2018 IL App (2d) 170905-U
No. 2-17-0905
Order filed August 15, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DON A. NORTON, Independent Administrator of the Estate of Frances C. Norton, deceased, Plaintiff-Appellant, v. METLIFE HOME LOANS, a division of MetLife Bank, N.A., NATIONSTAR MORTGAGE LLC d/b/a CHAMPION MORTGAGE COMPANY, FIVE BROTHERS MORTGAGE COMPANY SERVICES AND SECURING INC., and JOHN DOES 1-20, Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 17-CH-31 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the trial court's dismissal of plaintiff's complaint; plaintiff's claims in the chancery court are barred as *res judicata* based on a prior judgment in the foreclosure proceedings.

¶ 2 Plaintiff, Don A. Norton, Independent Administrator of the Estate of Frances C. Norton, deceased (the Estate), filed a complaint in chancery for declaratory judgment and injunctive and

other relief, alleging that defendants were liable for damages sustained to Frances's former residence following her death. The Estate previously attempted to raise similar claims as affirmative defenses in a foreclosure case involving the same residence, but the affirmative defenses were stricken with prejudice. Thereafter, the chancery court dismissed the Estate's complaint with prejudice, determining that the Estate's claims were barred as *res judicata* based on the prior ruling by the foreclosure court. The Estate now timely appeals.

¶ 3 I. BACKGROUND

¶ 4 In February 2010, Frances entered into a reverse mortgage with defendant, MetLife Home Loans (MetLife). The mortgage was secured by Frances's home in Downers Grove. The terms of the mortgage provided that, "[i]f the Property is vacant or abandoned or the loan is in default, [MetLife] may take reasonable action to protect and preserve such vacant or abandoned Property without notice to the Borrower."

¶ 5 Frances died in December 2010. Her sole heirs were Don and his brother, Brian. In February 2011, Don opened a probate case for Frances's Estate. According to Don, MetLife offered to "work with" him to sell the home and distribute the proceeds without resorting to foreclosure proceedings. The record reflects that the home was listed for sale between March 2011 and July 2011.

¶ 6 In October 2011, defendant, Five Brothers Mortgage Company Services and Securing Inc. (Five Brothers), acting as the authorized agent of MetLife, entered the home and changed all of the locks. Don sent two letters to MetLife in November 2011, in which he demanded information regarding the alleged "trespass" and threatened police action if he was not allowed access to the home.

¶ 7 In January 2012, MetLife filed a foreclosure complaint naming, among others, Don and Brian (together the Norton Brothers) as defendants. Included with the Norton Brothers' answer was an affirmative defense based on the doctrine of "unclean hands." Also included was a seven-count counterclaim against MetLife and Five Brothers for (1) trespass, (2) trespass to chattels, (3) tortious interference with contract, (4) tortious interference with possible contract, (5) tortious interference with contract of insurance, (6) illegal eviction, and (7) conversion. The Norton Brothers alleged that several items were stolen from the home after they were locked out, and that the home suffered extensive water damage rendering it unfit for sale. The record reflects that the water damage resulted from a failed sump pump sometime in early 2012.

¶ 8 In June 2012, the probate case was dismissed for want of prosecution. Don explained to the foreclosure court that, "after the property was basically completely destroyed and unsellable, that's when I allowed the probate estate to be dismissed, because I knew the property could not be sold at that point." A different explanation was offered by defendant, Champion Mortgage Company (Champion), who was substituted as plaintiff in the foreclosure case. According to Champion, Don allowed the probate case to be dismissed in an effort to avoid the Estate's property tax liability.

¶ 9 On June 26, 2014, the foreclosure court dismissed the Norton Brothers' counterclaims for lack of standing based upon their lack of ownership interest in Frances's former home. Don argued that this was a curable defect, asserting that he could establish standing by reinstating the probate case. The foreclosure court accordingly ruled that the dismissal was without prejudice and granted the Norton Brothers 28 days to file an amended counterclaim. Although Don reinstated the probate case one month later, the Norton Brothers never filed an amended counterclaim in the foreclosure case.

