

2015 IL App (1st) 140637-U

No. 1-14-0637

Filed October 23, 2015

FIFTH DIVISION

**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).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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In re ESTATE OF DENNIS NARDONI, Deceased	)	Appeal from the
(FirstMerit Bank, N.A.,	)	Circuit Court
	)	of Cook County
Petitioner-Appellant,	)	
	)	No. 2010 P 6715
v.	)	
	)	
Michael D. Hughes, Independent Executor of the Estate of	)	
Dennis Nardoni, deceased,	)	Honorable
	)	James G. Riley,
Respondent-Appellee).	)	Judge Presiding.

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JUSTICE PALMER delivered the judgment of the court.  
Justices Lampkin and Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the circuit court's grant of summary judgment to respondent estate, ruling that claims arising under personal guaranties executed by the deceased were precluded by *res judicata* and the policy against claim-splitting.

¶ 2 Petitioner FirstMerit Bank, N.A., (FirstMerit) is the successor in interest to the bank which issued loans to Dennis Nardoni personally and to firms in which Nardoni had an interest. Nardoni gave the bank a promissory note for the personal loan and guaranties for the other loans. Following Nardoni's death, FirstMerit brought claims against respondent Michael D. Hughes as the independent executor of Nardoni's estate (the estate) seeking to collect on the note and guaranties. FirstMerit also filed and secured judgment in a foreclosure action on a mortgage Nardoni had provided as security for the personal loan. The foreclosure court awarded FirstMerit its attorneys' fees and costs, both for the foreclosure action and the probate actions. The probate court then granted summary judgment to the estate on FirstMerit's claims, finding FirstMerit engaged in claim-splitting and its claims were barred by *res judicata*. FirstMerit argues the probate court erred in granting summary judgment to the estate as its claims were not barred by *res judicata*, the requirements of claim-splitting were not met and the estate, through Nardoni, had agreed in the guaranties that it would be precluded from arguing a claim-splitting defense. We affirm.

¶ 3 BACKGROUND

¶ 4 Between 2008 and 2010, Midwest Bank and Trust Company (Midwest) made five loans to companies in which Dennis Nardoni held an interest. Nardoni executed guaranties for the loans. Midwest also made a loan to Nardoni personally pursuant to a promissory note (Nardoni note). The Nardoni note was secured by mortgage security agreements for real properties located in Iroquois County, Illinois. When Nardoni died in August 2010, all six of the Midwest loans went into default. In March 2011, FirstMerit, as successor in interest to Midwest, filed six claims against Nardoni's estate in the probate

court of Cook County seeking to recover the loans' indebtedness under Nardoni's note and the guaranties he gave for the loans.

¶ 5 Several months later, in July 2011, FirstMerit filed a complaint in Iroquois County seeking foreclosure on two of the properties that had been mortgaged as security for the Nardoni note. It named the estate as one of the parties to the action. One property subsequently was sold and FirstMerit received proceeds from the sale. Relevant here is FirstMerit's foreclosure action regarding the second property.

¶ 6 In FirstMerit's foreclosure action on the second property, it requested attorneys' fees and costs.<sup>1</sup> First Merit submitted a petition for attorneys' fees in November 2012, averring that the attached list of fees and costs "represent a true and accurate representation of the services provided, time expended, fees charged and costs incurred by [the law firm] in the representation of Plaintiff in this matter, in connection with the default by its borrower and related matters from August 2010 through the present."

¶ 7 The foreclosure court granted foreclosure on the second property in February 2013, entering a judgment amount of \$1,976,177.00, including "[f]or costs, expenses and attorneys' fees: \$105,545.86." The court's order stated "[t]he foregoing is inclusive of fees incurred incident to Plaintiff's claims in the pending probate case relating to the

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<sup>1</sup> In the parties' briefs on appeal, they consistently direct us to FirstMerit's original July 2011 foreclosure complaint. However, the record contains an "Answer to *Amended Complaint*" (emphasis added) filed by the estate in the foreclosure action. It also contains the February 8, 2013, order in which the foreclosure court states it is entering judgment on the "Motion of [FirstMerit] \*\*\* for Default, Default and Summary Judgment and Judgment of Foreclosure and Sale on Count II of its *Amended Complaint*." (Emphasis added.) It appears, therefore, that FirstMerit filed an amended complaint for foreclosure. There is no copy of either this amended complaint or FirstMerit's motion for default/summary judgment on the amended complaint in the record. It is uncontested, however, that FirstMerit requested attorneys' fees and costs in its foreclosure action.

death of Dennis Nardoni and is awarded over the objections of Counsel for Defendants."<sup>2</sup> It further stated: "[t]his court has reviewed the foregoing costs and attorneys' fees and finds they were necessarily incurred in connection with the collection of the indebtedness which is the subject of this action and with the prosecution of this action as well as the prosecution of Plaintiff's claims in the probate case, they are fair, reasonable and customary, and they are approved and allowed."

