Case No. 123038

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest To Waukegan Savings Bank f/k/a/ Waukegan Savings and Loan, SB,	)))	Appeal from the Appellate Court, First District, No. 1-17-0872
Plaintiff-Appellant,	)))	On Appeal from the Circuit Court of Cook County, Law Division
v.	))	Case No. 15 L 007759 Honorable Raymond W. Mitchell, Judge Presiding.
Andres Cobo; Amy M. Rule,	))	Date of Appellate Order:
Defendants-Appellees.	)	November 6, 2017

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ORAL ARGUMENT REQUESTED

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CERTIFICATE OF SERVICE

To: Arthur Czaja
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I, Stephen G. Daday, hereby certify that I served Petitioner First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB's Reply Brief upon the party listed above by emailing a copy of the same to the email address listed above on June 13, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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TABLE OF POINTS AND AUTHORITIES

INTRODUCTION

The case at bar asks the Court to answer whether a mortgage foreclosure case and a breach of note matter are the same cause of action for purposes of the single refiling rule contained in section 13-217 of the Illinois Code of Civil Procedure (hereinafter "the Code"). In presenting their position, Defendants-Appellees, Andres Cobo and Amy Rule (herein "Defendants") ask the Court to broadly apply the principles of *res judicata* to the application of the single refiling rule beyond the scope of Illinois case law. Defendants further argue that this Court should overrule long standing case law and instead announce a new rule of law that goes against the principles and practice of lending and debt servicing. While placing limitations and restrictions against lenders seeking to recover from a default may benefit Defendants, the policy implications of such a ruling go beyond the case at bar and will have widespread effect on lending practices and debt servicing. If this Court adopts Defendants' theory of the case, a lender will be required to include any possible remedy contained within any of the documents pertaining to a particular loan transaction in its initial recovery action or risk losing the ability to recover under its bargained-for contracts. This Court should reject the arguments put forth by Defendants, and hold that Plaintiff did not violate the single refiling rule. In doing so, Plaintiff First Midwest Savings Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB (hereinafter "Plaintiff") respectfully requests that this Court reverse the decision of the Appellate Court.

ARGUMENT

I. The Single Refiling Rule is Limited to those Matters that Arise from a Single Set of Operative Facts.

Defendants argue that by refiling an action for breach of contract on a defaulted note, Plaintiff violated the single refiling rule of section 13-217 of the Code. Defendants assert that Plaintiff's Second Collection Action is the second refiling of the Foreclosure Complaint, rather than the first refiling of the First Collection Action. The Defendants are incorrect.

The single refiling rule provides a plaintiff with a one-time right to refile a claim that has been voluntarily dismissed or dismissed for want of prosecution within one year of the entry of the dismissal order or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217 (West 2018). "For the purposes of section 13-217, a complaint is considered to be a refiling of a previously filed complaint if it constitutes the same cause of action under the principles of *res judicata*." *Wells Fargo Bank v. Norris*, 2017 IL App (3d) 150764, ¶21. In order to make that determination, the Courts apply the transactional test. *River Park Inc.,v. The City of Highland Park*, 184 Ill.2d 290, 310-311 (1998). "[P]ursuant to the transactional analysis, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* at 311.

Despite Defendants claims to the contrary, Plaintiff did not twice voluntarily dismiss and refile its lawsuits against the Defendants in violation of the single refiling rule. Plaintiff's mortgage foreclosure case is a separate and distinct cause of action arising from a separate and distinct transaction from the two collection actions filed by Plaintiff. A mortgage foreclosure action and a breach of note matter are different causes of action because they arise out of separate operative facts, namely one arises out of the promissory note and the other arises out of the mortgage. This distinction was noted in *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237 (2d Dist. 2004) in a discussion concerning a note, mortgage, and guarantee. "While the three transactions are related, we do not believe that their mere proximity in time and the overlap of some of the parties render them a single transaction, especially in light of the purpose of each of the transactions." *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237, 241 (2d Dist. 2004). Defendants' assertions that the mortgage foreclosure action and the collection matters arise out of the same group of operative facts fails to acknowledge the different purpose of the various contracts that may comprise a loan transaction. Defendants' assertions also misstate the requirements of the single refiling rule.

