

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

PNC Bank, National Association	:	
successor in interest to National City	:	
Real Estate Services LLC successor by	:	
merger to National City Mortgage, Inc.,	:	
fka National City Mortgage Co. dba	:	No. 11AP-275
Commonwealth United Mortgage Company,	:	(C.P.C. No. 10CVE-4-5841)
	:	
Plaintiff-Appellant,	:	(REGULAR CALENDAR)
	:	
v.	:	
	:	
Jennie B. Richards et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

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D E C I S I O N

Rendered on April 10, 2012

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*Lerner, Sampson & Rothfuss*, and *Patricia K. Block*, for appellant.

*Rachel K. Robinson*, for appellee Jennie B. Richards.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} This is an appeal by plaintiff-appellant, PNC Bank National Association ("PNC"), from an entry of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Jennie B. Richards.

{¶ 2} On June 22, 2004, appellee executed a promissory note in the amount of \$84,500 in favor of National City Mortgage Company ("National City"). The note was secured by a mortgage on property located at 1366 Frebis Avenue, Columbus. On

December 27, 2005, National City filed a complaint in foreclosure, alleging that appellee had defaulted on the note and mortgage. National City subsequently filed three separate motions for summary judgment, and the trial court ultimately granted National City's third motion for summary judgment and issued a final judgment and decree of foreclosure.

{¶ 3} Appellee appealed the grant of summary judgment, asserting that the loan had not been properly accelerated. On June 2, 2009, this court reversed the judgment of the trial court, finding that National City had failed to give appellee "the contractually required notice of default and an opportunity to cure her default before accelerating the balance due on the note and initiating proceedings to foreclose on the mortgage." *Natl. City Mtge. Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556, ¶ 30 (10th Dist.).

{¶ 4} On August 7, 2009, National City submitted a proposed "entry of dismissal" to the trial court, providing in part: "[T]he plaintiff's Complaint is dismissed without prejudice and at plaintiff's costs." On August 11, 2009, appellee filed a motion requesting the trial court to strike the entry of dismissal. On September 17, 2009, the trial court entered an order vacating the entry of dismissal. The court's order stated in part: "The Court agrees with Defendant that the Court of Appeals decision did fully resolve the instant matter on the merits, and therefore the case should be dismissed with prejudice." (Emphasis sic.)

{¶ 5} According to a recitation of background facts set forth in the trial court's decision and entry filed February 28, 2011, the trial court conducted a conference with the parties on October 16, 2009 for the purpose of discussing the trial court's order of September 17, 2009. During that conference, National City argued that, because the appellate court dismissed the 2005 complaint on June 2, 2009, the trial court lacked jurisdiction to decide, on September 17, 2009, whether the dismissal was with or without prejudice. The trial court noted that appellee conceded at that time the validity of National City's position; the trial court thus issued an order vacating its entry of September 17, 2009 "only with respect to the dismissal of Plaintiff's claims 'with prejudice.'" (Trial Court Decision, Feb. 28, 2011 at 3.)

{¶ 6} Subsequent to National City's 2005 complaint in foreclosure, PNC became the owner and holder of the note at issue by virtue of a merger with National City. On

April 16, 2010, PNC filed a complaint in foreclosure against appellee, alleging that appellee owed \$83,477.89 on the note secured by a mortgage. Appellee filed an answer on May 28, 2010, raising several affirmative defenses, including res judicata and collateral estoppel.

{¶ 7} On June 21, 2010, appellee filed a motion for summary judgment, requesting the trial court to grant judgment in her favor and dismiss PNC's complaint based upon the doctrine of res judicata. On August 18, 2010, PNC filed a memorandum in opposition to appellee's motion for summary judgment. On January 19, 2011, PNC filed a motion for summary judgment against appellee. On February 17, 2011, appellee filed a motion requesting the trial court to hold its decision on PNC's motion for summary judgment in abeyance pending resolution of appellee's motion for summary judgment.

{¶ 8} By decision and entry filed February 28, 2011, the trial court granted appellee's motion for summary judgment, finding that all of the elements necessary for the application of res judicata had been met. Based upon that determination, the trial court ruled that PNC's motion for summary judgment was rendered moot.

{¶ 9} On appeal, PNC sets forth the following assignment of error for this court's review:

The trial court erred in granting Appellee's Motion for Summary Judgment because Appellant's foreclosure action filed on April 6, 2010 was not barred by res judicata.