¶ 10 On March 5, 2015, the Estate was granted leave to file an answer and affirmative defenses to the foreclosure complaint. The order stated that "any counterclaims or [third-party] complaints may be filed only with leave of court." The record reflects that the Estate filed an answer with an affirmative defense of unclean hands.

¶ 11 In April 2016, the Estate filed a motion for leave to file counterclaims and a third-party complaint in the foreclosure case. The proposed pleading included seven counts—for (1) civil trespass, (2) conversion, (3) *respondeat superior*, (4) negligent hiring, (5) failure to properly train, (6) failure to supervise, and (7) breach of fiduciary duty. However, the Estate later withdrew its motion for leave to file the pleading. The Estate offers no explanation for why the motion was withdrawn.

¶ 12 In October 2016, the Estate filed an amended answer to the foreclosure complaint, this time including six affirmative defenses: (1) unclean hands; (2) breach of contract; (3) failure to mitigate damages; (4) promissory estoppel; (5) laches; and (6) a setoff from the amounts otherwise due to Champion based on lost rental income dating back to the lockout. Champion responded with a motion to strike the affirmative defenses.

¶ 13 On January 10, 2017, before the foreclosure court ruled on Champion's motion to strike the Estate's affirmative defenses, the Estate filed the instant chancery action. The factual allegations in the Estate's chancery complaint mirror those laid out in the Norton Brothers' counterclaims in the foreclosure case (which were dismissed for lack of standing), the Estate's motion for leave to file counterclaims in the foreclosure case (which was withdrawn without explanation), and the Estate's affirmative defenses in the foreclosure case (which were facing Champion's pending motion to strike). The claims in the Estate's chancery complaint consist of the following: (1) declaratory judgment; (2) trespass; (3) conversion; (4) *respondeat superior*; (5)

negligent hiring; (6) failure to properly train; (7) failure to supervise; (8) breach of fiduciary duty; and (9) loss of rental value of property.

¶ 14 On March 7, 2017, the foreclosure court granted Champion's motion to strike the Estate's affirmative defenses with prejudice. The order stated that the Estate was "not granted leave to file any further affirmative defenses or counterclaims." Portions of the corresponding transcripts are attached as exhibits to Champion's pleadings in the chancery record. Two bases for the foreclosure court's ruling can be gleaned from these limited excerpts. First, the court agreed with Champion that the Estate's breach of contract allegations were actually counterclaims masquerading as affirmative defenses. The court explained, "[a] defense that does not give color to the Plaintiff's claims but rather attacks the sufficiency of the claim is not an affirmative defense." See *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 63. The court then concluded, "[a]ccordingly, a defense that—a defense that the Plaintiff materially breached the agreement is not an affirmative defense, but rather os (sic) an attack on the sufficiency of the Plaintiff's claim." Second, the court agreed with Champion that, pursuant to a recent ruling from our supreme court, Five Brothers acted lawfully when it changed the locks on the home. The court stated, "the Schweihs case *** is very clear [that] if the mortgage permits the bank to do what they did, they can do it. *** They go in. They change the locks. They secure the premises." See *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 57 (rejecting the borrower's argument that the lender had no legal justification for entering the property, because the borrower "signed a note with the mortgage that contained a provision designated 'protection of lender's rights in the property,' which allowed [the lender] to enter the property to make repairs if [borrower] fell into default").

¶ 15 Returning to the chancery case, MetLife and Champion separately filed combined motions to dismiss the Estate's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1) (West 2016)). Five Brothers adopted both motions. Champion's primary argument was that the Estate's claims were barred as *res judicata* based on the foreclosure court's ruling on March 7, 2017. In the alternative, Champion argued that the Estate's claims were either barred by an affirmative matter—the preservation-of-property clause in the reverse mortgage—or they were legally insufficient. By contrast, MetLife's motion argued that the Estate's claims were time-barred pursuant to the applicable five-year statutes of limitations.

