ILLINOIS COURT REVERSES DISMISSAL OF FORECLOSURE ACTION FINDING MULTIPLE FILINGS NOT BARRED BY SINGLE REFILING RULE

Last month the Appellate Court of Illinois, Second District, reversed an order of dismissal from a Du Page County Circuit Court in a mortgage foreclosure action involving a $780,000 loan. *Bank of New York Mellon as Tr. for Certificate Holders of CWALT, Inc., Alternative Loan Tr. 2007-3T1, Mortgage Pass-Through Certificates, Series 2007-3T1 v. Dubrova*y, 2021 IL App (2d) 190540. The Dubrovays took their loan out in 2007 and defaulted in November 2010.[i] The bank filed four foreclosure actions, each seeking the same principal amount and including the following pertinent allegations[ii]:

2011 Foreclosure:	Filed 03/08/11 Default alleged 11/10/10 Requested "any additional taxes paid, or advances paid for insurance." Dismissed with leave to reinstate 06/07/12
2012 Foreclosure:	Filed 08/10/12 Default alleged 11/10/10 Requested "any additional taxes paid, or advances paid for insurance." Dismissed with leave to reinstate 08/12/13
2016 Foreclosure:	Filed 03/9/16 Default alleged 11/10/10 Did not request taxes or insurance Dismissed without prejudice 12/06/16
2017 Foreclosure:	Filed 10/10/17 Default alleged 04/01/13 Requested "any additional taxes paid, or advances paid for insurance." Dismissed with prejudice 02/08/19

The basis for the dismissal of the 2017 foreclosure was the bank's alleged violation of section 13-217[iii] of the Code of Civil Procedure ("the Code"), commonly referred to as the single refiling rule. This rule applies to cases which are voluntarily dismissed and permits a party to refile within one year or within the remaining period of limitations, whichever is greater..."[iv] Although the purposes of the rule "is to facilitate the disposition of case on the merits" the Illinois Supreme Court interpreted section 13-217 to allow only one refiling of a claim.

A court applying the single refiling rule must determine whether separate claims (like four foreclosure actions filed against the same parties based on default of the same note and mortgage) should be treated as the same cause of action.[v] This is called the transactional test. If claims "arise from a signal group of operative facts" they will be treated as the same cause of action and claims *refiled* more than once will be dismissed.

The Dubrovays successfully argued to the circuit court that the bank's 2017 Foreclosure action violated the single refiling rule.[vi] The bank countered that the 2017 Foreclosure was not the same as the other foreclosure actions because the 2017 foreclosure "alleged a different default date than the earlier filed complaints."[vii] The Dubrovays rebutted that upon the bank's acceleration of the note "all installment obligations merged into one single obligation" so the different default date in the 2017 Foreclosure was a distinction without a difference. The lower court agreed and entered an order dismissing the 2017 Foreclosure with prejudice.[viii] The bank appealed.

The Second District disagreed with the Dubrovays' argument. Firstly, the Court pointed out the loan allowed for payments in installments and "a separate cause of action arises on each installment."[ix] The Court relied on two analogous cases (*Moy*[x] and *Barrera*[xi]) to assist with its transactional test analysis in the context of installment loans. In both *Moy* and *Barrera* the court concluded that differing default dates (*Moy*) and a request for newly accruing taxes and insurance (*Barrera*) constituted new facts so prior actions based on different defaults did not prevent the subsequent foreclosure filing in either action.[xii] The Court identified this as the "new default rule" (in *Barrera*) and surmised that new defaults "were not part of the core of operative facts that formed the basis of the prior complaints" so the single refiling rule did not apply. The Court noted the new default rule prevents unreasonable and unjust results and "was necessary to provide remedies for contracts that require performance over a number of years."

Lastly, the Court rejected the Dubrovays' argument that acceleration of the note resulted in merger of the installment payments which acceleration could only be undone by the Dubrovays making a payment and the bank accepting it.[xiii] The Court explained that the dismissals (without prejudice) of each of the three prior foreclosures rendered those proceedings a nullity which, in turn, nullified or revoked[xiv] the acceleration of the loan. The Court noted three benefits which resulted from this clear rule regarding deacceleration of the note: (1) It makes it easier for attorneys to counsel borrowers on how to proceed in a particular matter; (2) It allows borrowers to bring their loans current and make installment payments instead of being required to pay a lump sum; and (3) It "prevents unjust results because, in the absence of this rule, borrowers would be rewarded for disregarding the note and mortgages that they signed and then failed to pay on for numerous years."[xv]

The Court[xvi] reversed the judgment of dismissal and remanded the case for further proceedings. The clarification provided by this holding will prove helpful in navigating cases

affected by the single refiling rule and, subject to the statute of limitations, may even provide the basis for refiling foreclosure actions on claims that were previously dismissed based on that rule.