A. Under the Transactional Test, the Note and Mortgage Do Not Arise from the Same Set of Operative Facts.

A note and mortgage are separate and distinct contracts. They involve different rights as well as different remedies. Often, a note and a mortgage are only two of the contracts involved in a complex real estate transaction that can include various other documents such as a guaranty, an assignment of rents, pledges of collateral or receivables, or UCC Article 9 security agreements and financing statements. Each of these contracts may have different parties involved, each relies on the bargained-for agreements within the four corners of that document, and each provides for different remedies in the event of a breach. The remedy provided in a mortgage contract is foreclosure. A mortgage foreclosure action is a *quasi in rem* action that seeks to terminate a mortgagor's interest as well as all other subordinate interests in a piece of real property. In contrast, a breach of note action is an *in personam* action that seeks to impose personal liability against a debtor in favor of a lender. *See Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶33 (citing *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12, 78 S. Ct. 1228, 2 L.Ed.2d 1283 (1958)). Despite these differences, Defendants argue that the three lawsuits filed by Plaintiff are the same causes of action simply because they involve the same default date, and roundly group the lawsuits together under the umbrella heading of "debt collection." In doing so, Defendants oversimplify the unique nature of a mortgage foreclosure action, and ignore case law precedent.

Central to Defendants' argument is the notion that the trial court could have determined the liability of the Defendants under the note in the mortgage foreclosure case, thus satisfying the transactional test. That is not the standard of the transactional test. As argued above, under the transactional test, separate claims will be considered the same cause of action if they arise out of the same operative facts. Defendants conflate the principles of *res judicata* into the single refiling rule. In a single count mortgage foreclosure complaint, the Illinois Mortgage Foreclosure Law (hereinafter "IMFL") and Illinois case law require that the note be introduced into evidence in order to prove a *prima facie* case for mortgage foreclosure. *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶67. The court in a mortgage foreclosure case adjudicates the remedies under the mortgage such as ordering the property at issue to sale and granting a deficiency judgment if such a deficiency exists following sale. However, a personal deficiency judgment is different from a judgment on the promissory note. The IMFL does not permit a mortgagee to collect its money damages against the mortgagor without entering judgment of foreclosure, completing a judicial sale, and confirmation of the judicial sale. It is only at the point of confirmation of sale that the IMFL permits a mortgagee to seek a personal deficiency against a borrower. Even then, certain requirements must be met. First, there must be a deficiency following the judicial sale. If a plaintiff fully recovers the debt through a judicial sale, then there is no further judgment as to the note. Second, a court may require additional evidence supporting a deficiency, like a broker's price opinion of the property. Third, a personal deficiency judgment requires personal service on the borrower, or that the borrower enter an appearance. 735 ILCS 5/15-1508. In an instance where service against a defendant is accomplished through publication and no appearance is entered on behalf of the borrower, a mortgagee would not be entitled to a personal deficiency judgment. Under Defendants' reasoning, the plaintiff would have no further remedy available following an adjudication of the mortgage foreclosure case. Yet, this is contrary to the bargained-for exchange in the note as well as case law precedent. "It is also settled that, upon default, the mortgagee is allowed to choose whether to proceed on the note or guaranty or to foreclose upon the mortgage. 'These remedies may be pursued consecutively or concurrently.'" *Goldstein*, 349 Ill.App.3d at 241 (citing *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847, 852, 93 Ill. Dec. 200, 486 N.E.2d 301 (1985)). This means that a mortgagee may choose to include a second count in their complaint for a breach of the promissory note, but that they are not required to do so. In fact, the IMFL uses permissive and not mandatory language in allowing a plaintiff to bring additional counts within the mortgage foreclosure complaint. *See* 735 ILCS 5/15-1504(b) (West 2018). As a note and mortgage are separate and distinct bargained-for agreements, arising from separate operative facts that give rise to different remedies, a mortgage foreclosure action and a breach of note action do not constitute the same cause of action under the transactional test.