¶ 16 On October 12, 2017, after hearing arguments, the chancery court dismissed the Estate's complaint with prejudice. In its oral ruling the court stated the following:

> "All right. I believe that the tort of trespass requires that the alleged trespass be done without legal authority.
>
> I believe it has already been decided in the prior case, which the Court can take judicial notice, that the mortgagee had the right under the mortgage to secure vacant property. I believe that constitutes *res judicata*. I think that allegation is dispositive of not only the date on which the alleged trespass took place, but the alleged continuing entries onto the property. That is *res judicata*.
>
> Anything prior to that is time-barred. Anything prior to five years before the filing of this case is time-barred.
>
> I believe [Champion's counsel] is correct that *res judicata* embraces not only anything that was pled but anything that could have been pled. The parties in the prior

foreclosure case were identical to the claims that are made in this case, and I believe that the rulings in that case are dispositive of the allegations that are made in this case.

For those reasons I am going to grant the motions to dismiss. That will be with prejudice. It will be a final and appealable order."

¶ 17 II. ANALYSIS

¶ 18 Our review is of the chancery court's order granting each of the combined motions to dismiss—from Champion, MetLife, and Five Brothers. Pursuant to section 2-619.1 of the Code, a party may file a combined motion attacking various counts of a complaint under both sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1 (West 2016). A section 2-615 motion to dismiss attacks the sufficiency of the plaintiff's complaint; the defendant assumes that the plaintiff's allegations are true, but argues that they do not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2016); *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 23. A section 2-619 motion to dismiss likewise assumes the plaintiff's allegations to be true, but asserts an affirmative defense or other matter that would defeat the plaintiff's claim. 735 ILCS 5/2-619 (West 2016); *Parille*, 2016 IL App (2d) 150286, ¶ 23. Our standard of review is *de novo* under either section of the Code. *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶ 11.

¶ 19 Although several issues were raised in the combined motions to dismiss, the chancery court's ruling was based primarily on the doctrine of *res judicata*, as the court agreed with Champion that the action was barred by a prior judgment. See 735 ILCS 5/2-619(a)(4) (West 2016). "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent cause of action between the parties or their privies on the same cause of action." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. This rule applies to all

matters decided in the original action, as well as to matters that could have been decided. *Id*. Three requirements must be met for application of the doctrine of *res judicata*: "(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* (quoting *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 302 (1998)).

¶ 20 Here, the Estate initially disputes which prior judgment from the foreclosure court served as the basis for the chancery court's *res judicata* ruling. Nearly all of the Estate's arguments in its opening brief presume that the order in question was entered on June 26, 2014, when the foreclosure court dismissed the Norton Brothers' counterclaims for lack of standing. The Estate argues that, because this was not a final judgment on the merits, the chancery court's *res judicata* ruling was erroneous. However, Champion is quick to counter that the Estate's arguments are premised on the wrong order. Indeed, the record clearly reflects that the chancery court's *res judicata* ruling was based on the foreclosure court's order from March 7, 2017, in which the Estate's affirmative defenses were stricken with prejudice and the Estate was further barred from raising any additional affirmative defenses or counterclaims. We will proceed with our analysis accordingly.

¶ 21 In its opening brief, the Estate's sole argument with respect to the foreclosure court's order from March 7, 2017, is based on the timing of the filing in the chancery case. The Estate points out that it filed the chancery complaint on January 10, 2017, nearly two months before the foreclosure court's ruling. The Estate argues, therefore, that the chancery case did not constitute a "subsequent cause of action" (see *Cooney*, 2012 IL 113227, ¶ 18) for purposes of *res judicata*. Although the Estate provides no supporting legal authority, it maintains that "the proposition

requires no citation since it is based on the simple English-language definition of the word 'subsequent.' " This argument has no merit.

¶ 22 While the parties have presented no case law that is squarely on point, we note that a party is prohibited from pursuing pending litigation when earlier litigation and the pending litigation constitute, for purposes of *res judicata*, the same cause of action. *Cartwright v. Moore*, 394 Ill. App. 3d 1, 9 (2009). This rule applies irrespective of whether the pending litigation was instituted before the earlier litigation was resolved.

