ILLINOIS COURT REVERSES DISMISSAL OF BANK'S FORECLOSURE ESTABLISHING EXCEPTION TO SINGLE REFILING RULE

The Second District (Appellate Court) of Illinois reversed the dismissal of an action finding the fourth filing of a lawsuit based on the same note and mortgage was not barred by Illinois' single refiling rule[i]. *Wilmington Sav. Fund Soc'y, FSB as Tr. of Residential Credit Opportunities Tr. III v. Barrera*, 2020 IL App (2d) 190883 (2d Dist. September 21, 2020)[ii]. In *Barreras* the borrowers executed a note and mortgage in 2006 and defaulted on their loan in 2011.[iii]

Wells Fargo, a successor mortgagee, initiated foreclosure proceedings against the Barreras in June of 2012 for their September 2011 payment default seeking foreclosure and "an *in personam* deficiency judgment."[iv] The lower court dismissed that lawsuit "without prejudice on April 4, 2013."[v] Wells Fargo refiled the same lawsuit alleging the same default and again requesting "an *in personam* deficiency judgment" in July 2014 and voluntarily dismissed that lawsuit in April 2015.[vi] In October 2017 Wilmington, successor mortgagee to Wells Fargo, brought an action on the note based on a June 2012 default. The court dismissed this third action finding "the default dates alleged in the third complaint were at issue in the earlier two actions."[vii]

Finally, in December 2018 Wilmington filed another lawsuit against the Barreras' asserting the Barreras failed to pay real estate taxes and hazard insurance for the subject property.[viii] Upon the Barreras' motion, the lower court dismissed the fourth lawsuit finding it arose "from the same single group of operative facts" and sought to "adjudicate the parties' rights under the same mortgage and note…"[ix] The lower court further concluded the first two lawsuits "specifically requested"[x] taxes and insurance so dismissal under the single refiling rule was appropriate. The single refiling rule provides in relevant part "that, when an action 'is voluntarily dismissed by the plaintiff, or is dismissed for want of prosecution, the plaintiff may commence a new action within one year or within the remaining period of limitation, whichever is greater, after the action is voluntarily dismissed by the plaintiff.'"[xi] This has been interpreted to mean only one refiling of a claim is permitted.[xii]

Wilmington moved for rehearing and argued, in part, that its form complaint included a general request for "advances," but the prayer for relief in the complaint did not so the single refiling rule did not apply. Alternatively, on rehearing Wilmington sought leave to amend its complaint so it could plead the default with more specificity to include default dates which occurred after the filing of the prior complaints. The court denied rehearing and refused the request to amend. Wilmington appealed the order of dismissal.

On appeal Wilmington argued the single refiling rule did not bar the fourth action because the fourth action was based on a different default – failure to pay taxes and insurance

– not failure to pay principal and interest. Wilmington reasoned the obligation to pay taxes and insurance stemmed from the mortgage whereas the obligation to make installment payments stemmed from the note. Further, Wilmington explained that "at least one default occurred after the third complaint's dismissal" so it could not have been raised in any of the prior lawsuits. Wilmington elaborated that "the mortgagor's tax and insurance obligations are different" from payment defaults because the tax and insurance obligation is ongoing and cannot be "reduced to a lump sum and cannot be accelerated."[xiii]

The Second District agreed with Wilmington that the "single refiling rule was not a complete defense" to the fourth complaint because the failure to pay taxes and insurance constituted "new defaults."[xiv] The Court explained when evaluating whether dismissal is appropriate under the single refiling rule the court must apply the "'transactional test' derived from *res judicata* cases."[xv] The test requires the court to "pragmatically" determine whether "the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[xvi] The Court looked to the Illinois Supreme Court's analysis in *Cobo*[xvii] where that Court applied the transactional test and concluded that "a lender may not assert a claim under the mortgage and the note concurrently by seeking foreclosure and a deficiency judgment under the note and then assert a claim under the note consecutively twice more."[xviii]

The Barreras relied on the Court's opinion in *Cobo* to argue under the single refiling rule "a lender cannot more than twice seek a foreclosure under a single mortgage instrument."[xix] The Barreras' reasoned that "a note or a mortgage…equates to a transaction" for purposes of the transactional test and "prevent[s] more than two suits based on any one contract" because the two suits would "necessarily arise from the same group of operative facts."[xx] The Second District disagreed with that reasoning and explained the Barreras' argument "misapprehended" the holding of the *Cobo* court. The Court elaborated that "further defaults cannot pragmatically be treated as part of the same group of operative facts as actual defaults" because "a default that has not occurred typically cannot be litigated."[xxi] The Court surmised that blanket application of the single refiling rule to prevent more than two foreclosures per mortgage would mean a party's "continuing pattern of defaults" would in effect "immunize" them from suit.[xxii]

To avoid this unreasonable result the Court created an exception to the single refiling rule which it called the "new default rule."[xxiii] The Court reasoned that "a contract requires performance over multiple years" resulting in disputes that may "lead to multiple claims for defaults."[xxiv] The Court identified the new-default rule as "a specific instance of the transactional test" and explained it was necessary "to provide remedies for recurring types of defaults."[xxv]

