Appeal No. 2016AP1496 **Cir. Ct. No. 2014CV3377**

WISCONSIN COURT OF APPEALS
DISTRICT IV

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

CORY THOMPSON,

DEFENDANT-APPELLANT,

UNKNOWN SPOUSE OF CORY THOMPSON,

DEFENDANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

This appeal raises the issue of whether, where a foreclosure action brought on a borrower's default on a note has been dismissed with prejudice, the lender is barred by claim preclusion from bringing a second foreclosure action on the borrower's continuing default on the same note. Because this issue is not only one of first impression in Wisconsin but is one in which "state courts have struggled to develop their jurisprudence," Megan Wachspress et al., Comment, *In Defense of "Free Houses,"* 125 YALE L.J. 1115, 1116 (2016), we certify this

appeal to the Wisconsin Supreme Court pursuant to WIS. STAT. RULE 809.61 (2015-16).[1]

Background

The first foreclosure action. In November 2010, BAC Home Loans Servicing, LP, formerly Countrywide Home Loans Servicing, LP, filed a complaint against Cory Thompson. The complaint sought foreclosure and the entire balance owed under a 2004 note and mortgage after Thompson allegedly failed to make payments as of April 2009 and BAC accelerated the debt, which made the principal balance of $153,202.53 immediately payable in full. The circuit court denied BAC's motion for summary judgment and BAC's renewed motion for summary judgment, and the foreclosure action proceeded to a trial to the court. The court concluded that BAC failed to present evidence of the original notice of intent to accelerate, evidence of the original note, and evidence that BAC was in possession of the original note. The court determined that BAC failed to present sufficient evidence to proceed with the foreclosure and dismissed the foreclosure action with prejudice.[2]

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[1] This appeal raises one additional issue. That issue is whether a plaintiff in a foreclosure action proves that it possesses the original note and, therefore, is the holder entitled to enforce the note, when: (1) at the beginning of trial, its trial counsel presents to the circuit court a document that counsel represents to the court is the original note, but does not further state that counsel's client possesses the note; (2) no witness so testifies; and (3) the borrower objects to admission of the note in the absence of any witness testimony. That issue is currently before the Wisconsin Supreme Court in ***Deutsche Bank National Trust Co. v. Wuensch***, No. 2015AP175. Accordingly, we do not address that issue.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] A more detailed summary of the 2010 action is found in our 2013 opinion affirming the circuit court's order dismissing that action with prejudice. ***BAC Home Loans Servicing LP v. Thompson***, No. 2013AP210, unpublished slip op. (WI App Dec. 19, 2013).

The second foreclosure action. Bank of America, N.A. became the servicer of Thompson's loan in 2011. In December 2014, Bank of America filed the complaint at issue in this appeal against Thompson, seeking foreclosure and the entire balance owed under the same note and mortgage as in the 2010 action, based in part on the allegation that Thompson failed to make payments as of September 2009. Bank of America accelerated the debt, which made the principal balance of $152,355.98 immediately payable in full.

Thompson moved to dismiss the complaint on the ground, relevant to this appeal, that the action is barred by the doctrine of claim preclusion. The circuit court granted Thompson's motion in part and denied it in part. The court found that the 2010 and 2014 actions involved the same parties, the same note and mortgage, and the same "essential" allegation of default, and sought the same remedy. The court found that the only difference between the two actions was the different default periods, beginning in April 2009 in the first action and in September 2009 in the second. The court concluded that claim preclusion barred the portion of Bank of America's "default claim" that was alleged to have occurred between April 2009 and the date of the trial in the first action, August 16, 2012, and that any "default claim" alleged to have occurred after August 16, 2012, "remains viable."

Bank of America filed an amended complaint alleging that Thompson failed to make payments under the note after the judgment in the 2010 action, as of September 2012, and that he owed a principal balance of $152,141.69. Federal National Mortgage Association replaced Bank of America as the plaintiff in December 2015.

