

No. 1-19-0306

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
FIRST DISTRICT

UNITED GUARANTY RESIDENTIAL INSURANCE)	Appeal from the
COMPANY OF NORTH CAROLINA, as assignee of)	Circuit Court of
NATIONAL CITY MORTGAGE,)	Cook County.
)	
Plaintiff-Appellant,)	
)	No. 18 L 064007
v.)	
)	
MAINOR L. JIMENEZ,)	Honorable
)	Cheyrl D. Ingram,
Defendant-Appellee.)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's dismissal of plaintiff's complaint as barred by *res judicata* is reversed where plaintiff was permitted to bring an action seeking to enforce its note that was not previously litigated or adjudicated in the prior foreclosure action.
- ¶ 2 Plaintiff-appellant, United Guaranty Residential Company of North Carolina (United Guaranty), as assignee of National City Bank (NCB), brought this action for breach of a home equity line of credit (HELOC) which had been secured by a mortgage against defendant-appellee,

Mainor L. Jimenez, after he defaulted on the HELOC. NCB's rights were secondary to a mortgage executed by Mr. Jimenez and Provident Funding Group (Provident). Provident had brought a prior foreclosure action against Mr. Jimenez and NCB in which NCB filed an answer asserting it had mortgage rights and a lien subordinate to Provident. On Mr. Jimenez's motion in this case, the circuit court granted Mr. Jimenez's motion to dismiss with prejudice on *res judicata* grounds. We reverse.¹

¶ 3

I. Background

¶ 4 On September 12, 2007, Mr. Jimenez executed a promissory note with Provident for the principal amount of \$340,000 that was secured by a mortgage on property located at 507 N. Emroy Avenue, Elmhurst, Illinois (the property). Provident recorded the mortgage on October 12, 2007. On September 19, 2007, Mr. Jimenez executed a note, the HELOC, with NCB that was secured by a mortgage on the property. Under the HELOC, NCB extended a line of credit to Mr. Jimenez in the principal amount of \$85,000.00 with interest at 7.000% per annum. NCB recorded its mortgage on October 17, 2007 to secure the HELOC. On August 15, 2008, NCB assigned the HELOC to United Guaranty.

¶ 5 In 2008, Mr. Jimenez defaulted on both the Provident promissory note and the HELOC by failing to make payments. On August 8, 2018, Provident filed a complaint to foreclose its mortgage against, *inter alia*, Mr. Jimenez and NCB under case number 2008 CH 02986 in the circuit court of DuPage County (foreclosure action). In its request for relief, Provident sought a judgment of foreclosure and sale, a personal judgment for deficiency ("if requested"), and an order granting

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

possession. The complaint alleged that NCB had an inferior loan on the property. On August 29, 2008, NCB filed its answer, stating that NCB had rights under its mortgage as set forth in Provident's complaint for foreclosure, and that NCB had a valid lien on the subject property which was subordinate and inferior only to the lien of Provident. NCB alleged that Mr. Jimenez owed principal of \$88,317.88 plus interest under the HELOC. In its answer, NCB included a prayer for relief that the court "[r]ecognize and include its subordinate mortgage lien in any judgment of foreclosure and sale" and "[s]uch other relief as the Court deems just."

¶ 6 On September 1, 2009, the foreclosure court entered an order confirming the sale of the property (order approving sale). The court found that \$245,174.26 remained due and unpaid to Provident. The order approving sale gave possession to Provident and entered "an IN REM deficiency judgment against the property in the sum of \$245,174.26." The order approving sale did not include the relief that NCB requested in its answer, nor did it grant any party an *in personam* judgment.

¶ 7 On February 13, 2018, United Guaranty filed a one-count complaint in this case alleging a breach of contract against Mr. Jimenez based on his failure to make payments as required by the HELOC.

¶ 8 On September 6, 2018, Mr. Jimenez filed a motion to dismiss on *res judicata* grounds under section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2018)) arguing that because United Guaranty's assignor, NCB, failed to assert its claim against Mr. Jimenez in the prior foreclosure action, United Guaranty was barred from doing so now. Mr. Jimenez attached to his motion Provident's complaint, NCB's answer, and the order approving sale from the foreclosure action. In response, United Guaranty argued that *res judicata* does not bar a breach of contract

claim on a promissory note subsequent to a foreclosure action relying on *Turczak v. First American Bank*, 2013 IL App (1st) 121964. Mr. Jimenez in his reply cited *LSREF2 Nova Investments v. Coleman*, 2015 IL App 140184, arguing that a subsequent action on a note, brought by a plaintiff who had already foreclosed on a mortgage, was barred by *res judicata*. On January 22, 2019, the circuit court granted the motion and dismissed United Guaranty's complaint with prejudice. On February 14, 2019, United Guaranty filed a timely notice of appeal.