The Court reversed the order of dismissal and remanded the matter for further proceedings clarifying that the single refiling rule barred claims for tax and insurance defaults which could have been sought in Wells Fargo's first foreclosure.[xxvi] However, the Court explained the "tax and insurance defaults postdating the dismissal of the first complaint but

predating the filing of the second complaint" were not barred because those defaults were not "part of the core operative facts of the third complaint" which was based on the note alone.[xxvii] The Court noted lenders could "pursue claims under mortgages and notes in separate actions" and payment of the taxes and insurance derived from the mortgage" not the note.[xxviii] Finally, the Court explained the defaults which occurred after the filing of the second complaint were "new and thus…not barred."[xxix]

The Second District's decision in *Barreras* is a welcome one as it carves out an important exception to the single refiling rule. The extent of that carve out is still to be determined as the Court did not discuss the parameters for determining what may be considered a "new default" and whether the exception applies. We anticipate additional litigation on this issue so stay tuned for developments.

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1. The Second District (Appellate Court) of Illinois reversed the dismissal of an action finding the fourth filing of a lawsuit based on the same note and mortgage was not barred by Illinois' single refiling rule. *Wilmington Sav. Fund Soc'y, FSB as Tr. of Residential Credit Opportunities Tr. III v. Barrera*, 2020 IL App (2d) 190883 (2d Dist. September 21, 2020). In *Barreras* the bank filed four successive lawsuits against the Barreras. The first two were based on payment defaults and sought foreclosure and a deficiency judgment. The third lawsuit was an action on the note. These suits had been dismissed prior to adjudication on the merits. The fourth lawsuit was for taxes and insurance that had not been paid.
2. The lower court dismissed the fourth complaint based on the single refiling rule finding the allegations in the last complaint arose "from the same single group of operative facts" and sought to "adjudicate the parties' rights under the same mortgage and note…" The Court concluded the single refiling rule barred the fourth lawsuit. On appeal the Second District disagreed carving out an exception to the single refiling rule which it coined "the new default rule." The Court explained that "a contract requires performance over multiple years" resulting in disputes that may "lead to multiple claims for defaults." The new default rule was created to "provide remedies for recurring types of defaults." The Court noted a payment default was different than a default based on failure to pay taxes and insurance.
3. The Court reversed the order of dismissal and remanded the matter for further proceedings clarifying that the single refiling rule barred claims for tax and insurance defaults which could have been sought in the bank's first foreclosure. However, the Court explained the "tax and insurance defaults postdating the dismissal of the first complaint" and "defaults occurring after the filing of the second complaint" were not barred. The Second District's decision in *Barreras* is a welcome one as it carves out an important exception to the single refiling rule. The extent of that carve out is still to be determined as the Court did not discuss the parameters for determining what may be

considered a “new default” and whether the exception applies. We anticipate additional litigation on this issue so stay tuned for developments.

[i] The single refiling rule is codified at Code of Civil Procedure 735 ILCS 5/13-217 (West 1994). This code section was amended but that amendment was later found to be unconstitutional so the "effective version of section 13-217 is the one codified in the Illinois Compiled Statues of 1994…" *Barrera*, n1.
[ii] This opinion will be final if a motion for rehearing is not filed before October 7, 2020.
[iii] *Barrera*, at 2, ¶6.
[iv] *Barrera*, at 1-2, ¶¶4-6.
[v] *Barrera*, at *2, ¶6.
[vi] *Barrera*, at *2, ¶6.
[vii] *Barrera*, at 2, ¶6.
[viii] *Barrera*, at 1, ¶3.
[ix] *Barrera*, at 2, ¶7.
[x] Both prior complaints sought "advances, if any…" *Barrera*, at 2, ¶6.
[xi] *Barrera*, at 4, ¶16 (quoting portions of 735 ILCS 5/13-217 (West 1994) (The court used "***" to indicate where it omitted some of the text of the statute. These *** are omitted in this article).
[xii] *Barrera*, at 4, ¶16
[xiii] *Barrera*, at 3, ¶13.
[xiv] *Barrera*, at 3, ¶14.
[xv] *Barrera*, at 4, ¶17.
[xvi] *Barrera*, at 4, ¶17.
[xvii] *First Midwest Bank v. Cobo*, 2018 IL 123038, 429 Ill.Dec. 416, 124 N.E.3d 926.
[xviii] *Barrera*, at 4, ¶18.
[xix] *Barrera*, at 4, ¶18.
[xx] *Barrera*, at 6, ¶24.
[xxi] *Barrera*, at 5, ¶20.
[xxii] *Barrera*, at 4-4, ¶¶19-20.
[xxiii] Barrera, at 4, ¶19.
[xxiv] *Barrera*, at 4, ¶19.
[xxv] *Barrera*, at 5, ¶21.
[xxvi] *Barrera*, at 9, ¶34.
[xxvii] *Barrera*, at 9, ¶34.
[xxviii] *Barrera*, at 9, ¶34.
[xxix] *Barrera*, at 9, ¶35.