¶ 8 The court ordered the property to be sold at a public auction. FirstMerit was the high bidder at the judicial sale of the property, bidding its entire judgment amount. The court approved the final sale and possession of the property in May 2013 and the estate did not appeal from that order.

¶ 9 In the probate action, one of FirstMerit's claims had been satisfied and dismissed. The estate moved for summary judgment on FirstMerit's five remaining claims, which included claims on guaranties Nardoni gave for loans Midwest made to Broadway Tiffany LLC and Garldoni LLC. It argued: "FirstMerit's attorneys' fees which were included in the Foreclosure Judgment comprise a portion of each of the Claims which FirstMerit filed in this probate proceeding" and, therefore, any further litigation on those claims was "barred by the doctrine of *res judicata* and the public policy prohibiting splitting claims and causes of action." It asserted: "[b]y reason of the claim-splitting

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<sup>2</sup> In its brief on appeal, the estate claims it had objected to the fee petition but does not cite to such objections in the record on appeal. In fact, the record does not contain the estate's objections to the fee petition. The record does contain the joint objection filed by a counterplaintiff and two of the other defendants, who argued "the fees and costs sought appear excessive for a mortgage foreclosure case and apparently include fees and costs that were not incurred in pursuing the mortgage foreclosure." However, the estate was not a party to this objection. Accordingly, we cannot determine whether the estate did object to the fee petition and, if it did object, what those objections were.

engaged in by FirstMerit (i.e., by including its attorney's fees with respect to its claims in this probate proceedings and its foreclosure case), FirstMerit's Claims in this probate proceeding became concluded and barred." In the estate's reply in support of its motion, it added the argument that the mortgage underlying the foreclosure proceeding secured all indebtedness due from Nardoni to the lender and, therefore, "FirstMerit could have elected to include all indebtedness due from Nardoni (including under the Notes regarding Broadway Tiffany and Galdoni) in the Foreclosure Judgment."

¶ 10 The probate court agreed with the estate that FirstMerit engaged in claim-splitting and granted the estate's motion for summary judgment on January 29, 2014. FirstMerit filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, FirstMerit challenges the probate court's grant of summary judgment to the estate on two of FirstMerit's five claims, those relating to the commercial guaranties Nardoni executed for loans Midwest made to Broadway Tiffany LLC and Galdoni LLC.<sup>3</sup> FirstMerit argues the probate court erred in finding its probate claims barred by the doctrine of *res judicata* for two reasons. It first argues that the doctrine of *res judicata* did not bar its probate claims as there was no identity of causes of action between the mortgage-based claim in the foreclosure action and the guaranty-based claims brought in the Broadway Tiffany and Galdoni probate actions. It argues that it did not engage in claim-splitting as it had requested attorneys' fees in the foreclosure action solely under the fee provisions of the mortgage given for the Nardoni note and had

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<sup>3</sup> FirstMerit informs this court that its other three probate claims, including the claim on the Nardoni note, have been fully satisfied and it, therefore, does not appeal from the grant of summary judgment to the estate on those claims.

made no arguments whatsoever under the guaranties Nardoni gave for the Broadway Tiffany and Galdoni loans. It secondly argues that, under those Broadway Tiffany and Galdoni guaranties, the estate had agreed it would not pursue a claim-splitting defense.

¶ 13 Summary judgment is properly granted when the pleadings, affidavits, depositions and admissions in the record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Dookeran v. County of Cook*, 2013 IL App (1st) 111095, ¶ 13. We review a trial court's grant of summary judgment *de novo*. *Id.*

¶ 14 1. *Res Judicata* and Claim-Splitting

¶ 15 We also review *de novo* the trial court's determination that a claim is barred by *res judicata*. *Id.* "*Res judicata* is an equitable doctrine and is applied to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same." *Id.* at ¶ 15. "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). "For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *Id.* at 335.