{¶ 10} At issue on appeal is whether the trial court erred in granting summary judgment in favor of appellee on the basis that PNC's complaint in foreclosure was barred by the doctrine of res judicata. Both PNC and appellee cite *Reasoner v. Columbus*, 10th Dist. No. 04AP-800, 2005-Ohio-468, as setting forth the elements necessary to establish res judicata. In *Reasoner* at ¶ 5, this court held in part:

Res judicata operates to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction. *State ex rel. Kroger Co. v. Indus. Comm.* (1998), 80 Ohio St.3d 649, 651, 687 N.E.2d 768. The party asserting res judicata must show the following four elements: (1) there was a prior valid judgment on the merits; (2) the second action involved the same parties as the first action; (3) the present action raises claims that were or could have been

litigated in the prior action; and (4) both actions arise out of the same transaction or occurrence. See *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381-382, 653 N.E.2d 226.

{¶ 11} In its decision granting summary judgment in favor of appellee, the trial court found that all four elements were satisfied. Specifically, the trial court held:

First, Defendant was named as the defendant in both foreclosure actions. In addition, Plaintiff PNC Bank is National City's successor in interest to the note and mortgage at issue. \* \* \*

Further, since Plaintiff seeks judgment on the same note and mortgage at issue in the 2005 Complaint, both actions arise out of the same transaction or occurrence and the present action raises claims that were or could have been litigated in the prior action.

Finally, no bona fide factual dispute exists as to whether there was a prior valid judgment on the merits. On June 2, 2009, the Appellate Court held that National City failed "to give Richards the contractually required notice of default and an opportunity to cure her default before accelerating the balance due on the Note and initiating proceedings to foreclose on the mortgage." *National City*, supra, ¶30. The Appellate Court stated that whether National City satisfied the condition precedent went to the merits of the Complaint \* \* \*.

The Court further finds well taken Defendant's reliance on Civ.R. 41(B)(3) \* \* \*. The Appellate Court did not state that its dismissal of the 2005 Complaint was other than on the merits, rather concluding that "\* \* \* we reverse the judgment of the Franklin County Court of Common Pleas and dismiss National City's complaint. Judgment reversed and cause dismissed." *Id.* at ¶31. Thus, reasonable minds could only conclude that the Appellate Court's decision dismissing National City's Complaint operated as a[n] adjudication upon the merits.

{¶ 12} In reviewing a trial court's grant of summary judgment, an appellate court "stands in the shoes of the trial court and reviews all questions of law de novo." *Lynch v. Lilak*, 6th Dist. No. E-08-024, 2008-Ohio-5808, ¶ 9, citing *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996).

{¶ 13} PNC argues that the trial court erred in finding that all of the elements of res judicata were satisfied, including whether this court's prior decision dismissing National City's complaint operated as a prior valid judgment on the merits (the first element as set forth in *Reasoner*). PNC also argues that several other elements of res judicata were not met; specifically, whether the present action involves claims that were or could have been litigated in the prior action (the third element under *Reasoner*), and whether both actions arose out of the same transaction or occurrence (the fourth element under *Reasoner*).

{¶ 14} We initially consider the trial court's determination that the dismissal of National City's complaint operated as a prior valid judgment on the merits. Under Ohio law, "[r]es judicata bars a subsequent action based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action, whether or not that particular claim was litigated, so long as there has been a valid, final judgment rendered upon the merits." *State v. Banks*, 3d Dist. No. 13-99-60 (Apr. 19, 2000), citing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995), syllabus. With respect to the word "merits" in the context of the phrase "upon the merits," the word " 'implies a consideration of substance, not of form; of legal rights, not of mere defects of procedure, or the technicalities thereof.' " *Kimberlin v. Stoley*, 49 Ohio App. 1, 3 (9th Dist.1934), quoting *People ex rel. Joseph Fallert Brewing Co. v. Lyman*, 53 A.D. 470, 473, 65 N. Y. S. 1062 (1900).

{¶ 15} In this court's prior decision resulting in the dismissal of National City's complaint, we addressed the issue whether National City complied with the notice requirements set forth in the contractual language of the note and mortgage, and thus whether National City had fulfilled "a condition precedent to its acceleration of the note and foreclosure of the mortgage." *Natl. City Mtge.* at ¶ 25. As noted under the facts, in considering the record on summary judgment, we concluded that National City failed to give appellee "the contractually required notice of default and an opportunity to cure her default before accelerating the balance due on the note and initiating proceedings to foreclose on the mortgage." *Id.* at ¶ 30.

{¶ 16} PNC argues that, because National City failed to meet a condition precedent (sending the notice of default by ordinary mail to appellee) prior to filing its 2005

complaint in foreclosure, the earlier dismissal did not result in a valid final judgment on the merits with respect to the foreclosure action. We agree.

{¶ 17} While no Ohio cases appear to be directly on point, the issue of whether a bank's failure to meet a condition precedent to accelerating a mortgage constitutes an adjudication on the merits was addressed in *State St. Bank & Trust Co. v. Badra*, 765 So.2d 251 (Fla.App.2000). In *Badra*, after a bank filed a foreclosure action against the mortgagees, the trial court granted the mortgagees' motion for summary judgment, holding that the bank's notices of acceleration, which had been sent to incorrect addresses, were insufficient to satisfy the bank's burden of proof with respect to conditions precedent under the mortgage. The bank subsequently sent properly addressed notices of acceleration to the mortgagees, and the bank then filed another complaint for foreclosure. The trial court granted the mortgagees' motion for partial summary judgment based upon res judicata and collateral estoppel.