¶ 23 For instance, in *Bennett v. Gordon*, 282 Ill. App. 3d 378 (1996), the plaintiff raised affirmative defenses in response to her attorneys' fee petition following the attorneys' representation in a divorce action. However, prior to the divorce court's final ruling on the fee petition, the plaintiff filed a malpractice action against her attorneys in the circuit court's law division. The circuit court granted the attorneys' motion to dismiss the malpractice action, finding that the doctrine of *res judicata* barred the plaintiff from litigating claims which could have been raised during the fee petition hearing in the divorce court. *Id*. at 380-81. The appellate court affirmed the circuit court, holding that, although the plaintiff's malpractice claims were more fully developed than her affirmative defenses, the matters arose from the same core set of facts, and they therefore constituted a single cause of action for purposes of *res judicata*. *Id*. at 383-84.

¶ 24 *Bennett* is instructive here. Similar to the Estate, the plaintiff in *Bennett* filed affirmative defenses in the earlier litigation and then filed a complaint based on the same set of operative facts in the pending litigation. This tactic violates the general rule against claim-splitting, which provides that a plaintiff cannot divide a single cause of action for the purpose of maintaining separate lawsuits. *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 890-91 (2009). We will

discuss this aspect of the Estate's pleadings in more detail *infra*, when we address the second requirement for application of the doctrine of *res judicata*. See *Cooney*, 2012 IL 113227, ¶ 18 (requiring an identity of cause of action). For present purposes, it is noteworthy that, even though the plaintiff in *Bennett* filed her complaint in the pending litigation before the final judgment was entered in the earlier litigation, the sequence of these events was of no consequence with respect to the doctrine of *res judicata*. Accord *Carr v. Tillery*, 591 F. 3d 909, 916 (7th Cir. 2010), and *Blair v. Equifax Check Services, Inc.*, 181 F. 3d 832, 838 (7th Cir. 1999) (both holding that, when two cases proceed in parallel, the first to reach judgment controls the other for purposes of *res judicata*). Similar to the outcome in *Bennett*, so long as the three requirements for *res judicata* were met in the instant case, it made no difference that the foreclosure court dismissed the Estate's affirmative defenses *after* the Estate filed its chancery complaint. To hold otherwise would undermine the very purpose of *res judicata*, which is to "promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and also [to] prevent[ ] the unjust burden that would result if a party could be forced to relitigate what is essentially the same case." [Brackets in original.] *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 319 (1998) (quoting *Henstein v. Buschbach*, 248 Ill. App. 3d 1010, 1015-16 (1993).

¶ 25 Having determined that the timing of the Estate's chancery complaint is irrelevant, we now turn to the three requirements for *res judicata*. First, there must have been a final judgment on the merits rendered by a court of competent jurisdiction. *Cooney*, 2012 IL 113227, ¶ 18. In its reply brief, the Estate argues that the foreclosure court's order from March 7, 2017, did not constitute a final judgment, because it did not dispose entirely of all matters in the foreclosure

case, and it did not include a finding of immediate appealability pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. March 8, 2016)). We disagree.

¶ 26 Supreme Court Rule 273 provides that, "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan. 1, 1967). Here, the foreclosure court's order striking the Estate's affirmative defenses with prejudice was an adjudication upon the merits, as it does not qualify for any of the exceptions listed in Rule 273.

¶ 27 Furthermore, "[a]n order is final if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate branch thereof." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 19. Here, the issue of finality is made slightly complicated because the order in question disposed of affirmative defenses rather than claims or counterclaims. Our research has revealed instances where an order denying affirmative defenses has been deemed non-final because it did not resolve a separate part of the essential controversy between the parties. See, e.g., *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 57; *Smith v. Interstate Fire & Casualty Co.*, 47 Ill. App. 3d 555, 558 (1977). However, no such concern is present here. We agree with the foreclosure court's rulings that the Estate's breach of contract allegations were actually counterclaims masquerading as affirmative defenses, and that Five Brothers acted lawfully when it changed the locks on the home. It is also noteworthy that the Estate was precluded from filing any further affirmative defenses or counterclaims. These rulings effectively foreclosed the Estate's ability to seek damages as an offset to its liability under the reverse mortgage. Hence, the foreclosure court disposed of the

rights of the parties on a separate branch of the entire controversy, and its order from March 7, 2017, constituted a final judgment on the merits for purposes of *res judicata*.