B. The Single Refiling Rule Does Not Require a Full *Res Judicata* Analysis.

Defendants argue that the single refiling rule extends to any matters that could be raised in the same action. This proposition misstates the requirements of the single refiling rule. Defendants extend the single refiling rule to include the principles of *res judicata*. Yet, the required elements of *res judicata* are missing from a matter in which the single refiling rule is involved because there is no final adjudication on the merits. *See Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc.*, 318 Ill.App.3d 856, 863 (2nd Dist. 2001). The analysis for the purpose of the single refiling rule is whether under the transactional test, separate claims are the same cause of action. As such, *LaSalle National Bank v. County Board of School Trustees of Du Page County*, 61 Ill.2d 524 (1975), cited by Defendants, is unhelpful and irrelevant as it considers only the matter of *res judicata* and not the single refiling rule.

Defendants also rely on *United Central Bank v. KMWC 845 LLC*, 800 F. 3d 307 (7th Cir. 2015) (herein "*UCB*") to stand for the proposition that Plaintiff's second collection action on the note is barred, arguing that Plaintiff twice filed actions seeking to determine liability of Defendants under the note prior to the filing of the present matter. However, *UCB* is distinguishable, because in that case the note had already been adjudicated by way of a prior dismissal with prejudice. *United Central Bank v. KMWC 845 LLC*, 800 F. 3d 307, 311 (7th Cir. 2015). In *UCB*, Plaintiff filed and then dismissed two collection actions pursuant to a note. *Id.* at 308-309. Then, Plaintiff filed a mortgage foreclosure. *Id.* The court found that UCB was precluded from the third filing, because further action on the note was barred, as the indebtedness no longer existed. *Id.* at 311 ("It does not matter that UCB's foreclosure action itself does not constitute an impermissible second refiling; what matters is, as the district court noted, that long-standing Illinois law precludes a plaintiff from foreclosing on a mortgage when an action on the underlying note is barred by the statute of limitations or another procedural rule."). *UCB* is distinguishable from the case at bar, because the debt was not adjudicated in the mortgage foreclosure case prior to dismissal.

Defendants argue that the only difference between a mortgage foreclosure case and a lawsuit on the promissory note is that the trial court can order a sale of the property to satisfy the judgment. That is incorrect. As stated above, the purpose of a mortgage foreclosure action is to terminate the mortgagor's interest in the property while an action on a note is to determine the liability thereunder. Defendants correctly point out that the IMFL permits a plaintiff to seek a personal deficiency judgment, but plaintiff's right to the deficiency is not guaranteed in every mortgage foreclosure case, such as when a mortgagor is served by publication. In the current matter, a personal deficiency judgment was not possible because the case was dismissed prior to the entry of a judgment of foreclosure, the sale of the property, and confirmation of the sale. Because the liability of Defendants under the note was never adjudicated in the foreclosure action, the dismissal of the first collection action was not a final bar to an action on the note.

Likewise, because Plaintiff never obtained a deficiency judgment in the mortgage foreclosure action there was no bar to Plaintiff's actions on the note. In *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, the court determined that a plaintiff who filed a single-count foreclosure case that sought a personal deficiency judgment against defendants was barred by *res judicata* from pursuing a second action for breach of the note in the amount of the deficiency judgment following the order approving sale. *Coleman*, 2015 IL App (1st) 140184 at ¶14-¶16. The court determined that the two claims, a claim for breach of note and a claim for personal deficiency arose out of the same operative facts—the deficiency which resulted from the foreclosure sale based on the default. *Id.* at ¶16.

