

NOTICE
Decision filed 04/29/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140086-U

NO. 5-14-0086

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

KIM DOWNS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	St. Clair County.
)	
v.)	No. 13-CH-916
)	
ONEWEST BANK, FSB,)	
)	
Defendant-Appellee)	
)	Honorable
(FSB Federal National Associates,)	Stephen P. McGlynn,
Quicken Loans, Inc., Defendants).)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* Where the lawsuit from which this appeal arises was based upon the same operative facts as an earlier foreclosure action, and all issues raised in the lawsuit could have been raised in the foreclosure action, the circuit court did not err in dismissing the lawsuit as barred by the doctrine of *res judicata*.

¶ 2 Kim Downs appeals from the circuit court's order dismissing her lawsuit against OneWest Bank, FSB (the Bank). As explained below, dismissal was appropriate because the lawsuit was barred under the doctrine of *res judicata*. The judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 In the instant appeal, Downs has proceeded *pro se*. Her brief lacks the kind of statement of facts that Supreme Court Rule 341(h)(6) demands of an appellant, *i.e.*, a statement of "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). The following factual summary is derived from the statement of facts in the Bank's appellee's brief, this court's independent examination of the not-lengthy record on appeal, and this court's opinion in a prior appeal involving these same parties and the same basic subject matter.

¶ 5 On April 5, 2010, the Bank filed a mortgage foreclosure complaint against Downs and other defendants, known and unknown, including a Gerald Hawthorne, in St. Clair County case No. 10-CH-0491 (the foreclosure action). The foreclosure complaint alleged that the Bank was the holder of the mortgage and note for the property at 3521 Steinberg Farm Road in Belleville, Illinois; Downs and Gerald Hawthorne were the mortgagors and the owners of the mortgaged real estate; and no monthly mortgage payments had been made in 10 months. On June 24, 2010, the circuit court entered an order of default against Downs and the other defendants, and a judgment for foreclosure and sale. On May 19, 2011, the circuit court entered an order confirming the judicial sale of the mortgaged real estate.

¶ 6 On September 16, 2011, Downs filed *pro se* a "Petition to Reopen/Vacate Judgment Pursuant to 735 ILCS 5/2-1401 and or Motion to Set Aside for Misrepresentation." Her petition alleged that the Bank was known to have employed

"robo-signers" who falsely swore that they had reviewed mortgage documents in foreclosure actions and that the assignment of the mortgage to the Bank may have been falsely signed by such a robo-signer. The petition asserted a "strong likelihood" that the assignment purporting to transfer ownership of the mortgage and note in Downs's case had been robo-signed and falsely attested to. If so, the petition asserted, the Bank lacked standing to bring the foreclosure action in the first place, and may have committed fraud upon the court. Furthermore, at the time Downs's mortgage was assigned to the Bank, a loan modification agreement was in effect which the Bank failed to honor. For relief, Downs requested vacatur of the order approving the sale and a grant of time in which she could engage in further investigation and discovery in order to determine whether fraud or other improper conduct occurred in the course of the foreclosure proceedings.

¶ 7 On October 27, 2011, the circuit court held a hearing on Downs's *pro se* section 2-1401 petition. Downs appeared *pro se*, and the Bank appeared by counsel. The court denied the petition, finding that Downs had not shown the existence of a meritorious defense that was likely to succeed. Downs appealed. On March 12, 2013, this court affirmed the judgment of the circuit court. See *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475. This court agreed with the circuit court that Downs had failed to plead facts showing the existence of a meritorious defense to the foreclosure action. In addition, this court concluded that Downs also had failed to demonstrate due diligence in pursuing or presenting her defense prior to the judgment of foreclosure. This court noted that Downs had failed to offer "any explanation for her failure to raise the now-claimed defense prior to the entry of the foreclosure judgment. The defense she now seeks to

raise was available to [her] at the time of entry of the foreclosure judgment had she only bothered to appear and contest the foreclosure." *Id.* ¶ 23.

