

No. 1-17-0167

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HINSDALE BANK AND TRUST COMPANY,)	Appeal from the
)	Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 15 L 011341
)	
MICHAEL TOLOMEO,)	Honorable
)	Patrick J. Sherlock,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 **Held:** The circuit court properly granted summary judgment in favor of the plaintiff bank. During separate foreclosure proceedings, the circuit court expressly reserved a second cause of action for *in personam* recovery of the amount remaining due from the defendant. Accordingly, the doctrine of *res judicata* did not bar the plaintiff's cause of action to collect on the promissory notes. We affirm.

¶ 2 Plaintiff Hinsdale Bank & Trust Company (Hinsdale Bank) sued defendant Michael Tolomeo for breach of two separate promissory notes. Michael raised the affirmative defense of *res judicata*, contending that the complaint was barred due to a final judgment rendered in the prior litigation foreclosing the mortgages securing the promissory notes. Hinsdale Bank moved for summary judgment, arguing that the court in the foreclosure case expressly reserved Hinsdale

Bank's right to collect the deficiency due from Michael in a later, separate action. The circuit court granted Hinsdale Bank's motion. Michael filed a motion to reconsider, which the court denied. We affirm.

¶ 3 BACKGROUND

¶ 4 On December 15, 2009, Michael and his wife, Laura Tolomeo, executed two separate promissory notes to Hinsdale Bank in the original principal amounts of \$620,000.00 and \$92,950.54. The parties amended the original notes on December 15, 2011 and replaced them with promissory notes in the amounts of \$605,019.10 and \$68,900.00. Both notes were secured by a mortgage on the Tolomeos' residence in Hinsdale.

¶ 5 On January 11, 2013, Michael filed a chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Illinois (*In re Tolomeo*, No. 13 BK 1162). Laura also filed a bankruptcy petition, but it was dismissed on May 22, 2013. The Tolomeos failed to pay off the notes when they matured on February 15, 2014.

¶ 6 On April 9, 2014, the bankruptcy court modified the automatic stay¹ to allow Hinsdale Bank to pursue a foreclosure of the mortgage on the Tolomeos' residence. On September 9, 2014, Hinsdale Bank filed a four-count complaint against both Michael and Laura. Counts 1 and 3 sought to foreclose the mortgage on their residence. In counts 2 and 4, Hinsdale Bank sought a personal judgment solely against Laura for breach of the two promissory notes.

¹ "An automatic stay goes into effect upon the filing of the bankruptcy petition, prohibiting certain actions against the debtor or the property of the bankruptcy estate." *In re Kuzniewski*, 508 B.R. 678, 683–84 (Bankr. N.D. Ill. 2014). See 11 U.S.C. § 362(a). Section 362(a) of the Bankruptcy Code provides, in part, that the filing of a bankruptcy petition operates as a stay of "the commencement or continuation * * * of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy case]." 11 U.S.C. § 362(a)(1).

¶ 7 On March 9, 2015, the bankruptcy court entered an order which ended the automatic stay. Despite this, Hinsdale Bank did not then or later amend its complaint in the foreclosure case to seek a personal judgment against Michael.

¶ 8 The court hearing the foreclosure case entered an agreed summary judgment of foreclosure and sale in favor of Hinsdale Bank and against the Tolomeos and other defendants on April 24, 2015. The judicial sale of the property occurred on August 11, 2015.

¶ 9 On August 12, 2015, Hinsdale Bank moved to confirm the judicial sale and enter a deficiency judgment. The Tolomeos' residence sold for \$500,000, leaving a deficiency of \$305,619.63. In its prayer for relief, Hinsdale Bank sought an *in rem* deficiency judgment against the property and the "entry of an IN PERSONAM deficiency judgment * * * against Michael Tolomeo and Laura L. Tolomeo, jointly and severally, in the amount of \$305,619.63."

¶ 10 On November 5, 2015, Hinsdale Bank filed this breach of contract action against Michael only, for breach of the promissory notes. Hinsdale Bank sought recovery of \$628,266.17 in count 1 and \$49,265.23 in count 2, each count corresponding to one of the two unpaid notes.

¶ 11 The circuit court in the foreclosure case entered an order confirming the judicial sale on November 16, 2015. The court order stated:

"The sale resulted in a deficiency judgment of \$305,619.63 but Plaintiff Hinsdale Bank & Trust Company is not barred by the doctrine of res judicata to seek money judgments on the Notes against Laura L. Tolomeo and/or Michael Tolomeo as it did not seek in its prayer for relief the entry of any personal deficiency judgment."

¶ 12 On the same date, the foreclosure court granted summary judgment in favor of Hinsdale Bank and entered a personal deficiency judgment against Laura in the amount of \$305,619.63.

¶ 13 In his answer to the breach of contract complaint, Michael asserted the affirmative defense of *res judicata*, arguing that the personal deficiency judgment against Laura in the foreclosure case barred the subsequent action against Michael.