In the pending matter, the trial court observed that a plaintiff cannot obtain a deficiency judgment in the mortgage foreclosure action prior to judgment of foreclosure and sale of the real property, and distinguished *Coleman* on those grounds. R. V1, C. 246-R. V2, 252. The trial court further found that Plaintiff's action on the note was not an attempt to recover a deficiency amount arising out of the mortgage foreclosure action. R. V1, C. 249. The trial court's analysis correctly distinguished the difference between a deficiency judgment and a judgment on the note. The deficiency judgment is a result of a judgment of foreclosure and a sale of real property while a judgment on a note is based entirely on the contract without regard to any real property. As Plaintiff's mortgage foreclosure case in this matter did not adjudicate the liability of Defendants' under the note and no deficiency judgment was entered, Plaintiff was not barred from seeking relief under the note. Further, as there was no final adjudication on the merits, the doctrine of *res judicata* does not apply. As such, the only issue before the court is whether a mortgage foreclosure action and a breach of note action are the same cause of action under the transactional test. As previously addressed above, the two matters are clearly separate causes of action.

II. A Single Count Mortgage Foreclosure Complaint Does Not Seek Concurrent Relief Under the Note.

Defendants argue that by filing a single count mortgage foreclosure case in compliance with the form pleading requirements of the IMFL, a plaintiff concurrently moves for relief under the note. Illinois case law says otherwise.

In *Turczak v. First American Bank*, 2013 IL App (1st[t]) 121964, the borrowers financed the purchase of their home with a loan from Wells Fargo Bank who held a first mortgage on the property and First American Bank who held a second mortgage on the property. *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶4. Upon default, Wells Fargo filed a mortgage foreclosure action naming First American as a defendant. *Id.* at ¶5. During the pendency of Wells Fargo's foreclosure suit, First American filed a separate collection action on its promissory note and obtained a default judgment. *Id.* at ¶6. Thereafter, the borrowers attempted to short sale their home. *Id.* at ¶7. First American refused to release its mortgage unless it received a payment in consideration for doing so. *Id.* at ¶8. The borrowers filed a lawsuit against the First American alleging that the doctrine of *res judicata* prevented any action on the second mortgage and that the demand for money to release the second mortgage violated the Illinois Consumer Fraud and Deceptive Business Practices Act and the Fair Debt Collection Practices Act. *Id.* at ¶2. The court held that "Illinois law holds a lender may proceed in separate suits to enforce the mortgage and the underlying promissory note, and the second mortgagee's rights in the property were not extinguished as a matter of law." *Id.* In response to the borrowers' argument that the IMFL requires the enforcement of the note and mortgage together in a single case, the court further stated "the language pertains only to actions to foreclose mortgages, and says nothing that would make it applicable to other types of lawsuits, including actions at law for judgment on a promissory note." *Id*. at ¶35.

In *Goldstein*, the court considered whether an action on a guaranty could be brought following an adjudication of a mortgage foreclosure suit, and determined that "[b]ecause a mortgage and an accompanying promissory note securing the mortgage constitute separate contracts, they give rise to legally distinct remedies that cannot be pursued in a single-count foreclosure suit." *Goldstein*, 349 Ill.App.3d at 241 (citing *Hickey v. Union National Bank & Trust Co. of Joliet*, 190 Ill.App.3d 186, 190, 138 Ill. Dec. 134, 547 N.E.2d 4 (1989)).

In *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847 (4th Dist. 1985), the lender obtained a confession of judgment on a promissory note and then filed a mortgage foreclosure action. The borrowers argued that the trial court impermissibly allowed the bank to increase the amount of judgment it had previously obtained on the note. The court disagreed, stating, "The Bank, in obtaining a judgment of foreclosure, did not impermissibly increase a prior judgment, but pursued a separate and distinct remedy available to it as a holder of a note secured by a mortgage." *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847, 852 (4th Dist. 1985). "Upon default, a mortgagee may sue upon the note itself or bring an action to foreclose the mortgage. These remedies may be pursued consecutively or concurrently." *Id*.