¶ 9 On appeal, United Guaranty argues that the circuit court erred in dismissing its suit on *res judicata* grounds relying on *Turczak* and *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 241 (2004) and distinguishing this case from *Coleman*. Mr. Jimenez failed to file an appellee's brief and on November 12, 2019, this court entered an order taking the appeal on the record and appellant's brief only. Under the standards set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131 (1976), we find that this matter is easily decided in the absence of an appellee's brief and we will address the merits of United Guaranty's appeal. *Id.*

¶ 10

II. Analysis

¶ 11 A section 2-619 motion admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter defeating the plaintiff's claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. The dismissal of a complaint under section 2-619 is reviewed *de novo*. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993). The reviewing court "must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Id.* at 116-17.

¶ 12 Mr. Jimenez filed his motion pursuant to section 2-619(a)(4), which allows for the dismissal of an action if it “is barred by a prior judgment.” 735 ILCS 2-619(a)(4) (West 2018). The doctrine of *res judicata* prevents the multiplicity of lawsuits between the same parties involving the same facts. *Turczak*, 2013 IL App (1st) 121964. For *res judicata* to apply, three requirements must be satisfied: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). On appeal United Guaranty does not dispute the presence of the first and third elements, but argues that under the second element, there was no identity of causes of action between the foreclosure action and the action on the HELOC. We agree.

¶ 13 To determine the identity of causes of action, Illinois courts apply the “transactional test.” *Coleman*, 2015 IL App (1st) 140184, ¶ 13 (citing *River Park, Inc.*, 184 Ill. 2d at 310). Under the transactional test, “separate claims are considered as part of the same cause of action, even without substantial overlap in the evidence, as long as the claims ‘arise from a single group of operative facts, regardless of whether they assert different theories of relief.’ ” *Coleman*, 2015 IL App (1st) 140184, ¶ 13 (quoting *River Park*, 184 Ill. 2d at 311). Upon default by a borrower, a mortgagee is permitted to choose whether to proceed on the note or to foreclosure upon the mortgage, consecutively or concurrently. *Goldstein*, 349 Ill. App. 3d at 241 (*res judicata* does not bar an action on note secured by mortgage and separate action on personal guaranty); *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (1985). Foreclosure actions on property, *quasi in rem* proceedings, apply a legally distinct remedy from an *in personam* proceedings on a promissory note. *Turczak*, 2013 IL App (1st) 121964, ¶ 33. However, an identity

of causes of action exists where a mortgagee, in a foreclosure action, seeks to foreclose on defendant's property, but also explicitly seeks a personal deficiency judgment against defendant based on a promissory note and later files an action seeking to enforce the same promissory note. *Coleman*, 2015 IL App (1st) 140184, ¶¶ 14-16.

¶ 14 In the foreclosure action against Mr. Jimenez and NCB, as a junior lienholder, Provident sought to foreclose on Mr. Jimenez's property and requested a personal deficiency based on its promissory note. NCB filed its answer and in its prayer for relief requested that the court recognize its subordinate mortgage lien. However, there is no indication that NCB filed a counterclaim to affirmatively assert its lien or seek a personal judgment against Mr. Jimenez pursuant to section 15-1504(h) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15/-1504(h) (West 2018) ("[a]ny party may assert its interest by counterclaim"). The entry of the foreclosure judgment on behalf of the senior lienholder, Provident, extinguished the interest of the junior lienholder and party to the foreclosure proceeding, NCB, in the property. See *Turczak*, 2013 IL App (1st) 121964, ¶ 36; 735 ILCS 5/15-1404 (West 2018) ("the interest in the mortgaged real estate of (i) all persons made a party in such foreclosure *** shall be terminated by the judicial sale of the real estate, pursuant to a judgment of foreclosure, provided the sale is confirmed ***"). Further, the order approving sale gave possession to Provident and entered an *in rem* deficiency judgment against the property in favor of only Provident. It did not grant any relief to NCB.

¶ 15 In the current action, United Guaranty, as an assignee of NCB, seeks an *in personam* judgment against Mr. Jimenez based on his breach of the HELOC after the foreclosure action brought by Provident. We reject *Coleman* as factually distinguishable and find under the holdings

in *Goldstein* and *Turczak* the dismissal of United Guaranty's action based on *res judicata* grounds was in error.

¶ 16 In *Goldstein*, the defendant executed a promissory note and a mortgage, but also executed a personal guaranty. 349 Ill. App. 3d 237, 238 (2004). Upon default, a foreclosure suit was filed. *Id.* at 239. The property was sold leaving a deficiency, and the plaintiff's predecessor obtained an *in rem* deficiency judgment. *Id.* The plaintiff later filed an action based on the personal guaranty. *Id.* The circuit court dismissed the complaint as barred by *res judicata*. *Id.* The appellate court, however, found the *in rem* deficiency judgment in the foreclosure action did not bar the suit on the personal guaranty. *Id.* at 241.²

¶ 17 Applying the transactional analysis, the appellate court held that while the transactions were related, the mere proximity in time and the overlap of some of the parties did not render them a single transaction. *Id.* The court reasoned that the foreclosure action was an *in rem* action while the action on the guaranty was *in personam*. *Id.* The court further found that the foreclosure action did not encompass the guaranty, did not put defendant's rights in the guaranty at issue, and did not adjudicate the guaranty. *Id.* The court noted that a mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage, consecutively or concurrently. *Id.* at 242 (citing *Farmer City*, 138 Ill. App. 3d 847, 852 (1985)).