After trial to the circuit court, the court granted a foreclosure judgment in favor of FNMA and against Thompson, and found that the principal amount of $152,355.98—plus escrow, interest after August 16, 2012, and costs incurred by FNMA—was due to FNMA. Thompson appeals.

Discussion

Under claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (quoting ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983)). The elements of claim preclusion are: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). "The question of whether claim preclusion applies under a given factual scenario is a question of law that [the appellate court] reviews *de novo*." ***Id.***

The dispositive dispute is whether the second element of claim preclusion, an identity between the causes of action, is present here. Wisconsin has adopted the transactional approach to determine whether there is an identity of claims between two actions. ***Id.*** at 553. "Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." ***Parks v. City of Madison***, 171 Wis. 2d 730, 735, 492 N.W.2d 365 (Ct. App. 1992).

Thompson argues that claim preclusion bars the second foreclosure action in two ways. First, Thompson argues that because BAC in the first action

accelerated the note, making all sums under it immediately due in full, the transaction in the first action was the entire debt under the note. In other words, the action concerned "the entirety of the debt." Therefore, according to Thompson, where BAC failed to prove in the first action that it had a right to receive the entire amount due under the note, claim preclusion bars the second action because it also concerns the entire amount due under the note.

Second, in an apparent variation of Thompson's first argument, he argues that the relevant transaction in the first action was the note itself. Therefore, according to Thompson, where BAC failed to prove that it had possession of the note and, accordingly, the right to enforce the note, claim preclusion bars FNMA's action because it seeks to enforce the same note. Thompson argues that claim preclusion bars FNMA from trying to prove what BAC failed to prove in the first action: "the right to enforce the note." *See* ***Wisconsin Pub. Serv. Corp. v. Arby Const., Inc.***, 2012 WI 87, ¶32, 342 Wis. 2d 544, 818 N.W.2d 863 ("[A] party, when called upon in legal form to establish a cause of action or defense, must do so by proving all the facts within his power and ... if he purposely or negligently fail in doing this, he will not afterwards be permitted to deny the correctness of the determination, or renew the controversy." (quoted source omitted)).

Both of Thompson's arguments are premised on the proposition that additional proof of the right to enforce the note does not alter the cause of action.

FNMA argues that the different date of default and different principal balance in the second foreclosure action, plus the new notice of intent to accelerate issued in May 2014, constitute new facts that "give[] rise to a new and subsequent default." Therefore, according to FNMA, the second action concerns a

different transaction from that of the first foreclosure action. The premise of FNMA's argument is that "Thompson remains continually obligated to pay the loan," which he has continually failed to pay.

Prior pronouncements of the Wisconsin Supreme Court do not appear to resolve the issue. In ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶26-27, 279 Wis. 2d 520, 694 N.W.2d 879, the Court stated, "The concept of a transaction connotes a common nucleus of operative facts" and courts are to take a pragmatic approach, which "looks to see if the claim asserted in the second action should have been presented for decision in the earlier action, taking into account practical considerations relating mainly to trial convenience and fairness." (Quoted source omitted.) Both parties' arguments here can be found to be consistent with this proposition. Thompson argues that "the common nucleus of operative facts," ***id.***, ¶26, is the note and entire debt, and that the right to enforce that note and to collect that entire debt was litigated in the first action and should not be relitigated in the second action. FNMA argues that there is no "common nucleus of operative facts" as to the different dates of Thompson's separate defaults, each of which triggered a separate notice of intent to accelerate, and that Thompson's subsequent default could not have been litigated in the first action. We certify this appeal to the Wisconsin Supreme Court to determine which, if either, argument reflects the proper application of the doctrine of claim preclusion on these facts.

We note that several other state courts have addressed the question of how the doctrine of claim preclusion applies to a subsequent foreclosure action after a prior dismissed foreclosure action, and they have taken varied approaches, often generating vigorous dissenting opinions. We close by summarizing the major cases from other jurisdictions, without attempting to analyze the merits of any opinion or to make any additional points of our own.