¶ 14 On September 2, 2016, Hinsdale Bank moved for summary judgment against Michael, which the circuit court granted. The court entered judgment in favor of Hinsdale Bank and against Michael totaling \$397,028.04 in damages, \$19,711.50 in attorney fees, and \$554.50 in costs. Michael moved to reconsider, which the court denied on December 15, 2016. This appeal followed.

¶ 15 ANALYSIS

¶ 16 Michael argues on appeal that Hinsdale Bank's breach of contract complaint against him is barred by the doctrine of *res judicata*. He contends that *res judicata* applies because in the foreclosure case, Hinsdale Bank sought both *in rem* and *in personam* relief against Laura, a co-obligor on the promissory notes. After the automatic stay was terminated in Michael's bankruptcy proceedings, Hinsdale Bank could have sought leave to amend its complaint in the foreclosure case to allege a personal deficiency from Michael, but failed to do so. Michael argues that Hinsdale Bank should not be able to split its claim into two separate lawsuits as he was already a defendant in the foreclosure case.

¶ 17 He also argues that the foreclosure court did not expressly reserve Hinsdale Bank's right to institute and pursue a second action against him on the same promissory notes. Michael contends the foreclosure court was not being asked to determine the *res judicata* effect of Hinsdale Bank seeking and obtaining a deficiency judgment against only one of the co-obligors.

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2010). Summary judgment is a drastic measure and should only be granted when the moving party’s right to judgment is “clear and free from doubt.” *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). “In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent.” *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). “Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied.” *Id.* We review a circuit court’s entry of summary judgment *de novo*. *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 19 The doctrine of *res judicata* prevents a “multiplicity of lawsuits between the same parties involving the same facts and issues.” *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, ¶ 11. Under this doctrine, “a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action.” *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). “The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit.” *Id.* “For the doctrine of *res judicata* to apply, the following three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies.” *Id.*

¶ 20 It is well established, however, that *res judicata* will not bar an independent claim or part of the same cause of action if the court in the first action “expressly reserves the plaintiff’s right to maintain the second action or the plaintiff is unable to obtain relief on his claim because of a

restriction of the subject-matter jurisdiction of the court in the first action.” *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 392-93 (2001). In general, parties may agree to sever or reserve causes of action or a court may expressly reserve a plaintiff’s right to maintain a second action. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 413 (2002) (citing Restatement (Second) of Judgments § 26(1)(b) (1982)). The comments to subsection (1)(b) of the Restatement (Second) state that “[i]t may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the first action.” Restatement (Second) of Judgments § 26(1)(b) cmt. b (1982).

¶ 21 This case follows the same factual scenario as *Coleman*, 2015 IL App (1st) 140184, ¶¶ 14-16, in which the court found the doctrine of *res judicata* applied when the plaintiff mortgagor, the holder of the promissory note, pursued separate, consecutive lawsuits for the adjudication of the mortgage and promissory note. Like in *Coleman*, the circuit court in this case rendered a final judgment by granting relief in the foreclosure case. The plaintiff in *Coleman* sought to foreclose on the defendant’s property, but also explicitly sought a personal deficiency judgment against the defendant. Similarly, Hinsdale Bank sought to foreclose on the Tolomeos’ property, and also sought a personal deficiency judgment against Laura, one of the co-obligors on the promissory notes. Section 15-1508(e) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(e) (West 2014)) authorized the circuit court to enter a personal money judgment against Laura in the foreclosure case and allowed Hinsdale Bank to enforce and collect it to the same extent and manner applicable to any money judgment. See also *Coleman*, 2015 IL App

(1st) 140184, ¶ 14. In this case, the foreclosure court entered a personal deficiency judgment against Laura, but not Michael, because Hinsdale Bank never sought leave to amend its complaint to add Michael to its breach of contract claims. Further, as in *Coleman*, there is no dispute as to the identity of the parties in this case.

¶ 22 Undoubtedly, all three elements of the doctrine of *res judicata* are present here. However, this case diverges from *Coleman* because of the foreclosure court's express reservation in the November 16, 2015 order allowing Hinsdale Bank to seek money judgments against Laura and Michael. *Robinson*, 201 Ill. 2d at 413 (citing Restatement (Second) of Judgments § 26(1)(b) (1982)). Although inartfully worded, the foreclosure court's order specifically identified the reserved cause of action – breach of the promissory notes. *Robinson*, 201 Ill. 2d at 414. The record does not make clear why the foreclosure court reserved a future breach of contract action against both Laura and Michael, but on the same date entered a personal deficiency judgment only against Laura. Nevertheless, the foreclosure court clearly reserved Hinsdale Bank's right to pursue Michael in a second action to recover a deficiency judgment for the promissory notes. Michael presented nothing to indicate he objected to the language included in the November 16, 2015 foreclosure court's order when it was entered. Accordingly, we find the foreclosure court expressly reserved Hinsdale Bank's right to maintain a breach of contract action against Michael. *Id.* In light of this finding, the circuit court properly entered summary judgment in favor of Hinsdale Bank and against Michael in the breach of contract action. Further, the court properly denied Michael's motion to reconsider.

¶ 23 CONCLUSION

¶ 24 We affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.