assignment of rents.

¶ 3 On May 2, 2011, Metrobank, as successor by merger with Chicago Community Bank, brought a foreclosure action against plaintiff for failing to make a loan payment that was due on January 5, 2011, and all subsequent payments.

¶ 4 On May 22, 2012, defendant filed his answer and affirmative defenses. Defendant claimed, as an affirmative defense, that Metrobank failed to mail him proper notice required under section 1502.5 (735 ILCS 5/15-1502.5 (West 2012)) of the Mortgage Foreclosure Act.

¶ 5 In its answer to defendant's affirmative defense, Metrobank claimed that it gave proper notice. Metrobank attached the affidavit of Rosemarie Viramontes, who attested that notice was sent to defendant at the subject property.

¶ 6 Metrobank then filed a motion for summary judgment. Defendant stated in his response to the motion that Metrobank had filed its complaint on the 29th day after mailing notice to defendant, which was in violation of section 1502.5(d), which states "until 30 days after mailing

the notice provided for under subsection (c) of this Section, no legal action shall be instituted ***." 735 ILCS 5/15-1502.5(d) (West 2012).

¶ 7 At the hearing on Metrobank's motion for summary judgment, the trial court stated that "with [Metrobank] not complying with [section] 1502.5, I have to find, *** at a minimum that there's a genuine issue as to material fact. Under 1502.5 I don't think the Court has subject matter jurisdiction over the case even, but certainly I think at this stage of summary judgment, we're a little beyond that." On November 1, 2012, the trial court denied Metrobank's motion for summary judgment, with prejudice.

¶ 8 Metrobank subsequently filed a motion for a finding pursuant to Supreme Court Rule 304(a), requesting that the trial court find that the order entered on November 1, 2012, was a final and appealable order and that there was no just reason to delay the appeal of that order. It argued that "[b]y virtue of the November 1, 2012 Order the Court has effectively ruled that it does not have subject matter jurisdiction to hear the matter."

¶ 9 On February 13, 2013, the trial court *sua sponte* amended its November 1, 2012 order to strike the "with prejudice" language from the order denying plaintiff's motion for summary judgment. The trial court also dismissed Metrobank's complaint with prejudice. No basis was given as to why the complaint was dismissed with prejudice.

¶ 10 On April 24, 2013, Metrobank filed its complaint for foreclosure and sale that is at issue in this case. Metrobank alleged that defendant was in default for the failure to make the loan payment due on January 5, 2012, and all subsequent payments, and that the principal balance due under the note was $490,737.81. Metrobank labeled the property as "commercial property" in its complaint.

¶ 11 Defendant responded that Metrobank's complaint was barred by the doctrine of *res judicata*. He also filed a motion to dismiss based on *res judicata*.

¶ 12 Metrobank filed a response to defendant's motion to dismiss, arguing that the trial court dismissed the 2011 case with prejudice in order to allow Metrobank to cure its violation of section 1502.5 of the Mortgage Foreclosure Act. Metrobank contended that the allegations of its 2013 complaint had changed because now the complaint alleged that defendant's loan was past due for the loan maturity payment due on July 5, 2012, as well as the earlier defaults.

¶ 13 Metrobank then filed a motion to appoint a receiver.

¶ 14 On August 20, 2014, the trial court held a hearing on defendant's motion to dismiss as well as Metrobank's motion to appoint a receiver. Metrobank argued that the 2011 case was not a final judgment on the merits because the trial court had dismissed the case with prejudice based on Metrobank's failure to comply with section 1502.5 of the Mortgage Foreclosure Act, and did not reach the merits of the case.

¶ 15 The trial court noted that there was no record of the alleged hearing that took place in February 2013. The trial court noted that the previous trial judge had stricken "with prejudice" from its order denying summary judgment, but dismissed the complaint with prejudice despite the fact that there was "no 2-619 motion brought as far as I know to dismiss the complaint." The trial court commented that the previous judge's order was "a confusing order at best." The trial court noted that the 2013 complaint dealt with the same mortgage and the same note as the 2011 case, but that with "each month that passes or whatever the terms may be of the note that passes where a default occurs is another reason for a complaint to be filed." The trial court went on to state that if it were to grant defendant's motion to dismiss, it "would allow the defendant to have this property free and clear until the defendant decides to sell the property." It further stated that

the previous judge dismissed the case based on the failure of Metrobank to file a grace period notice in a timely manner, and did not decide the merits of the case. The trial court stated that "it sounded like a 2-619 motion to dismiss the complaint based on the fact that the grace period notice had not been sent out in a timely fashion. That would not preclude the plaintiff from filing a new complaint." Counsel for defendant reminded the court that there had not been a motion to dismiss the complaint under either sections 2-615 or 2-619. The trial court then denied defendant's motion to dismiss based on *res judicata*.

¶ 16 On September 2, 2014, the trial court entered an order appointing receiver as to the two commercial units only. Defendant now appeals.

¶ 17 On appeal, defendant claims that Metrobank's claim is barred by the doctrine of *res judicata* because its prior foreclosure claim was dismissed with prejudice. Metrobank responds that the trial court's dismissal of its prior foreclosure case was not a final judgment on the merits, and therefore *res judicata* does not apply. We admit that there is some confusion surrounding the trial court's final order in the 2011 case, but nevertheless find that the current complaint was not barred by *res judicata*.

¶ 18 "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co*., 172 Ill. 2d 325, 334 (1996). *Res judicata* bars not only what was actually decided in the first action but also whatever could have been decided. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Id*.

¶ 19 Metrobank does not dispute the second and third requirements are met here. Rather, Metrobank contends that the first element is not satisfied because the prior foreclosure claim was not disposed of by a final judgment on the merits.

¶ 20 Illinois Supreme Court Rule 273 states that unless the order of dismissal or a statute of this State otherwise specifies, "an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Apr. 1, 2015). Our supreme court has noted that a dismissal operates as an adjudication on the merits under "Rule 273 *** only to an involuntary dismissal of an action, such as that which occurs when a motion to dismiss under section 2-615 or 2-619 of the Code is granted." *Rein*, 172 Ill. 2d at 335-36. Accordingly, *res judicata* would apply if the 2011 complaint had been dismissed pursuant to a section 2-615 motion or a section 2-619 motion to dismiss, but neither motion was brought in that case. Rather, the trial court *sua sponte* dismissed the case with prejudice, without giving a basis for this decision in its order, and we do not have the benefit of a transcript from what transpired in February 2013. However, based on the 2011 court's statements at the hearing on defendant's motion for summary judgment expressing doubts about subject matter jurisdiction, we find that it would not be inappropriate to conclude that the 2011 court dismissed the case for lack of subject matter jurisdiction. Thus, a finding by the trial court in this case that *res judicata* did not apply would conform to the law. See *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 997 (2007) (absent a sufficient record, "the reviewing court presumes that the trial court conformed to the law and its rulings were supported by the evidence.")

¶ 21 Accordingly, we find that the order dismissing the 2011 complaint was not a final judgment on the merits, and therefore the 2013 complaint was not barred by *res judicata*. See

Illinois Supreme Court Rule 273 (an involuntary dismissal of an action, other than for lack of jurisdiction, operates as an adjudication on the merits); see also *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 302 (1998) ("the dismissal of a complaint for lack of subject matter jurisdiction is not considered a decision on the merits of that complaint"). Because we find that the trial court did not err in dismissing defendant's motion to dismiss based on *res judicata*, we need not address the other issues in defendant's appeal, all of which were based on *res judicata*.

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.