2011 IL App (1st) 103668-U

THIRD DIVISION
September 28, 2011

No. 1-10-3668

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, as successor in interest to LaSalle Bank National Association, Plaintiff-Appellant, v. CREATIVE STAIRS & WOODWORKING, INC. and ELIOT J. DEL LONGO, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 10 L 10923 Honorable Bill Taylor, Judge Presiding.

Justice Murphy delivered the judgment of the court.

Presiding Justice Steele and Justice Neville concurred in the judgment.

¶ 1 **ORDER**

¶ 2 *HELD*: Where plaintiff sought payment of indebtedness on promissory notes and commercial guaranty, trial court did not err in dismissing complaint as barred by doctrine of *res judicata* based on three prior rulings from Circuit Court of Kane County involving same parties for foreclosure and sale, replevin, and forcible entry and detainer, including an award either *in rem* or *in personam* for any deficiency.

¶ 3 This case is before this court on plaintiff Bank of America's (as successor in interest to

LaSalle Bank) appeal of the trial court's order granting defendants Creative Stairs & Woodworking, Inc. (Creative) and Eliot J. Del Longo (Del Longo), motion to dismiss three counts of plaintiff's four count complaint with prejudice pursuant to section 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9) (West 2008). Plaintiff filed the complaint in the Circuit Court of Cook County to enforce promissory notes between the parties and the guaranty agreement entered with Del Longo to secure those notes. The notes were further secured by a mortgage on a property that was subject to a foreclosure action as well as a forcible entry and detainer action in Kane County.

¶ 4 Based on the rulings in the Kane County actions, including a third action for replevin, the trial court granted defendants' motion to dismiss based on the doctrine of *res judicata*. Plaintiff also advanced a claim for conversion against Del Longo, that was subsequently voluntarily dismissed, with prejudice. Plaintiff now appeals the dismissal of the first three counts asserting that the Kane County actions were proceedings *in rem* and that it is entitled to seek a deficiency action *in personam*. For the following reasons, we affirm the judgment of the trial court.

¶ 5 I. BACKGROUND

¶ 6 On April 5, 2002, Creative entered into a "Business Loan Agreement" (Agreement) and "Promissory Note" (Note) with LaSalle Bank National Association (LaSalle), predecessor in interest to plaintiff, Bank of America. The Agreement and Note provided terms for a revolving line of credit to Creative. Also as part of this April 5, 2002, agreement, Del Longo, executed a "Commercial Guaranty" to LaSalle (Guaranty). Del Longo agreed and promised to pay any and all of Creative's indebtedness under the Agreement and Note.

¶ 7 The Note was renewed and extended by the parties several times and additional notes

were executed by Creative and Del Longo, including May 19, 2005, March 20, 2006, May 5, 2006, and September 30, 2007. Creative failed to make payments pursuant to its obligations in October 2007. On December 27, 2007, LaSalle made demand upon Creative for payment of its indebtedness. LaSalle also made demand upon Del Longo that he pay the indebtedness of Creative under the Guaranty.

¶ 8 On February 4, 2008, Creative entered into an agreement with Moglia Advisors as assignee for the benefit of Creative's debtors entitled "Trust Agreement and Assignment of Assets for the Benefit of Creditors." Prior to its resignation as trustee, Moglia Advisors collected $26,078.50 of funds as trustee and informed LaSalle and Creative. Attorneys for Creative and LaSalle agreed to open a bank account to have the funds deposited and turned a check over to Del Longo with instructions to deposit the funds into the new account. However, Del Longo deposited the funds into his personal account and had not responded to LaSalle's demand to return the funds.

¶ 9 *Kane County Proceedings*

¶ 10 In response to defendants' failure to comply with LaSalle's demands, it filed three causes of action in the Circuit Court of Kane County. On April 7, 2008, plaintiff filed a verified complaint for foreclosure and sale of a property located at 3705 Swenson Street, St. Charles, Illinois (the property). Plaintiff attached four promissory notes to its complaint and alleged that the original indebtedness and additional advances were made under the mortgage of the property and the notes were in default for $1,892,000.

¶ 11 Plaintiff sought: foreclosure of the first and second mortgage and judicial sale of the property; an order granting a shortened redemption period; a personal judgment for a deficiency;

an order granting possession; an order placing the mortgagee in possession or appointing a receiver; attorney fees, costs and expenses; and any other just relief. On November 13, 2008, the Kane County court entered an order granting plaintiff relief. The court ordered the sale of the property at auction. In addition, the court stated "[t]hat Plaintiff shall be entitled to a deficiency for such amount *in rem*, or *in personam* as the Court determines against...Eliot J. Del Longo, and Creative Stairs & Woodworking, Inc., upon petition of the Plaintiff to approve the report of sale and distribution." In addition, the court included a provision requiring a hearing to confirm the sale and enter an order approving the sale and fees charged, finding personal judgment against those deemed personally liable, and priority of parties who deferred proving priority.