¶ 18 Here, similar to the facts in *Goldstein*, Mr. Jimenez's personal liability under the HELOC was not at issue or adjudicated in the foreclosure action. Provident, the plaintiff-creditor, filed the foreclosure against Mr. Jimenez and NCB to foreclose on the property and requested a personal

² In *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526 (2010) the Illinois Supreme Court defined a foreclosure as a *quasi in rem* proceeding. That distinction does not change the *res judicata* analysis in *Goldstein*.

deficiency judgment based on its promissory note with Mr. Jimenez. NCB, as co-defendant, in its answer, only asked the circuit court to recognize its lien; it did not seek a personal judgment under the HELOC against Mr. Jimenez. Further, the order approving sale did not address the HELOC nor did it grant any party a personal deficiency judgment.

¶ 19 In *Turczak*, Wells Fargo Bank and First American Bank financed the plaintiffs' purchase of their home. 2013 IL App (1st) 121964, ¶ 4. Each loan was secured by a promissory note and a mortgage, with Wells Fargo having the first mortgage. *Id.* After default on both loans, Wells Fargo filed a foreclosure action against the plaintiffs and First American. *Id.* The foreclosure court entered a judgment for foreclosure and sale. During the pendency of the Wells Fargo foreclosure action, First American obtained a default judgment against the plaintiffs on its note, and recorded a memorandum of judgment. *Id.* at ¶¶ 4-6. Before the foreclosure action resolved, the plaintiffs attempted to sell the property, but First American, through its lawyers, would not agree to the release of its mortgage. *Id.* ¶ 8. The lawyers insisted that First American still had an enforceable mortgage. Plaintiffs filed a separate suit against the law firm that represented First American for damages alleging it had engaged in false and misleading conduct. *Id.* ¶¶ 7-9. The circuit court granted the law firm's motion to dismiss the suit which argued the law firm properly asserted that First American had an enforceable mortgage after the judgment on the note because "Illinois law allows a creditor to consecutively as well as concurrently pursue remedies on a mortgage and the note securing the mortgage." *Id.* ¶¶ 11-12.

¶ 20 On appeal, the appellate court, citing *Goldstein* and *Farmer*, upheld the dismissal finding that the settled law allows a mortgagee to enforce the note in consecutive suits and stated that

“[f]oreclosure suits on property, *quasi in rem* proceedings, apply a legally distinct remedy from an *in personam* proceeding on a promissory note.” *Id.* ¶ 33.

¶ 21 Here, similar to *Turczak*, United Guarantee as the assignee of the second mortgagee, NCB, sought enforcement of the HELOC, an *in personam* proceeding, separate from the *quasi in rem* foreclosure proceeding filed by Provident in which NCB had asserted its subordinate mortgage lien on the property. Although United Guaranty waited to file its suit on the HELOC until after the order approving sale was entered in the foreclosure action, Illinois case law allows for a creditor to pursue remedies on a mortgage and a note consecutively as well as concurrently.

¶ 22 This case is distinguishable from *Coleman*, where the appellate court found the plaintiff’s complaint seeking to enforce a promissory note was barred by *res judicata*. 2015 IL App (1st) 140184. In *Coleman*, the plaintiff filed a single-count complaint to foreclose a mortgage seeking, in its prayer for relief, a judgment to foreclose the mortgage and a personal judgment for deficiency. *Id.* ¶ 4. A judgment of foreclosure and sale stated that the plaintiff may be entitled to a deficiency judgment, but following the judicial sale, the court did not provide for an *in personam* deficiency judgment. *Id.* ¶ 5. The order approving sale entered an *in rem* deficiency judgment against the property. *Id.* ¶ 6 Over one year later, the plaintiff filed a new complaint seeking to enforce the promissory note against the defendant. *Id.* ¶ 7. The circuit court dismissed the plaintiff’s complaint as being barred by *res judicata*. *Id.* The appellate court affirmed the dismissal and reasoned that the plaintiff’s breach of contract action was barred because the plaintiff sought to recover the same personal deficiency sought in the foreclosure action. *Id.* ¶¶ 14-16, 29.

¶ 23 The plaintiff in *Coleman* sought a personal deficiency judgment in the foreclosure action, based on the same promissory note which was the subject of the subsequent lawsuit. NCB, unlike

No. 1-19-0306

the plaintiff in *Coleman*, was a co-defendant in the foreclosure action and did not seek a personal judgment against Mr. Jimenez based on the HELOC, the subject of the current action, nor did the order approving sale enter a personal deficiency judgment on the HELOC.

¶ 24 Thus, we conclude that there is no identity of causes of actions between the foreclosure action and the action to enforce the HELOC and United Guaranty's complaint is not barred by *res judicata*. We reverse the order of dismissal and remand for further proceedings consistent with this order.

¶ 25 Reversed and remanded.