¶ 16 Where all three requirements are met, "*res judicata* extends not only to every matter that was actually determined in the prior suit, but to every other matter that might have been raised and determined in it." *Id.* at 339.

"When *res judicata* is established as a bar against the prosecution of a second

action between the same parties upon the same claim or demand it is conclusive not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other matter which *might* have been offered for that purpose." (Emphasis in original.) *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2001).

¶ 17 "The principle that *res judicata* prohibits a party from later seeking relief on the basis of issues which might have been raised in the prior action also prevents a litigant from splitting a single cause of action into more than one proceeding." *Rein*, 172 Ill. 2d at 339. "The rule against claim-splitting, which is an aspect of the law of preclusion, prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action." *Id.*

¶ 18 The question here is whether, as the probate court found, FirstMerit's claims are barred by *res judicata* as it engaged in claim-splitting. FirstMerit agrees that the first and third elements of *res judicata* are met. The Iroquois County court's orders granting foreclosure, awarding FirstMerit attorneys' fees and costs and entering judgment on the judicial sale were final judgments on the merits (element 1) and FirstMerit and the estate were parties in both the probate and foreclosure actions (element 3). The remaining determination is whether there was an identity of causes of action (element 2) between the foreclosure action and the Broadway Tiffany and Galdoni probate actions.

¶ 19 "A cause of action is defined by the facts which give a plaintiff a right to relief." *Rein*, 172 Ill. 2d at 338.

"While one group of facts may give rise to a number of different theories of recovery, there remains only a single cause of action. "If the same facts are

essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action." ' ' ' *Id.* quoting (*People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 295 (1992), quoting *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 157 (1981)).

"Therefore, to determine whether there is an identity of causes of action between the first and second suits, we must look to the facts that give rise to plaintiffs' right to relief, not simply to the facts which support the judgment in the first action." *Id.* at 338-39.

¶ 20 At first glance, the causes of action in the Broadway Tiffany and Galdoni probate actions do not appear to be the same as the cause of action in the foreclosure action. The Broadway Tiffany and Galdoni probate actions were based on two commercial guaranties Nardoni executed as security for two loans Midwest made to Broadway Tiffany and Galdoni. The foreclosure action was based on a mortgage Nardoni provided as security for the personal loan Midwest made to Nardoni. The same set of facts was, therefore, arguably not necessary for the maintenance and proof in the foreclosure action on the mortgage underlying the Nardoni note and probate actions on the guaranties underlying the Broadway Tiffany and Galdoni loans.

¶ 21 However, when FirstMerit filed its Broadway Tiffany and Galdoni claims in probate court, it requested not only payment of the indebtedness underlying the claims but also the attorneys' fees and costs it incurred in pursuing those claims.<sup>4</sup> It then

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<sup>4</sup> The Broadway Tiffany and Galdoni probate claims alleged that Broadway Tiffany and Galdoni had defaulted on their obligations under their respective notes and owed FirstMerit \$1,547,801 (Broadway Tiffany) and \$210,370 (Galdoni) "plus interest, fees and expenses" which continued to accrue. Citing the guaranties Nardoni had executed to secure the Broadway Tiffany and Galdoni notes, FirstMerit sought payment



requested those same attorneys' fees and costs in its later-filed foreclosure action when it filed its petition requesting the attorneys' fees and costs it had incurred up to November 19, 2012, the date of its fee petition. FirstMerit did not specifically request attorneys' fees and costs for the Broadway Tiffany and Galdoni probate claims in its fee petition in foreclosure action. Instead, as the probate court succinctly stated, FirstMerit "lumped" all six of its probate claims together in the fee petition.

¶ 22 FirstMerit admitted as much during the hearing on the estate's motion for summary judgment in the probate action, stating it had filed in the foreclosure action "for the fees incurred in this probate case" and "it could be one note or six notes. It doesn't make any difference." It stated the foreclosure judgment included attorneys' fees "[f]or the services rendered in the probate proceeding as a whole." It told the court, "[w]e have six claims in the probate, but it's not like we're here one day on \*\*\* the Dennis Nardoni note, and then the next time we come in here we're on the Broadway Tiffany note," essentially arguing it could not have allocated the fees between the six probate claims. Accordingly, we find the fee petition FirstMerit filed in the foreclosure action encompassed not only the attorneys' fees and costs FirstMerit had incurred in pursuing its foreclosure and probate claims on the Nardoni note up until November 19, 2012, but also those it had incurred up to that date in pursuing its five other probate claims, including those on the Broadway Tiffany and Galdoni guaranties.

