2012 IL App (1st) 112391-U

Third Division
June 13, 2012

No. 1-11-2391

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee in Trust for the Registered Holders of Ameriquest Mortgage Securities, Inc., Asset-Backed Pass Through Certificate Series 2005-R3-Assignee of Ameriquest Mortgage Company, Plaintiff-Appellee, v. JAMES McDANIELS, OLA K. ALLIBALOGUN, MORTGAGE ELECTRIC REGISTRATION SYSTEMS, INC., by virtue of Mortgages recorded a document number 0611742070 and 0611742071, NON-RECORD CLAIMANTS, UNKNOWN TENANTS, and UNKNOWN OWNERS, Defendants, and U.S. BANK NATIONAL ASSOCIATION, as Trustee of SG Mortgage Securities Asset Back Certificates, Series 26006-FRE2, Intervenor-Appellant.	)	Appeal from the Circuit Court of Cook County. 08 CH 8492 Honorable Mathias Delort, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *HELD*: A final judgment in a suit to foreclose a mortgage precludes a second lawsuit to foreclose the same mortgage, even though the mortgagor never recorded a release of the mortgage.

¶ 2 In 2005, Deutsche Bank National Trust Company, as trustee of a trust that owned mortgage-backed securities, filed a complaint to foreclose its mortgage on property James McDaniels owned. After the trial court dismissed the lawsuit, McDaniels sold the property to Ola Allibalogun, who obtained a loan in exchange for a mortgage on the property. US Bank held the mortgage in 2008, when Deutsche Bank sued McDaniels again for foreclosure of the mortgage. US Bank intervened in the second foreclosure suit and moved to dismiss the complaint based on the final judgment entered in 2005. Deutsche Bank moved for summary judgment against US Bank, relying on the fact that McDaniels and Deutsche Bank never recorded a release of the mortgage following the dismissal of the prior lawsuit. Deutsche Bank also argued that the trial court in the 2005 lawsuit erred when it dismissed the foreclosure complaint with prejudice. The trial court in 2011 granted Deutsche Bank's motion for summary judgment. US Bank now appeals.

¶ 3 We hold that Deutsche Bank needed to follow statutory procedures for vacating the prior judgment before filing a second complaint to foreclose the mortgage. Because it did not move to vacate the judgment before a *bona fide* purchaser for value bought the property, Deutsche Bank lost the right to foreclose the mortgage. Accordingly, we reverse the judgment of the trial court and remand for entry of a judgment in favor of US Bank.

¶ 4 BACKGROUND

¶ 5 On February 23, 2005, Ameriquest Mortgage Company loaned McDaniels $88,000 in exchange for a mortgage on real estate McDaniels owned in Chicago. Deutsche Bank National Trust Company, as trustee of a trust for the registered holders of Ameriquest Mortgage Securities, Inc.'s certificates, series 2005-R3, held the mortgage. Deutsche Bank sued to foreclose the mortgage in 2005, alleging that McDaniels failed to make payments due in May 2005.

¶ 6 On October 17, 2005, the trial court entered an agreed order in which the court stated:

"[T]he c[our]t being advised that the loan at issue has been paid off,

It is ordered:

This cause is hereby dismissed with prejudice."

Neither party appealed from this order, and neither party moved to vacate the order.

¶ 7 In 2006, Ola Allibalogun sought to purchase the property from McDaniels. He applied for a loan from Fremont Investment & Loan, to be secured by a mortgage that named the Mortgage Electronic Registration Systems, Inc. (MERS) as mortgagee, with MERS acting as nominee for Fremont. An attorney, James O'Connell, reviewed the state of title to the property, looking for all liens against the title, seeking to assure Fremont, MERS, Allibalogun, and the company insuring title that McDaniels could convey title free from undisclosed liens. O'Connell found both the mortgage to Ameriquest and the order that dismissed with prejudice the lawsuit for foreclosure of that mortgage. He also found an

outstanding mortgage lien for a loan from Homecomings Financial, with a balance of more than $78,000 unpaid. Fremont loaned Allibalogun $119,000 in exchange for a mortgage on the property, and at the closing Allibalogun paid off the mortgage to Homecomings Financial.