The *Coleman* case distinguishes the above cases by limiting the relief a plaintiff may seek under a promissory note following the adjudication of a mortgage foreclosure matter in which plaintiff obtained an *in rem* deficiency judgment. In *Coleman*, the plaintiff filed a mortgage foreclosure case and sought a personal deficiency in its prayer for relief. *Coleman*, 2015 IL App (1st) 140184, ¶4. The judgment of foreclosure specifically provided for the entry of a deficiency judgment in the event of a deficiency following sale. *Id*. at ¶5. The order approving sale entered an *in rem* deficiency. *Id*. at ¶6. Plaintiff then sued to recover the deficiency amount under the note. *Id*. at ¶7. The court found that:

> plaintiff's claim for a personal deficiency judgment was raised concurrently with its request for foreclosure on the property and in the foreclosure action, and a final judgment was entered against defendant allowing for entry of a deficiency judgment after the sale of the property. Plaintiff, having pursued its remedy for a personal deficiency judgment in the mortgage foreclosure case, is precluded from now seeking a personal deficiency judgment solely on the promissory note in this consecutive action. *Id*. at ¶19.

In the case at bar, Defendants and the Appellate Court read *Coleman* too broadly. Defendants argue that by filing a foreclosure, a mortgagee cannot thereafter pursue an action on the note. Resp. Brief, pg. 23. However, *Coleman* is not a wide sweeping statement that the filing of a single count mortgage foreclosure lawsuit is a concurrent filing on the note. Rather, under the factual circumstances in *Coleman* where (1) the plaintiff requested a personal deficiency judgment in their prayer for relief; (2) a judgment of foreclosure was entered specifically providing for a personal judgment; and (3) after sale in the entry of the order approving sale the court awards an *in rem* deficiency judgment, then the plaintiff is precluded from seeking a personal judgment on the note for the deficiency amount. The court's holding was limited to the specific scenario therein, and this limited holding and should not be expanded. In *Coleman*, the subsequent action on the note was essentially an attempt to do-over the entry of the *in rem* deficiency judgment for an *in personam* deficiency judgment. The court rightfully determined that the collection action was barred on *res judicata* grounds.

Defendants also argue that *Skolnik v. Petella*, 376 Ill. 500 (1941) requires that this court uphold the Appellate Court's decision. However, much like in *Coleman, Skolnik*, is distinguishable. In fact, the court in *Turczak* distinguished *Skolnik* noting that "*Skolnik* is consistent with *res judicata* principles because the second action on the deficiency was nothing more than a do-over of the first action on the deficiency." *Turczak*, 2013 IL App (1st) 121964 at ¶28. As argued above, the present matter does not concern an action attempting to recover a deficiency following an adjudication of a mortgage foreclosure. A personal deficiency judgment was never at issue because a judgment of foreclosure was not entered, a sale did not occur, and a court did not approve the sale leaving a potential deficiency. This court should not extrapolate the doctrine of *res judicata* into the analysis of the single refiling rule and should determine that a mortgage foreclosure case and a breach of note case are not the same causes of action under the transactional test. This Court should not expand the holding in *Coleman* and should reverse the decision of the Appellate Court.

III. The Trial Court's Reasoning Aligns with the Body of Case Law Regarding the Single Refiling Rule.

Defendants argue that this Court does not need to disturb the decision in *Farmer City State Bank* if it upholds the Appellate Court's decision. First, Defendants' argument that *Farmer City State Bank* predates the IMFL and may no longer be relevant is misplaced. The reasoning in *Farmer City State Bank* that supports Plaintiff's position was also cited in *Turczak* which was decided in 2013 and after the adoption of the IMFL. Second, Defendants additionally argue that the holding of *Farmer City State Bank* shows that the sequence of lawsuits matters and that a suit on a note can precede a mortgage foreclosure action but a mortgage foreclosure action cannot precede an action on the note. In support of this position, Defendants cite to *Coleman*, but as argued above, Defendants and the Appellate Court read *Coleman* too broadly. Rather, the trial court's analysis of the interplay of all of these cases is correct. The body of law representing the issue of the single refiling rule is in line with the trial court's ruling in this matter.