¶ 23 The foreclosure court awarded FirstMerit all the fees and costs itemized in the

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from the estate for this indebtedness. In each of the guaranties, Nardoni had agreed "to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty."

fee petition. Therefore, as the estate correctly asserted in its motion for summary judgment, the probate-related attorneys' fees and costs awarded to FirstMerit in the foreclosure action necessarily "comprise a portion of each of the Claims which FirstMerit filed in this probate proceeding," which include the Broadway Tiffany and Galdoni claims,

¶ 24 FirstMerit argues it did not engage in claim-splitting, asserting that it did not raise either the Broadway Tiffany or Galdoni note or guaranty in the foreclosure action and that the judgment in the foreclosure action decided only what amounts were owed under the Iroquois County mortgage and not what amounts were owed under the Broadway Tiffany or Galdoni notes or guaranties. It asserts it sought relief under the fee provisions of the Iroquois mortgage, not under the attorneys' fees and costs provisions of the Broadway Tiffany or Galdoni guaranties.

¶ 25 We find that by requesting the foreclosure court to award it the attorneys' fees and costs it had incurred in the Broadway Tiffany and Galdoni probate actions while those probate actions were still pending, FirstMerit engaged in claim-splitting. It pursued part of its claims against the estate on the Broadway Tiffany and Galdoni indebtedness in the foreclosure action (partial recovery of its attorneys' fees and costs in the probate actions) even though it had already initiated the same claims and more against the estate in the probate action (full recovery on the indebtedness under Nardoni's Broadway Tiffany and Galdoni guaranties as well as the attorneys' fees and costs it incurred in pursuing the estate for that indebtedness).

¶ 26 FirstMerit asserts that, under the mortgage Nardoni gave Midwest as security for the Nardoni note, it could and did request all of its attorneys' fees and costs, including

any incurred in probate proceedings. In the mortgage, Nardoni assigned the lender a security interest in real property:

"to secure payment of the indebtedness under the Note with interest thereon; the payment of all charges provided herein and all other sums, with interest thereon, \*\*\*; and *the performance of the covenants and agreements contained herein and in the Note and all other indebtedness of Nardoni to Lender whether now or hereafter existing (collectively, the 'Secured Indebtedness')* \*\*\*." (Emphasis added.)

¶ 27 Section 11 of the mortgage provided, in relevant part, that the lender could collect "any costs, expenses and fees, including reasonable attorneys' fees" that it incurred "in connection with," *inter alia*, protecting and enforcing its rights under the mortgage, "recovering any *Secured Indebtedness*" and any litigation or proceedings affecting the Nardoni note or the mortgage, "including without limitation, \*\*\* *probate* proceedings." (Emphasis added.) Section 14 of the mortgage provided that, when the "*Secured Indebtedness*" became due, the lender had "the right to foreclose the lien hereof for *such indebtedness* or part thereof and/or exercise any right, power or remedy provided in this Mortgage." (Emphasis added.) The lender could also collect "the reasonable fees of any attorney employed by the Lender in any litigation or proceeding affecting this Mortgage, the Note or the Premises, including *probate* \*\*\* proceedings." (Emphasis added.)

¶ 28 The "*Secured Indebtedness*" defined in the mortgage necessarily included Nardoni's guaranties of the Broadway Tiffany and Galdoni notes, which constituted indebtedness of Nardoni to the lender. Thus, the mortgage gave FirstMerit the right to

pursue the estate in foreclosure court for the indebtedness, attorney's fees and costs associated with not only the Nardoni note but also with Nardoni's guaranties of the Broadway Tiffany and Galdoni notes. By requesting *all* the attorneys' fees and costs it had incurred in pursuing the estate in the probate action for Nardoni's indebtedness under the Broadway Tiffany and Galdoni guaranties, FirstMerit placed those guaranties in issue in the foreclosure action.