¶ 8 In 2008, Deutsche Bank again sued McDaniels to foreclose its mortgage, alleging that in May 2005, McDaniels defaulted on his mortgage payments. In the 2008 complaint, Deutsche Bank added as defendants Allibalogun and MERS. U.S. Bank National Association, as trustee of SG Mortgage Securities Asset Backed Certificates, Series 26006-FRE2 (US Bank), moved to intervene in the suit, alleging that it held the MERS mortgages. The trial court permitted US Bank to intervene.

¶ 9 US Bank and Deutsche Bank both moved for summary judgment. US Bank invoked section 2-1401(e) of the Code of Civil Procedure (735 ILCS 5/2-1401(e) (West 2008)) for its argument that the court should dismiss the claims against US Bank and MERS, because Allibalogun purchased the property for value after the court entered a final judgment in the 2005 foreclosure suit. Deutsche Bank argued that US Bank acted unreasonably when it relied on the dismissal with prejudice of its prior foreclosure lawsuit, because Deutsche Bank never recorded its release of the mortgage. Deutsche Bank also claimed that it erroneously agreed to the dismissal with prejudice of the complaint. Deutsche Bank admitted that in 2005 it told its attorneys McDaniels had paid off the mortgage, but Deutsche Bank told the trial court in the 2008 foreclosure lawsuit that McDaniels had not actually paid off the mortgage.

¶ 10 The trial court in its order dated July 27, 2011, did not mention section 2-1401. It granted Deutsche Bank summary judgment against US Bank because Deutsche Bank never

recorded a release of the mortgage. The court found that the dismissal of the prior lawsuit "simply *** memorialize[d] that the plaintiff was voluntarily dismissing the case, [and it did not] reflect the result of an adjudication of the issues on their merits." The court added a finding of no just cause to delay enforcement or appeal. US Bank now appeals.

¶ 11 ANALYSIS

¶ 12 Supreme Court Rule 304(a) gives this court jurisdiction to review a judgment that disposed of Deutsche Bank's claim against only US Bank. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The case involves two statutes and the common law principles of *res judicata* and collateral attacks on a judgment.

¶ 13 *Res Judicata*

¶ 14 We begin the analysis by restating the principles of *res judicata*.

> "The doctrine of *res judicata* provides that a final judgment on the merits by a court of competent jurisdiction is conclusive on the rights of the parties and their privies and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. [Citation.] The doctrine *** prevents the unjust burden that would result if a party would be forced continually to relitigate what is essentially the same case." *Knodle v. Jeffrey*, 189 Ill. App. 3d 877, 885 (1989)

¶ 15 The doctrine applies and bars a new lawsuit if a court of competent jurisdiction entered a final judgment on the merits for the same cause of action between the same parties

or their privies. *Knodle*, 189 Ill. App. 3d at 885-86. Deutsche Bank does not contest the trial court's jurisdiction to hear the 2005 lawsuit to foreclose the mortgage. An agreed order for dismissal with prejudice of a lawsuit constitutes a final judgment on the merits. *Keim v. Kalbfleisch*, 57 Ill. App. 3d 621, 624 (1978). The mortgage foreclosure complaint filed in 2005, for McDaniels's failure to pay amounts due in May 2005, involves the same parties and the same cause of action as the mortgage foreclosure complaint filed in 2008, for McDaniels's failure to pay amounts due in May 2005. Thus, *res judicata* bars Deutsche Bank's claim against McDaniels and all parties in privity with McDaniels.