¶ 8 On October 29, 2013, in the circuit court of St. Clair County, Downs filed *pro se* a complaint against the Bank and two other defendants. The complaint was not a model of clarity. However, in count I of the complaint, Downs alleged that in 2009, the Bank, without her consent and therefore in violation of a term of the mortgage, modified the mortgage so as to increase her monthly mortgage payment. Also in count I, Downs alleged that the Bank may not have followed proper foreclosure procedures, and might not be the valid assignee of her mortgage. In count II of the complaint, Downs alleged that the Bank was not the legal holder of the mortgage and note and therefore lacked standing in the foreclosure action, and that the Bank had used "robo-signed" mortgage documents to deceive the circuit court. Downs sought damages totaling several million dollars, including \$1 million for "emotional distress" and \$1 million for "mental distress."

¶ 9 On December 18, 2013, the Bank filed a combined motion for dismissal of the lawsuit pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012) (allowing, *inter alia*, section 2-615 and section 2-619 motions to dismiss to be filed together)). Attached to the combined motion were photocopies of the Bank's complaint in the foreclosure action, the mortgage and the note secured thereby, the default order in the foreclosure action, the judgment of foreclosure and sale, and the order confirming judicial sale of the mortgaged real estate. In one part of the combined motion, the Bank argued that Downs's complaint was barred by the doctrine of *res judicata* and should be dismissed pursuant to section 2-619(a)(4) of the Code. See 735

ILCS 5/2-619(a)(4) (West 2012) (permitting dismissal of a cause of action that is "barred by a prior judgment"). In the other part of the combined motion, the Bank sought dismissal pursuant to section 2-615 (735 ILCS 5/2-615 (West 2012)), but this part need not be described in detail, given this court's disposition of this appeal.

¶ 10 On February 11, 2014, the circuit court entered a written order noting that the cause was called for hearing on the Bank's section 2-619.1 motion to dismiss and that Downs appeared *pro se* and the Bank appeared by counsel. The court granted the motion, and dismissed the matter with prejudice. The written order did not specify any particular basis for dismissal. (The record on appeal does not include a transcript of this hearing, nor is there any bystander's report or agreed statement of facts.) Downs initiated this appeal.

¶ 11

ANALYSIS

¶ 12 This appeal is from an order granting a combined motion for dismissal pursuant to section 2-619.1 of the Code. Appellate review of such an order is *de novo*. *Carr v. Koch*, 2012 IL 113414, ¶ 27.

¶ 13 In the *pro se* brief that she filed in this court, Downs presented an argument that is somewhat confusing and disjointed. However, she certainly asserts that the circuit court dismissed her complaint on *res judicata* grounds, and she certainly contends that the dismissal was erroneous.

¶ 14 The doctrine of *res judicata* clearly applies in this case. It barred Downs's lawsuit against the Bank.

¶ 15 "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). "The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit." *Id.* "For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies." *Id.*

¶ 16 When determining whether the second of these three requirements has been satisfied—*i.e.*, when determining whether the cause of action in the subsequent lawsuit is the same as the cause of action in the first lawsuit—an Illinois court must apply the "transactional" test. *Id.* at 311. "[P]ursuant to the transactional analysis, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* The nature of the evidence needed to prove the claims at issue is relevant for determining whether the claims arose from a single group of operative facts, but "the transactional test permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.*

¶ 17 Here, the circuit court (undeniably a court of competent jurisdiction) had rendered a final judgment on the merits in the foreclosure action. Downs and the Bank had been opposing parties in the foreclosure action. Also, the cause of action was the same in both

the foreclosure action and Downs's lawsuit. The claims in both arose from a single group of operative facts—the facts concerning the terms of the mortgage, the nonpayment of mortgage installments, ownership of the mortgage and note, the mortgage foreclosure procedures utilized by the Bank, etc. The key allegations in Downs's lawsuit against the Bank were that the Bank violated the terms of the mortgage, did not own the mortgage, and failed to follow proper mortgage foreclosure procedures. She could have presented (and logically should have presented) her evidence and her arguments on those matters during the foreclosure action, and the circuit court would have decided those matters. However, Downs did not bother to appear and contest the foreclosure, but instead defaulted, as this court noted in its decision in *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, discussed *supra*. By the time Downs filed her lawsuit against the Bank, her opportunity to litigate mortgage and foreclosure issues had passed. The doctrine of *res judicata* clearly barred her lawsuit. The judgment of the circuit court, dismissing her lawsuit, is affirmed.

¶ 18 Affirmed.