¶ 12 With the approval of plaintiff and Creative, Del Longo arranged for the sale of the property prior to auction. While the sale was for an amount less than that owed under the promissory notes, the parties agreed to a stipulation to vacate the judgment of foreclosure. On January 21, 2009, the Kane County court entered an order accepting the parties' stipulation and agreement to vacate the November 13, 2008, judgment of foreclosure and dismissing the case in its entirety, with prejudice.

¶ 13 On May 20, 2008, plaintiff filed a replevin action in Kane County against Creative, seeking personal property again attaching the promissory notes as well as a security agreement. On August 14, 2008, the court entered an order of replevin in favor of plaintiff. On January 15, 2009, the court entered a stipulated order vacating the order of replevin and dismissing the cause with prejudice. Finally, on September 8, 2008, plaintiff filed a forcible entry and detainer action in Kane County, and the court granted plaintiff the right to access of the property on October 14, 2008.

¶ 14 *Cook County Proceedings*

¶ 15 Under the terms of the Notes and Guaranty defendants consented to the jurisdiction of the courts of Cook County, Illinois, and plaintiff filed a three-count complaint against defendants in the Circuit Court of Cook County on April 3, 2008. Plaintiff alleged that Creative breached the promissory notes of May 19, 2005, and September 30, 2007, and sought $368,394.20 and $1,042,999.86 plus interest under the notes, respectively, as well as attorney fees and costs. Plaintiff also alleged a breach of the Guaranty by Del Longo, seeking the aforementioned relief, as well as $818,844.24 plus interest for the Note dated March 20, 2006. Third, plaintiff alleged breach of the May 5, 2006, note executed by Del Longo and sought relief of $62,610.52 plus daily accrual of interest. On May 15, 2008, plaintiff filed an amended verified complaint and advanced a fourth count consisting of a claim of conversion against Del Longo for depositing the check from the trustee.

¶ 16 Defendants moved to dismiss plaintiff's complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2008)). Defendants argued that, based on the three prior actions filed by plaintiff against defendants in the Circuit Court of Kane County, plaintiff's instant action was barred by the doctrine of *res judicata*. In a July 27, 2009, order, the court found that the actions in Kane County were brought by LaSalle against defendants, and other parties, to foreclose on and gain access to the real property secured by the notes and guaranties and for replevin of all personal property secured by the notes.

¶ 17 The Cook County court found that plaintiff presented only *in rem* causes of action in Kane County. However, it found that plaintiff had requested *in personam* relief against defendants based on the terms of the notes and Guaranty. The court further cited the order of the

Kane County Circuit Court in the foreclosure action, which stated that plaintiff would be entitled to a deficiency *in rem* or *in personam* against defendants. Therefore, it determined that these three claims indicated that plaintiff sought, and recovered an amount *in personam* against defendants, and plaintiff would not be allowed to pursue this type of judgment again.

¶ 18 However, the Cook County court found plaintiff's conversion claim against Del Longo distinguishable and not barred by *res judicata*. Accordingly, the motion was granted for the first three counts and denied as to the conversion claim. The trial court denied plaintiff's motion for Supreme Court Rule 304(a) language. Plaintiff moved to voluntarily dismiss the remaining conversion count against Del Longo on September 23, 2009. On September 24, 2009, the trial court entered an order that plaintiff's "motion is granted, and the case is dismissed in its entirety." Plaintiff appealed the July 27, 2009, order.

¶ 19 *Appeal and Voluntary Dismissal*

¶ 20 Plaintiff appealed the trial court's order dismissing the three counts as barred by the doctrine of *res judicata*. This court agreed with defendants that the trial court's September 24, 2009, order was not dispositive of the issue of whether the voluntary dismissal was with or without prejudice. In fact, this court found that the record reflected the order was without prejudice; therefore, all the claims were not resolved and the appeal was dismissed for want of jurisdiction. *Bank of America v. Creative Stairs & Woodworking, Inc.*, No. 1-09-2731, slip op. at 5-8 (June 10, 2010) (unpublished order under Supreme Court Rule 23). This court also noted that while plaintiff's brief violated Supreme Court Rules 341 and 342 for plaintiff's failure to provide a citation to the record, amongst other issues, it did not reach a full discussion of plaintiff's failure to comply with the rules because it dismissed the appeal on jurisdictional

grounds. *Id.* at 8. On November 17, 2010, the trial court granted plaintiff's motion to dismiss the conversion count, with prejudice and the instant appeal followed.

