2014 IL App (2d) 131071-U
No. 2-13-1071
Order filed July 30, 2014

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).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FOSTER BANK, Plaintiff-Appellee, v. XIAOWEN ZHU, Defendant-Appellant (The City of Aurora and Unknown Owners and Nonrecord Claimants-Defendants).	))))))))))))	Appeal from the Circuit Court of Kane County. No. 12-CH-3937 Honorable Leonard J. Wojtecki, Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to dismiss plaintiff's foreclosure complaint as barred by *res judicata* or the related rule against claim-splitting, as plaintiff was permitted to bring an action to foreclose the mortgage after having brought an action to recover on the note.

¶ 2 Defendant, Xiaowen Zhu, appeals, *pro se*, from the judgment of the circuit court of Kane County denying her motion to dismiss and her amended motion to reconsider, contending that plaintiff Foster Bank's foreclosure action was barred by *res judicata* or the related rule against

claim splitting. Because the foreclosure action was not barred by *res judicata*, nor violated the rule against claim splitting, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff provided a home equity line of credit (HELOC) to Zhu in the amount of $111,000. The HELOC was secured with a mortgage on property located at 1838 Ashwood Lane, Aurora.

¶ 5 In December 2011, plaintiff filed a complaint in the circuit court of Cook County, alleging that Zhu had breached the terms of the HELOC and seeking a money judgment. The trial court entered a default judgment in the amount of $115,974.64.

¶ 6 In October 2012, plaintiff filed a complaint in the circuit court of Kane County, seeking to foreclose on the mortgage securing the HELOC. Plaintiff alleged that there was an unpaid principal balance of $109,137.52 and a "[c]ontractual [d]elinquency" of $6,557.10. Zhu and the other defendants were served but failed to answer or otherwise plead. On January 28, 2013, the trial court entered a default order and a judgment of foreclosure and sale, setting a redemption date of April 28, 2013. In the judgment of foreclosure, the court found that, including principal, interest, attorney fees, and costs, there was a total unpaid balance on the HELOC of $122,646.21.

¶ 7 On April 26, 2013, Zhu filed, *pro se*, a motion to dismiss, contending that the foreclosure action was barred by *res judicata*.[1] After hearing arguments, the trial court denied the motion to dismiss. The court scheduled the property to be sold on July 11, 2013.

¶ 8 Prior to the date of the sale, Zhu filed an amended motion to reconsider, arguing that the judgment of foreclosure should be set aside because the action was barred by *res judicata* and the related rule against claim splitting. The trial court stayed the sale pending its decision on the

[1] The other defendants never filed an appearance, an answer, or any other pleading.

amended motion to reconsider. On July 15, 2013, the court denied the amended motion to reconsider and rescheduled the sale for July 18, 2013. The property was sold for $60,000, and on August 26, 2013, the court approved the sale. That order provided that there was an *in rem* deficiency of $69,000, which was the difference between the amount Zhu owed plaintiff under the HELOC and the sale price. We allowed Zhu to file a late notice of appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, Zhu contends that the trial court erred in denying her motion to dismiss and her amended motion to reconsider. She argues that, because plaintiff obtained a money judgment based on the HELOC note, it was barred by *res judicata* from obtaining a judgment of foreclosure based on the mortgage. Alternatively, she maintains that plaintiff engaged in improper claim splitting by not seeking both money damages on the note and a foreclosure on the mortgage in the same proceeding.

¶ 11 Although Zhu did not specify the procedural basis for her motion to dismiss, it was effectively brought pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)). A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that defeats the plaintiff's claim. *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 243 (2010). Section 2-619(a)(4), in particular, permits a defendant to seek dismissal based on *res judicata*. 735 ILCS 5/2-619(a)(4) (West 2012). A section 2-619 motion admits as true all well-pleaded facts and reasonable inferences gleaned therefrom (*Calloway v. Kinkelaar*, 168 Ill. 2d 312, 325 (1995)), and a reviewing court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party (*Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352

(2008)). We review *de novo* a decision on a motion to dismiss based on *res judicata*. *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 489 (2009).