{¶ 18} On appeal, the court in *Badra* reversed, holding that the second action was not barred by res judicata on the basis that (1) " 'identity of the cause of action' had not been met" and (2) because there had been "no adjudication on the merits." *Badra* at 253. In addressing the requirement of identity of causes of action, the court found that the trial court, "in the first action, held that [the bank] relied upon notices of acceleration that were insufficient to satisfy its burden of proof with regard to the conditions precedent under the mortgage." *Id.* at 254. Therefore, because "the first and second actions involved different notices of acceleration and such letters were essential to the maintenance of each action, there existed essential facts between the two cases which differed." *Id.*

{¶ 19} As to the court's additional determination that the final judgment in the first action was not an adjudication on the merits, the court held: "The trial court in the first action granted the [mortgagees'] motion for judgment on the pleadings because [the bank] 'failed to meet its burden of proof 'with regard to the conditions precedent under the mortgage.' Thus, by failing to comply with certain conditions precedent, [the bank] took nothing by that action." *Id.* The court cited case law for the proposition that, where conditions precedent of a contract "were not complied with \* \* \* the trial court could only have determined that the action was premature." *Id.* at 255.

{¶ 20} In the present case, while PNC's predecessor, National City, sought to have the mortgage accelerated in the suit initiated in 2005, this court's dismissal of National City's complaint, based upon a determination that it failed to satisfy a condition precedent to acceleration, did not decide the merits of the action, i.e., whether appellee was in default. Rather, the dismissal of National City's complaint was for failure to meet a precondition to bringing an action in foreclosure. As such, because a condition precedent was not satisfied, National City's action was "premature." *Badra* at 255.

{¶ 21} Appellee argues that, pursuant to the plain meaning of Civ.R. 41(B), the involuntary dismissal of the 2005 complaint was an adjudication on the merits. Specifically, appellee relies upon Civ.R. 41(B), which states as follows:

*(3) Adjudication on the merits; exception.* A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

*(4) Failure other than on the merits.* A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

- (a) lack of jurisdiction over the person or the subject matter;
- (b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

(Emphasis sic.)

{¶ 22} Appellee maintains that this court's prior decision did not specifically state that dismissal was other than an adjudication on the merits. We are not persuaded by appellee's reliance upon Civ.R. 41(B)(3) and (4).

{¶ 23} This court has previously held that "[w]here a judgment is rendered on grounds not involving the merits of the case, that judgment cannot be used as a basis for the defense of *res judicata*." (Emphasis sic.) *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 933 (10th Dist.2000). Further, "[a] determination by the court that the plaintiff has no enforceable claim because the action is premature, or because he has failed to satisfy a precondition to suit, is not a determination that he may not have an enforceable claim thereafter, and does not normally preclude him from

maintaining an action when the claim has become enforceable." Restatement of the Law 2d, Judgments, Section 20(2), Comment k (1982).

{¶ 24} In the context of federal case law interpreting Fed.R.Civ.P. Civ.R. 41(b), "[t]he United States Supreme Court 'has interpreted the phrase "lack of jurisdiction" broadly to include matters such as preconditions to suit and other reasons not addressing the substantive merits of the controversy.' " *Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 94 F.3d 1514, 1518, fn. 4, quoting 1B *Moore's Federal Practice* at ¶ 0.409[1.-2], citing *Costello v. United States*, 365 U.S. 265 (1961). See also *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 524 (5th Cir.1980), quoting *Costello* at 285 (courts have characterized as "jurisdictional" dismissals based upon a plaintiff's failure to comply with a pre-condition requisite to a court going forward to determine the merits of the plaintiff's substantive claim). Thus, "[b]ecause a dismissal for failure to meet a condition for filing suit does not 'operate as an adjudication upon the merits,' it cannot bar a subsequent suit between the parties." *Truvillion* at 524.

{¶ 25} Based upon this court's de novo review, we conclude that the prior dismissal of National City's complaint for failure to satisfy a condition precedent to filing an action in foreclosure did not operate as a final judgment upon the merits to preclude PNC's subsequent claim for foreclosure after satisfying contractual notice requirements. Accordingly, because the dismissal did not have res judicata effect, the trial court erred in granting summary judgment in favor of appellee.

{¶ 26} Based upon the foregoing, PNC's single assignment of error is sustained, the judgment of the Franklin County Court of Common Pleas is reversed, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed;  
cause remanded.*

BRYANT and DORRIAN, JJ., concur.

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