¶ 21 II. ANALYSIS

¶ 22 We begin by addressing defendants' argument that plaintiff's appeal should be dismissed for its failure to comply with our Supreme Court rules. " 'A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995), quoting *Thrall Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). Supreme Court Rules 341(h)(6) & (7) require a statement of the facts, with citation to the record, necessary for an understanding of the case and a clear statement of contentions with supporting citation of authorities and pages of the record relied on. Ill. S. Ct. R. 341(h)(6), (7) (eff. July 1, 2008). In addition, Rule 342 requires the appellant's brief include an appendix containing, *inter alia*, a copy of the judgment appealed from and a complete table of contents with page references of the record on appeal. Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005).

¶ 23 We will not sift through the record or complete legal research to find support for this issue. Ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). Further, where the record is not complete, "the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 24 Accordingly, the import of these rules rises beyond mere procedural hurdles. Defendants argue that plaintiff's failure to include a copy of the judgment or a table of contents as well as their deficient presentation of the facts of this case merits this court's striking of plaintiff's brief. Defendants note that additional support in this case can be derived from the prior order of this court highlighting plaintiff's failure to comply with these exact rules in their brief in that appeal, thereby putting them on notice to comply.

¶ 25 Plaintiff responds "with all due respect to this Court's procedural rules," defendants' arguments do not merit dismissal. It contends that defendants are simply attempting to distract this court from the true issue. Further, it argues that it cured its "oversight" of failing to comply with Rule 342 by submitting an amended corrected brief. In addition, it argues that its statement of facts fully complied with Rule 341 because it need not state every fact of record, only those necessary to an understanding of the case. It continues to argue that if defendants believed facts central to the issue were omitted, they had the opportunity to respond and "suffered no prejudice by the relative succinctness" of plaintiff's recitation of the facts.

¶ 26 Because this case presents a relatively straightforward single issue and the record is not voluminous, we consider plaintiff's appeal. However, we note that plaintiff's seemingly cavalier attitude about our Supreme Court Rules, especially in light of this court's admonishment to plaintiff in the disposition of plaintiff's prior appeal in this matter, is disconcerting. While plaintiff's argument that defendants were free to provide their own recitation of the facts in this case bears some weight, that does not eliminate plaintiff's need to provide a full accounting of facts necessary to support its argument (*i.e.*, more than two paragraphs) or reduce the requirements of the Rules. These Rules not only serve to assist the court, but they assist the

parties in the proper, fair and efficient administration of appeals and aim to assure that the parties are not unduly burdened or prejudiced by an appellant's failure to properly argue the facts or establish and organize the record. In the interest of meeting these goals in this case, we consider plaintiff's arguments, despite its clear failure to comply with Rules 341 and 342.

¶ 27 Section 2-619 of the Code of Civil Procedure allows a party to move for summary disposition of issues of law or easily proved issues of fact. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-117 (1993). Such a motion admits the legal sufficiency of the complaint but raises defects, defenses or other affirmative matter appearing on the face of the complaint which defeat the plaintiff's claim. *Joseph v. Chicago Transit Authority*, 306 Ill. App. 3d 927, 930 (1999). This court, under a *de novo* standard of review, must determine whether a material issue of fact should have precluded dismissal or, absent a question of fact, whether the dismissal was proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116-117. This court may uphold a trial court's decision on any basis appearing in the record. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 359-60 (1999).

¶ 28 Under the doctrine of *res judicata*, a final judgment on the merits entered by a court with proper jurisdiction acts as an absolute bar to subsequent claims between the parties regarding the same claim, demand, or cause of action. *Mount Mansfield Insurance Group v. American International Group, Inc.*, 372 Ill. App. 3d 388, 392 (2007). The doctrine of *res judicata* is based on the public policy interests of judicial economy and finality of litigation. *Papers Unlimited v. Park*, 253 Ill. App. 3d 150, 153 (1993). The doctrine applies to not only claims actually made and decided in the first action, but also to matters that might have been raised and determined or that could have been offered to sustain or defeat a claim in the first cause of

action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). The essential elements of the equitable doctrine of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of parties or their privies; and (3) an identity of causes of action. *Mount Mansfield*, 372 Ill. App. 3d at 392.

¶ 29 Plaintiff argues that the trial court erred in concluding that the instant action was barred by the doctrine of *res judicata* because the instant action is separate and distinct from the proceedings in Kane County. It argues that the trial court further erred in determining that the Kane County foreclosure case was an *in personam* action. Because of this, plaintiff argues that the trial court's application of *res judicata* was in error as the transactional test was not met.