¶ 29 FirstMerit's probate claims for the estate's indebtedness under the Broadway Tiffany and Galdoni guaranties and its claims for the related attorneys' fees and costs present different theories of relief but those claims arose from the same causes of action, the guaranties. FirstMerit is correct that, under the mortgage, it could pursue the estate in the foreclosure action for those attorneys' fees and costs. However, the mortgage did not excuse claim splitting. These attorneys' fees and costs, which FirstMerit requested and received in full in the foreclosure action, were the same claims as those pending in the probate court, arising from the same causes of action: the Broadway Tiffany and Galdini guaranties. Under the mortgage, FirstMerit could have brought all of Nardoni's/the estate's indebtedness under the guaranties, including attorneys' fees incurred in pursuing that indebtedness, into its foreclosure action. However, by pursuing the estate in foreclosure court for only the attorneys' fees and costs incurred in enforcing its claims on the Broadway Tiffany and Galdoni guaranties, FirstMerit engaged in claim-splitting.

¶ 30 Once FirstMerit chose to pursue the attorneys' fees and costs for the Broadway Tiffany and Galdoni probate actions in the foreclosure court, it should have, as the estate suggests, amended its foreclosure complaint to add counts against the estate

under the Broadway Tiffany and Galdoni guaranties. The proceeds of the sale of the real property underlying the mortgage would not be sufficient to cover the indebtedness, interest, costs and fees due under the Nardoni, Broadway Tiffany and Galdoni notes. Therefore, once the property was sold, FirstMerit could seek a deficiency judgment in the foreclosure court for any shortfall between the sale proceeds and the indebtedness and presented that deficiency judgment in its probate actions.

¶ 31 Even though the probate actions were the first claims filed on the Broadway Tiffany and Galdoni claims, the later-filed foreclosure action seeking attorneys' fees for the probate claims went to judgment first. Therefore, the estate properly moved to bar the still pending probate claims as these claims could have been brought against the estate in the foreclosure action. Once the final judgment in the foreclosure action was entered, FirstMerit's rights to pursue claims that could have been brought in that foreclosure action were extinguished. The probate court did not err in granting summary judgment to the estate on its claim-splitting affirmative defense in the probate actions.

## 2. Acquiescence

¶ 32 FirstMerit argues that the probate court erred in granting summary judgment to the estate as the Broadway Tiffany and Galdoni guaranties expressly waived any defense that would bar enforcing the guaranties after obtaining the foreclosure judgment. Citing section 26(1) of the Restatement (Second) of Judgments (Restatement (Second) of Judgments § 26(1)9a) (1982)), FirstMerit asserts that causes of action are excused from the claim-splitting prohibition where the parties have agreed in terms or acquiesced to claim-splitting and that the estate had so agreed here.

¶ 33 As FirstMerit suggests, the claim-splitting prohibition has been relaxed where it

would be inequitable to apply the prohibition. *Rein*, 172 Ill. 2d at 341. Section 26(1) of the Restatement (Second) of Judgments sets out the situations in which it would be inequitable to apply the claim-splitting rule. *Id.* It provides, *inter alia*, that the rule does not apply to bar an independent claim of part of the same cause of action if "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." Restatement (Second) of Judgments § 26(1) (1980); *Rein*, 172 Ill. 2d at 341.

¶ 34 FirstMerit argues that, in executing the Broadway Tiffany and Galdoni guaranties, Nardoni expressly waived any rights he had to assert the defenses of claim-splitting and *res judicata* against FirstMerit and that his waiver applies to the estate. Both the Broadway Tiffany and Galdoni guaranties provided:

"Guarantor [Nardoni] also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to any rights or defenses arising by reason of \*\*\* 'one action' or 'anti-deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale."

FirstMerit argues that under this provision, Nardoni acquiesced to a prohibition on the defenses of claim-splitting and *res judicata* against FirstMerit and, consequently, pursuant to section 26(1) of the Restatement (Second) of Judgments, a claim-splitting defense would not apply to FirstMerit's claims in the probate action against Broadway Tiffany and Galdoni. It claims the estate stands in Nardoni's shoes, is subject to the

same agreements and acquiescence's provided by Nardoni and, therefore, cannot pursue any defense based on a "one action" law against FirstMerit.