¶ 16 Ola Allibalogun is in privity with McDaniels for purposes of this lawsuit because Allibalogun purchased the property from McDaniels. As the *Knodle* court said:

> "the concept of privity within the doctrine of *res judicata* contemplates a mutual or successive relationship or interest in the same property rights which were the subject matter of the prior litigation. *** One manner in which privity arises is by purchasing a property which was the subject matter of a prior suit." *Knodle*, 189 Ill. App. 3d at 887.

Privity further extends to US Bank as mortgagee of Allibalogun's interest in the property because "a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given." *Keokuk & Western R.R. Co. v. Missouri*, 152 U.S. 301, 314 (1894). Thus, *res judicata* protects all of the defendants specifically named in the 2008 complaint, and US Bank as intervenor.

¶ 17 Collateral Attack

¶ 18 The trial court decided that the judgment in the 2005 foreclosure case had no *res judicata* effect. The court in its July 2011 order said, "based on the court's experience regarding practice in this section and its review of the 2005 dismissal order, it is clear that the purpose of the dismissal order was simply to memorialize that the plaintiff was voluntarily dismissing the case, rather than to reflect the result of an adjudication of the issues on their merits." For this finding, the court relied on Deutsche Bank's representation that "the 2005 mortgage has never, in fact, been paid off." Thus, the trial court here permitted Deutsche Bank to collaterally attack the 2005 final judgment.

¶ 19 In *Malone v. Cosentino*, 99 Ill. 2d 29 (1983) our supreme court explained the procedure for attacking a final judgment:

> " 'A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect of its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding * * *.' (49 C.J.S. *Judgments* § 401 (1947).) This court has long recognized this principle as the law of this State. As early as 1850, this court stated that when jurisdiction is established a court's judgment 'being thus entered by authority of law, no matter how erroneous it may be, or even absurd--though it be made in palpable violation of the law itself, and manifestly against the evidence--is, nevertheless, binding upon all whom the law says shall

> be bound by it, that is, upon all parties and privies to it, until it is reversed in a regular proceeding for that purpose. While it remains a judgment, it cannot be inquired into, nor its regularity questioned, in any collateral proceeding.' (*Young v. Lorain* (1850), 11 Ill. 624, 637.) Once a court with proper jurisdiction has entered a final judgment, that judgment can only be attacked on direct appeal, or in one of the traditional collateral proceedings now defined by statute. Ill. Rev. Stat.1981, ch. 110, pars. 10-101 to 10-137 (*habeas corpus*); Ill. Rev. Stat.1981, ch. 110, par. 2-1401 (relief from judgments); Ill. Rev. Stat.1981, ch. 38, pars. 122-1 to 122-7 (post-conviction hearing)." *Malone,* 99 Ill. 2d at 32-33.

¶ 20 A party may invoke the collateral attack doctrine whenever an opposing party seeks to modify or challenge a former adjudication entered against that party or its privies. See *Illinois State Chamber of Commerce v. Pollution Control Board,* 78 Ill. 2d 1, 7 (1979). The trial court here effectively voided the judgment entered in 2005 by treating the dismissal of the suit with prejudice as a voluntary dismissal without prejudice. The trial court in 2005 dismissed the suit with prejudice, by agreement of the parties, because the parties told the court that "the loan at issue [had] been paid off." When a party mistakenly agrees to entry of a final judgment, and the party later seeks to avoid the *res judicata* effect of that judgment, "[t]he proper recourse would be to attack directly the dismissal order in the [trial] court or by appeal ***, not collaterally." *Knodle,* 189 Ill. App. 3d at 886. The trial court's judgment

here, voiding the 2005 judgment entered by a court with jurisdiction over the parties and the subject matter, violates the collateral attack doctrine. See *Malone*, 99 Ill. 2d at 32-33.