¶ 12 The doctrine of *res judicata* provides that a final judgment on the merits bars any subsequent action between the same parties or their privies that is based on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* applies to all matters that were actually decided in the original action and to all issues that could have been decided. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. The requirements of *res judicata* are: (1) a final judgment on the merits entered by a court of competent jurisdiction; (2) an identity of the cause of action between the two suits; and (3) identical parties or their privies. *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 73-74 (1994).

¶ 13 The specific issue before us, in terms of whether *res judicata* was a valid defense to the Kane County foreclosure action, is whether the action on the HELOC note and the foreclosure action were based on the same cause of action such that plaintiff was not permitted to obtain first a money judgment on the note and then later seek a judgment of foreclosure on the mortgage. They were not.

¶ 14 It is well settled that, upon default by the borrower, the mortgagee is permitted to choose whether to proceed on the note or to foreclose upon the mortgage, and that those alternative remedies may be pursued consecutively or concurrently. *LP XXVI, LLC. v. Goldstein*, 349 Ill. App. 3d 237, 241 (2004); *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (1985). *cf. Goldstein*, 349 Ill. App. 3d at 242 (*res judicata* does not bar action on note secured by mortgage and separate action on personal guarantee); *Farmer City State Bank*, 138 Ill. App. 3d at 852 (same). Moreover, a foreclosure suit, although *quasi in rem*, provides a remedy legally distinct from an *in personam* action on a promissory note. *Turczak v. First*

American Bank, 2013 IL App (1st) 121964, ¶ 33. Indeed, a note and a mortgage give rise to distinct contract claims that cannot be maintained within a single-count foreclosure action. See *Goldstein*, 349 Ill. App. 3d at 241. Therefore, a note and an accompanying mortgage give rise to separate causes of action.

¶ 15 In this case, plaintiff's initial action under the note was distinct from its subsequent action to foreclose on the mortgage. Therefore, because the two actions did not comprise the same cause of action, *res judicata* did not bar the subsequent action to foreclose the mortgage. Thus, the trial court correctly denied the motion to dismiss to the extent that it was based on *res judicata*.

¶ 16 Zhu contends, alternatively, that plaintiff was prohibited by the rule against claim splitting from filing separate actions. That rule is encompassed within the doctrine of *res judicata* and prohibits a party from splitting a single cause of action into more than one proceeding. *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 904 (2009); *Saxon Mortgage, Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098, 1109 (2000) (citing *Rein*, 172 Ill. 2d at 339).

¶ 17 As discussed, the doctrine of *res judicata* does not prohibit a mortgagee from first bringing an action on the note and later bringing a separate action to foreclose on the mortgage. Zhu cites no authority, nor do we find any, that has applied the rule against claim splitting to bar a foreclosure action brought subsequent to an action on a note. That is not surprising as each is a separate cause of action that may be maintained consecutively or concurrently. See *Goldstein*, 349 Ill. App. 3d at 241-42. Thus, the rule against claim splitting did not bar plaintiff's

subsequent action to foreclose, and the trial court properly denied the motion to dismiss to the extent that it was based on that rule.[2]

¶ 18 Finally, plaintiff contends that it is entitled to seek postjudgment attorney fees, including those related to this appeal. It asks us to "instruct the [trial court]" to allow it to present a petition for such fees. We decline to instruct the court in that regard, as the propriety of any such petition is best left to the trial court.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we affirm the judgment of the circuit court of Kane County denying Zhu's motion to dismiss and amended motion to reconsider.

¶ 21 Affirmed.

[2] We note that, although plaintiff may sue separately on both the note and the mortgage, it may obtain only one satisfaction. See *Farmer City State Bank*, 138 Ill. App. 3d at 859; *Skach v. Lydon*, 16 Ill. App. 3d 610, 614 (1973).