The Maine and Ohio supreme courts have taken the same approach, holding that dismissal with prejudice of a foreclosure action that sought payment of the entire accelerated debt precludes a subsequent action to enforce the note. In ***Johnson v. Samson Constr. Corp.***, 1997 ME 220, 704 A.2d 866, the first action had been dismissed with prejudice after the lender failed to file a report as ordered by the lower court. ***Id.***, ¶3. The Supreme Judicial Court of Maine held that claim preclusion barred a second foreclosure action because the lender in both actions alleged that the borrower had defaulted on the note and the lender was entitled to a judgment for the entire amount due under the note pursuant to the note's acceleration clause. The court held that a borrower "cannot avoid" in the second action "the consequences of his procedural default in [the first action] by attempting to divide a contract which became indivisible when he accelerated the debt in the first [action]." ***Id.***, ¶8.[3]

The Ohio Supreme Court reached a similar conclusion in ***U.S. Bank Nat'l Ass'n v. Gullotta***, 120 Ohio St. 3d 399, 2008 Ohio 6268, 899 N.E.2d 987. In that case, the lender voluntarily dismissed two actions in which the lender alleged default and sought foreclosure and payment of the entire debt under an acceleration clause. ***Id.***, ¶¶3-4. Under an Ohio rule, a second voluntary dismissal constitutes an adjudication on the merits. ***Id.***, ¶6. The lender filed a third action

[3] In a more recent case concerning two actions alleging breaches of different terms of the mortgage, one alleging failure to protect, repair, and adequately insure the property, and the second alleging failure to make payments, the Maine court held that claim preclusion did not bar the second action. ***Wilmington Trust Co. v. Sullivan-Thorne***, 2013 ME 94, ¶¶12-13, 81 A.3d 371. The court distinguished ***Johnson*** on the ground that, in the case before it, the lender had not accelerated the debt, but only sent the borrower "a notice of default stating that it would accelerate the debt if [the borrower] failed to cure her default." ***Id.***, ¶12 n.4. The court also appeared to suggest that claim preclusion might not bar subsequent foreclosure actions based on subsequent and separate defaults. ***Id.***, ¶12 (citing approvingly two cases, discussed below in this certification, from Florida and Indiana so holding).

again alleging default, declaring the entire debt due, and seeking judgment in foreclosure in the amount of the principal due on the note plus interest from the same date of default as in the first action. ***Id.***, ¶5. The lender then filed an amended complaint, "mov[ing] the start date for the collection of interest on the overall debt to a time after" the lender's second voluntary dismissal. ***Id.***, ¶8.

The Ohio Supreme Court concluded that the "note and mortgage never changed, that upon the initial default, the bank accelerated the payments owed and demanded the same principal payment that it demanded in every complaint, that Gullotta never made another payment after the initial default, and that U.S. Bank never reinstated the loan." ***Id.***, ¶19. Purporting to follow a transactional approach, the Ohio court concluded that all actions arose "from the same note, the same mortgage, and the same default," after which the entire amount of the principal was owed. ***Id.***, ¶28. The court stated, "The key here is that the whole note became due upon Gullotta's breach, not just the installment he missed." ***Id.***, ¶29. The court distinguished this case from those in which subsequent foreclosure actions were deemed to bring different claims, on the basis that, in those cases, "the underlying agreement had significantly changed or the mortgage had been reinstated following the earlier default." ***Id.***, ¶33. The court concluded that claim preclusion barred the subsequent suit because "nothing changed between the parties" since the borrower defaulted, but stated, "Had there been any change as to the terms of the note or mortgage, had any payments been credited, or had the loan been reinstated, then this case would concern a different set of operative facts, and [claim preclusion] would not be in play." ***Id.***, ¶38.