¶ 35 The estate asserts this argument is forfeit as FirstMerit did not raise it to the trial court. An appellant's failure to raise an issue in the circuit court results in forfeiture of that issue. *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93. FirstMerit responds that it did raise the issue to the probate court in its response in opposition to the estate's motion for summary judgment when it asserted that the estate acquiesced in FirstMerit's prosecution of both the foreclosure proceeding and the probate proceedings. It argues the response described the Restatement (Second) of Judgments' "acquiescence by conduct and agreement exceptions to claim-splitting" in detail and that it did not have to explicitly argue every potential aspect of acquiescence since the estate was on notice regarding its argument. FirstMerit asserts that the estate was put on notice of its intent to argue acquiescence through agreement by the statement: "the rule against claim-splitting will not apply 'if the parties have agreed in terms or in effect that the plaintiff may split his claims, or if the defendant has acquiesced therein.' "

¶ 36 FirstMerit did raise Nardoni's/the estate's acquiescence in its response in opposition to the motion for summary judgment. However, it did so only in the context of the estate's failure to raise a claim-splitting defense during the foreclosure proceedings. FirstMerit's argued in the response that the estate's failure to raise claim-splitting as an affirmative defense in the mortgage foreclosure action when that action was first brought "result[ed] in acquiescence to the two claims" and the estate's raising of the defense only after the action had been litigated "for years," amounted to waiver. It made absolutely no mention of the Broadway Tiffany and Galdoni guaranties in its response,

let alone that the estate was bound by Nardoni's purported acquiesce to the claim-splitting and/or his waiver of a claim-splitting affirmative defense under those guaranties. Neither the probate court nor the estate had any notice that this was encompassed by FirstMerit's argument.

¶ 37 FirstMerit's failure to raise this argument to the probate court is borne out by the transcript of the hearing on the estate's motion for summary judgment. During the hearing, FirstMerit argued that the estate had acquiesced to the claim splitting by failing to raise the claim-splitting defense during the foreclosure action. As in its response, it made no mention of its argument here that the estate, standing in Nardoni's shoes, acquiesced to the claim splitting in the Broadway Tiffany and Galdoni guaranties. FirstMerit did not raise this argument to the probate court. Therefore, the argument is forfeit.<sup>5</sup> *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93.

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<sup>5</sup> Were we to consider FirstMerit's argument, we would find that, as the estate points out, the guaranty provision underlying FirstMerit's argument did not in fact operate as a waiver of a *res judicata* or claim-splitting defense. As explained in *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.*, 569 F. 3d 667 (2009), a guaranty provision waiving "any and all rights or defenses arising out of ... any "one action" or "anti-deficiency" law" is commonly used by lawyers drafting an instrument that will be used in many states as states often require that all claims on a note, mortgage and guaranty be brought in a single action. *Freedom Mortgage Corp.*, 569 F. 3d at 671 (quoting *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 238 (2004)). By waiver of a mandatory-joinder rule, the provision allows a lender to avoid claim preclusion and bring an action against a guarantor separately from a foreclosure action on a mortgage or note. Such a provision is, however, unnecessary in Illinois as "Illinois does not require all claims to be made in a single action." *Id.* (citing *River Park Inc. v. Highland Park*, 184 Ill. 2d 290, 309-10 (1998); *LP XXVI, LLC*, 349 Ill. App. 3d 237; *Farmer City State Bank v. Champaign Nat'l Bank*, 138 Ill. App. 3d 847 (1985)). Instead, Illinois permits a lender to maintain a foreclosure action on a note/mortgage and a separate action on a guaranty and "follows the same-transaction approach to claim preclusion." *Id.* (citing *River Park Inc.*, 184 Ill. 2d at 309-10; *LP XXVI, LLC*, 349 Ill. App. 3d 237; *Farmer City State Bank*, 138 Ill. App. 3d 847. There is, therefore, "no need for a waiver of a nonexistent mandatory-joinder rule." *Id.* (citing *River Park Inc.*, 184 Ill. 2d at 309-10; *LP XXVI, LLC*, 349 Ill. App. 3d 237; *Farmer City State Bank*, 138 Ill. App. 3d 847). In sum,



¶ 38

CONCLUSION

¶ 39

For the reasons stated above, we affirm the probate court's grant of summary judgment to the estate on FirstMerit's claims.

¶ 40

Affirmed.

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the guaranty provision operates as a waiver of a nonexistent mandatory joinder rule, not of a *res judicata* or claim-splitting defense.