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1. Last month the Appellate Court of Illinois, Second District, reversed an order of dismissal from a Du Page County Circuit Court in a mortgage foreclosure action involving a $780,000 loan. *Bank of New York Mellon as Tr. for Certificate Holders of CWALT, Inc., Alternative Loan Tr. 2007-3T1, Mortgage Pass-Through Certificates, Series 2007-3T1 v. Dubrova*y, 2021 IL App (2d) 190540. Over the course of about six years the bank filed four separate foreclosure actions against the Dubrovays based on a payment default of the Dubrovays' note and mortgage. The first three foreclosures were dismissed without prejudice.
2. The Dubrovays moved to dismiss the fourth foreclosure based on the bank's violation of the single refiling rule (section 13-217 of the Code of Civil Procedure) which permits a party to refile the same claim if it is filed within one year of the previously dismissed claim. The Illinois Supreme Court interpreted section 13-217 to allow only one refiling of a claim if both claims arose "from a single group of operative facts." The lower court agreed with the Dubrovays and dismissed the fourth foreclosure action based on the bank's perceived violation of the single refiling rule. The bank appealed the order of dismissal arguing its fourth foreclosure involved a different default date than any of its previous three foreclosures so it was not barred by the single refiling rule.
3. The Second District agreed with the bank and reversed the judgment of dismissal. The Court pointed out the Dubrovays' loan allowed for payments in installments and "a separate cause of action arises on each installment." The Court relied on two analogous cases (*Moy* and *Barrera*) to assist with its transactional test analysis. In both *Moy* and *Barrera* the court concluded that differing default dates (*Moy*) and a request for newly accruing taxes and insurance (*Barrera*) constituted new facts so prior actions based on different defaults (this is known as the "new default rule") did not prevent the subsequent foreclosure filing in either action. For these reasons, the Court in *Dubrovay* reversed the order of dismissal and remanded the matter for further proceedings.

[i] *Dubrova*y, at ¶¶3, 5.
[ii] *Dubrova*y, at ¶¶5-11.
[iii] Codified at 735 ILCS 5/2-619 (West 2018).
[iv] *Dubrova*y, at ¶22. References and quotations to this case are to this citation until indicated otherwise.
[v] *Dubrova*y, at ¶23. References and quotations to this case are to this citation until indicated otherwise.
[vi] *Dubrova*y, at ¶¶14-15.
[vii] *Dubrova*y, at ¶24. References and quotations to this case are to this citation until indicated otherwise.
[viii] *Dubrova*y, at ¶¶15-16. References and quotations to this case are to this citation until indicated otherwise.
[ix] *Dubrova*y, at ¶25.
[x] *McHenry Savings Bank v. Moy*, 2021 IL App (2d) 200099.
[xi]*Wilmington Savings Fund Society, FSB v. Barrera*, 2020 IL App (2d) 190883, ¶ 17, 443 Ill.Dec. 917, 162 N.E.3d 1068.
[xii] *Dubrova*y, at ¶¶26-28. References and quotations to this case are to this citation until indicated otherwise.
[xiii] *Dubrova*y, at ¶¶29-30. References and quotations to this case are to this citation until indicated otherwise.
[xiv] Notably, the Court distinguished *Deutsche Bank Trust Co. Americas v. Sigler*, 2020 IL App (1st) 191006, 446 Ill.Dec. 96, 169 N.E.3d 759, relied upon by the Dubrovays for the premise that dismissal does not effectuate a deacceleration. The Court noted the bank in *Sigler* sent a pre-foreclosure notice to the borrowers indicating the bank was invoking the acceleration clause. Ostensibly, in that circumstance, after dismissal the bank was required to send a subsequent notice advising it was revoking its prior acceleration. The Court in *Dubrovay* noted the bank never sent the Dubrovays an acceleration notice so Sigler was distinguishable on that ground. *Dubrova*y, at ¶36.
[xv] *Dubrova*y, at ¶33.
[xvi] Judge Hutchinson wrote a lengthy dissent. *Dubrova*y, at ¶¶43-74. He opined that the court was "obligated to apply existing, unambiguous [Illinois] statutory authority and [Illinois] case law to the facts of the case" which would require affirming the lower court's dismissal. *Dubrova*y, at ¶73.