Courts in Florida and Indiana have taken a different approach, holding that subsequent actions based on the borrower's subsequent default are not barred under claim preclusion. In ***Singleton v. Greymar Assocs.***, 882 So. 2d 1004,

1005, 1007 (Fla. 2004), the Florida Supreme Court held "that a dismissal with prejudice in a mortgage foreclosure action does not necessarily bar a subsequent foreclosure action on the same mortgage ... for a default that involves a separate period of default from the one alleged in the first action." In that case, the lower court had dismissed the first foreclosure action, alleging a default based on the failure to make payments due from September 1999 to February 2000, because the lender failed to appear at a case management conference. ***Id.*** The lender brought a second foreclosure action, alleging a default based on the failure to make payments from April 2000 onward. ***Id.*** at 1005. In both actions, the lender sought to accelerate the entire debt. ***Id.*** at 1005 n.1. The Florida court reasoned that "an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue." ***Id.*** at 1007. The court concluded that claim preclusion did not bar the subsequent foreclosure action because "the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." ***Id.*** at 1008.

The Indiana Court of Appeals in ***Afolabi v. Atlantic Mortg. & Inv. Corp.***, 849 N.E.2d 1170 (Ind. Ct. App. 2006), came to a similar conclusion. In that case, the first foreclosure action was dismissed with prejudice after the note and mortgage were assigned to a new entity, Atlantic. ***Id.*** at 1172. The borrower failed to make any payments on the note and mortgage after the filing of that foreclosure action, and Atlantic filed a second foreclosure action. ***Id.*** The Indiana court held that claim preclusion did not bar the second foreclosure action because "the trial court had to determine whether there was a default between" the time of the dismissal of the first action and the filing of the second action, "a question which was not at issue in the first foreclosure action." ***Id.*** at 1175. The court reasoned that "the subsequent and separate alleged defaults under the note created

a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." ***Id.*** Therefore, the court concluded, claim preclusion did not "bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim." ***Id.***

The Vermont Supreme Court adopted a third approach. In ***Cenlar FSB v. Malenfant***, 2016 VT 93, 151 A.3d 778, the parties engaged in loan modification discussions after the filing of the first foreclosure action, which alleged a default date of May 2008, and when the lender failed to appear at a scheduled status conference in October 2010, the trial court dismissed the case for failure to prosecute. ***Id.***, ¶¶4-5. The lender filed a second foreclosure action, alleging a default date of September 2008. ***Id.***, ¶7. The trial court dismissed the second action because the lender failed, before filing the second action, to send to the borrower a new notice of default and acceleration based on the new default date. ***Id.*** However, the trial court held that, if the lender had issued such a notice, with an opportunity to cure, the lender would not have been barred from filing a third foreclosure action. ***Id.***, ¶¶8-10.

The Vermont Supreme Court affirmed, concluding that the lender was not entitled "to pursue a second action because it had not taken any steps to reinstate borrower's monthly payment obligations after lender had accelerated the note." ***Id.***, ¶2. The Vermont court clarified its holding as follows. First, the court ruled that, in a second or subsequent foreclosure action, the lender is barred from recovering any principal, interest, penalties, or other liabilities that accrued before the default and attempted acceleration on which the prior foreclosure action was predicated. ***Id.***, ¶33. The court also ruled that no arrearages of interest, principal, or fees accrued during the pendency of the prior action, and that the lender cannot claim any interest on the outstanding principal balance accrued during the

pendency of the prior action. ***Id.***, ¶¶34-35. The court ruled that the borrower retained the underlying obligation to pay the balance of the principal due, calculated as if all due principal was timely paid up to the date of default on which the prior action was predicated, as well as the obligation to make monthly payments of interest on that outstanding principal. ***Id.***, ¶36. However, those obligations must be conditioned on notice from the lender "unaccelerat[ing]" the loan and restoring the monthly payment obligations. ***Id.*** Finally, the court suggested that the preclusive effect of a dismissal may differ depending on whether the dismissal was based on adjudication on the merits, rather than, in that case, the lender's failure to provide a notice of default. ***Id.***, ¶41.