¶ 28 We now turn to the second requirement for applying the doctrine of *res judicata*, that there was an identity of cause of action. *Cooney*, 2012 IL 113227, ¶ 18. For purposes of *res judicata*, separate claims are considered the same cause of action if they arise from the same set of operative facts, regardless of whether they assert different theories of relief. *Id*. at ¶ 22. This holds true not only with respect to claims that were decided in the earlier litigation, but also to those matters that could have been decided in the earlier litigation. *Id*.

¶ 29 In its reply brief, the Estate asserts that there is "no logical connection" between its affirmative defenses in the foreclosure case and the claims raised in its chancery complaint. This assertion is patently false. Although the affirmative defenses in the foreclosure case were styled under different legal theories than the claims set forth in the chancery complaint, both pleadings were clearly based on the same set of operative facts. The Estate's factual allegations common to both pleadings focused on the lockout in October 2011, and the water damage that the home sustained sometime in early 2012. For example, the Estate's affirmative defense of breach of contract in the foreclosure case was based on its allegation that the terms of the reverse mortgage did not authorize defendants to take possession of the home; the Estate's chancery claims for declaratory judgment and trespass were based on that same allegation. Similarly, the Estate's affirmative defense of failure to mitigate damages was based on the Estate's allegation that defendants allowed the home to become uninhabitable, thereby rendering it unfit for sale; the Estate's chancery claims for respondeat superior, negligent hiring, failure to properly train, failure to supervise, breach of fiduciary duty, and loss rental value of property, were each based on that same allegation. The Estate also sought the same basic relief in both instances, that being

damages for the decreased value of the home and for lost rental value during the pendency of the foreclosure proceedings.

¶ 30 We acknowledge that there are some differences between the issues and legal theories raised in the relevant pleadings. However, the rule against claim-splitting prohibited the Estate from suing for part of its claim in one action and then suing for the remainder in another action. "Rather, the law requires that a plaintiff must assert all the grounds of recovery he may have against the defendant, arising from a single cause of action, in one lawsuit." *Piagentini*, 387 Ill. App. 3d at 890. Because the Estate's pleadings in both bases were based on the same set of operative facts, they constituted a single cause of action for purposes of *res judicata*.

¶ 31 The third and final requirement of *res judicata* is an identity of parties or their privies. *Cooney*, 2012 IL 113227, ¶ 18. The Estate's only argument with respect to this requirement is that the foreclosure court's order from June 26, 2014, involved the Norton Brothers and not the Estate. Of course, this argument is based on a false premise, as the prior judgment in question is the foreclosure court's order from March 7, 2017. Regardless, "[u]nder Illinois law, privity is said to exist when parties adequately represent the same legal interests." *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 513 (2010). Thus, it is the identity of interest that controls, not the nominal identity of the parties. *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 24. Here, there is no question that the parties in both cases shared an identity of interests, meaning that the third requirement for *res judicata* is satisfied.

¶ 32 Before we conclude, we take a moment to briefly comment on the Estate's assertion that we should reverse the chancery court's ruling to avoid an inequitable and unjust result. See *Piagentini*, 387 Ill. App. 3d at 890 ("Equity dictates that the doctrine of *res judicata* will not be

technically applied if to do so would create inequitable and unjust results."). The Estate argues that it is "being deprived of its day in court to seek redress of the damages it suffered as a result of the activities and negligence of the [d]efendants." The problem with this argument is that the Estate has provided a record only from the chancery case, even though the events leading up to the chancery court's ruling took place in the foreclosure case. As we discussed above, the foreclosure court entered an order on March 5, 2015, which stated that "any counterclaims or [third-party] complaints may be filed only with leave of court." However, there is nothing in the record to provide any context for this restriction. In April 2016, the Estate filed a motion in the foreclosure case for leave to file counterclaims and a third-party complaint, but that motion was later withdrawn, and the Estate has offered no explanation. Thus, our only glimpse into the relevant foreclosure proceedings comes from three fragmented pages that Champion lifted from the transcript of the hearing on March 7, 2017, and attached to its reply in support of its combined motion to dismiss the Estate's chancery complaint. Without more, we cannot say that the chancery court's ruling produced an unjust and inequitable result, as "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant,* 99 Ill. 2d 389, 391-92 (1984).

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 35 Affirmed.