¶ 30 Plaintiff argues that Illinois law provides that a note, mortgage and guaranty are distinct and serve different purposes and actions to enforce them may be brought separately. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 240 (2004). A foreclosure action is an *in rem* proceeding in which the rights and interests subject to the mortgage are determined while actions to enforce a note or guaranty are *in personam* actions against the person or entity. *Id.* at 241. Therefore, plaintiff points to the "well-settled precedent" that these legally distinct remedies cannot be pursued in a single-count foreclosure action and a foreclosure action is not a bar to subsequent actions on a note or guaranty. *Id.*; see also *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570 (1990); *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847 (1985); *Du Quoin State Bank v. Daulby*, 155 Ill. App. 3d 183 (1983). Therefore, plaintiff maintains that *res judicata* cannot apply based on the foreclosure action as that complaint contained a single count.

¶ 31 Plaintiff argues that, even if the judgment of foreclosure and sale had not been vacated, there would not have been a final judgment on the note and guaranty. Plaintiff argues that *Notroma Corp. v. Miller*, 292 Ill. App. 612 (1937), is instructive. In *Notroma*, the trial court entered a judgment of foreclosure and an *in personam* judgment for the deficiency; however, the *in personam* judgment was vacated as void *ab initio*. Accordingly, the plaintiff was not estopped from bringing a second action for a personal judgment for the deficiency because the defendant was in no different position than if no judgment had been rendered. *Id.* at 633. Accordingly, as the judgment was vacated in the instant matter, plaintiff argues that it should not be foreclosed from seeking an *in personam* judgment based on the note and guaranty.

¶ 32 Plaintiff finds it telling that defendants do not attempt to distinguish *Notroma*; however, that case is distinguishable on its face and does not support plaintiff's argument. The *Notroma* court specifically relied on the fact that the *in personam* action was void *ab initio* based on the trial court's lack of jurisdiction over that defendant and that is why the judgment was vacated. As the *Notroma* court noted, not only was the judgment vacated, it was as if it never occurred. In this case, the judgment was vacated, but it was vacated upon stipulation of the parties and, most importantly, with prejudice. Accordingly, unlike *Notroma*, it is not as if the original judgment never occurred and that case is distinguishable from the instant matter.

¶ 33 We also agree with defendants' analysis concerning plaintiff's arguments. Defendants do not disagree with plaintiff's assertion that Illinois law allows a party to bring a separate action *in personam* on a note or personal guaranty to recover a deficiency following an *in rem* foreclosure action. As defendants ably explain, the cases relied on by plaintiff are all distinguishable from the instant matter because of the parties' stipulated dismissal of the Kane County case with

prejudice - after the trial court had granted the foreclosure judgment as well as a deficiency judgment either *in rem* or *in personam*.

¶ 34 This court is presented with evidence that plaintiff filed a foreclosure action in Kane County, that it sought a personal deficiency judgment, and that the trial court granted that prayer for relief. We are not privy to any other item of record concerning this action. More importantly, while *LP XXVI*, does indeed provide that an *in personam* deficiency action may be brought separately and cannot be pursued in a single-count foreclosure suit, that court also cites to *Farmer City* approvingly for the proposition these two " 'remedies may be pursued consecutively or concurrently.' " *LP XXVI*, 349 Ill. App. 3d at 242, quoting *Farmer City*, 138 Ill. App. 3d at 852. Considering the Kane County order with our underlying presumption that it conforms with the law, we must conclude that the remedies were properly pursued concurrently.

¶ 35 Dismissal with prejudice of an action is tantamount to an adjudication on the merits. *Vanslambrouck v. Marshall Field & Company*, 98 Ill. App. 3d 485, 487 (1981). This amounts to an abandonment of plaintiff's claims and rights as a matter of law. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 86 (2001). Therefore, plaintiff is barred by the doctrines of *res judicata* and collateral estoppel from bringing a separate action against the same defendant alleging any matter relating to the same cause of action which was or might have been litigated in the first action. *Vanslambrouck*, 98 Ill. App. 3d at 487.

¶ 36 Whether plaintiff's pleading was deficient is not of import, the fact remains the trial court awarded plaintiff the relief it seeks in the instant matter. The Kane County court's order clearly awards this relief and plaintiff has failed to present any cogent argument to find that order was in error. The parties agreed to the sale of the foreclosed property and stipulated to the dismissal of

the foreclosure action, with prejudice. Accordingly, the dismissal of that action foreclosed plaintiff's ability to seek the same deficiency judgment in the instant matter and the trial court properly dismissed the cause of action as barred by the doctrine of *res judicata*.

¶ 37 III. CONCLUSION

¶ 38 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 39 Affirmed.