¶ 21 Mortgage Act

¶ 22 The trial court held that section 2 of the Illinois Mortgage Act (the Act), and not *res judicata*, controlled the result in this case. Section 2 of the Act provides:

> "Every mortgagee of real property, his assignee of record, or other legal representative, having received full satisfaction and payment of all such sum or sums of money as are really due to him from the mortgagor, *** shall, at the request of the mortgagor, *** make, execute and deliver to the mortgagor *** an instrument in writing executed in conformity with the provisions of this section releasing such mortgage ***, which release shall be entitled to be recorded ***.
>
> Mortgages of real property and deeds of trust in the nature of a mortgage shall be released of record only in the manner provided herein or as provided in the Mortgage Certificate of Release Act; however, nothing contained in this Act shall in any manner affect the validity of any release of a mortgage or deed of trust made prior to January 1, 1952 on the margin of the record." 765 ILCS 905/2 (West 2008).

¶ 23 Section 4 of the Act establishes the penalties a mortgagee must pay if the mortgagee

improperly refuses to release a mortgage. 765 ILCS 905/4 (West 2008). Nothing in the Act indicates that a mortgagee may avoid the *res judicata* effect of a court's judgment discharging a mortgage by the simple expedient of refusing to execute a release of the mortgage. See 765 ILCS 905/1 *et seq.* (West 2008). That is, after a court has entered a final judgment in a suit to foreclose a mortgage, the mortgagee cannot use the mortgage as a basis for a new independent suit for foreclosure, even if the mortgagee refused to execute a release following the entry of a final judgment in the first suit, and even if the mortgagor failed to record the release. *Harper v. Sallee*, 305 Ill. App. 85, 92 (1940), *aff'd* 376 Ill. 540 (1940). Section 2 of the Act does not require the recording of releases as a necessary step for making a judgment in a foreclosure case final and effective. See *Harper*, 305 Ill. App. at 92.

¶ 24 Section 2-1401

¶ 25 Finally, US Bank argues that the Code of Civil Procedure precludes Deutsche Bank from foreclosing the mortgage even if the trial court were to vacate the judgment entered in 2005. Section 2-1401(e) provides:

> " Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any

> certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment." 735 ILCS 5/2-1401(e) (West 2008).

¶ 26 As the foreclosure judgment in 2005 finally disposed of Deutsche Bank's claim for enforcement of its rights under the mortgage, Deutsche Bank cannot challenge the subsequent sale of the property to a *bona fide* purchaser for value, unless the record in the 2005 litigation shows on its face a jurisdictional defect. *Mountain States Mortgage Center, Inc. v. Allen*, 257 Ill. App. 3d 372, 380-81 (1993). Deutsche Bank in its brief on appeal, like the trial court in its order, does not mention section 2-1401, and both Deutsche Bank and the trial court effectively concede that Allibalogun and US Bank qualify as *bona fide* purchasers for value. Deutsche Bank and the trial court point to no jurisdictional defect in the 2005 judgment. Thus, section 2-1401(e) forecloses Deutsche Bank from selling Allibalogun's property to obtain repayment of the loan it made to McDaniels. If Deutsche Bank could successfully attack the 2005 judgment, it could again sue McDaniels for failing to repay the loan, but it cannot take Allibalogun's property to satisfy any judgment it obtains against McDaniels.

¶ 27 CONCLUSION

¶ 28 The final judgment in Deutsche Bank's 2005 lawsuit to foreclose its mortgage, entered because Deutsche Bank told its counsel and the court that McDaniels had paid off the loan, bars Deutsche Bank from again suing McDaniels to foreclose the mortgage. Deutsche Bank cannot collaterally attack that judgment in this second proceeding to foreclose the same mortgage. The Act does not provide that the failure to record a release of a mortgage voids

a final judgment dismissing with prejudice a suit to foreclose the mortgage. Even if Deutsche Bank could now obtain relief from the judgment entered in 2005, it can no longer foreclose the mortgage because McDaniels sold the property to a *bona fide* purchaser for value. Accordingly, we reverse the summary judgment entered in favor of Deutsche Bank and remand for the entry of a judgment in favor of US Bank and for other proceedings consistent with this order.

¶ 29 Reversed and remanded.