In contrast, in order for the prior law to make sense with the Appellate Court's decision, this court must rule contrary to *Goldstein, Turczak, and Farmer City State Bank*, and affect major changes to civil practice concerning default servicing matters following a default or breach. Defendants argue that *Goldstein* can be distinguished as it involves a guaranty and not an action on the note. However, Defendants read *Goldstein* too narrowly. *Goldstein*'s holding does not make a distinction between a note and a guaranty. In fact, it pertains to all documents that might comprise a loan transaction. *See Goldstein*, 349 Ill.App.3d at 241 ("Such a result, however, overlooks the practical aspects of the interrelated transactions comprising the execution of the note, mortgage, and guaranty, as well as long-settled precedent, and reduces the transactional analysis to the most cursory and formalistic level."). When read as a cohesive body of law, the Appellate Court's ruling in this matter is the outlier.

By ruling in favor of Plaintiff, this court will not disturb the holding in *Coleman*. The single refiling rule was not at issue in *Coleman*, and the suit on the note was barred on other *res judicata* grounds. The deciding factor in *Coleman* was not whether the note and mortgage arise out of the same operative facts, rather, the deciding factor was whether the claim had already been fully adjudicated following judgment of foreclosure and sale. As such, this court should not follow and expand on *Coleman*, because the mortgage foreclosure matter in the case at bar was not fully adjudicated. Rather, this court should look to the reasoning in *Goldstein*, *Turczak*, and *Farmer City State Bank* and reverse the decision of the Appellate Court. The trial court's analysis in the matter below allows all of these cases to be read conjunctively.

However, beyond the cases mentioned above, following the Appellate Court's decision, the case of *Wells Fargo Bank, N.A. v. Dixie R. Norris,* 2017 IL App (3d) 150764, is no longer clear. In *Norris*, the Court considered whether plaintiff violated the single refiling rule, where plaintiff had first filed and dismissed a mortgage foreclosure believing there to be a loan modification, then filed and dismissed a mortgage foreclosure as to the purported loan modification, and then filed a second mortgage foreclosure as to the initial date of default under the original note and mortgage. *Norris*, 2017 IL App (3d) 150764, ¶¶4-8. After the Appellate Court's decision in this matter, it is unclear whether the loan modification would be considered part of the same set of operative facts that gave rise to each of the foreclosure actions, considering that the same note and mortgage were part of the underlying transaction for the loan and the pledge of the property as security for the agreement. However, by following the trial court's reasoning in interpreting *Coleman*, the *Norris* case is unaffected. If this court rules in favor of the Plaintiff, each of the cases referenced above makes sense as a collective body of law. On the contrary, if this court upholds the Appellate Court's decision, the result will be a significant change to default servicing practice within Illinois.

IV. Policy Concerns Require this Court to Reject Defendants' Attempt to Expand the Single Refiling Rule.

In the final pages of their brief, Defendants ask this Court to overrule the decisions in *Farmer City State Bank*, *Turzcak*, *Goldstein* and other cases that rely upon the rule of law that a mortgagee can pursue separate actions on the note, mortgage and guaranty. Resp. Brief, pg. 28. The Defendants argue that a mortgage, note, and guaranty all arise from the same literal transaction and therefore the transactional test requires any action on the note, guaranty, and mortgage to be brought in a single action as any additional action would be barred by *res judicata*. This is in direct contrast to years of case law that provides that these actions may be filed consecutively or concurrently, at a plaintiff's discretion.

Contrary to Defendants' assertion, granting Plaintiff's appeal does not give preferential treatment to mortgagees. Rather, it recognizes the distinction between causes of action for mortgage foreclosure and breach of note. In fact, allowing Defendants to prevail may prejudice lenders from recovering the remedies they are owed pursuant to contract, and may further provide preferential treatment to defaulting mortgagors, permitting a borrower that defaulted on their obligation to receive a windfall.

Defendants argue that under Plaintiff's theory of the case, a plaintiff could file and dismiss unlimited lawsuits. This assertion misstates Plaintiff's position. The single refiling rule permits a party to refile a cause of action one time. Plaintiff asserts that a mortgage foreclosure case and a breach of note case are different causes of action. Plaintiff does not seek unlimited bites at the apple.

Defendants further argue that a plaintiff could arbitrarily change default dates in order to file endless litigation. In making this argument, Defendants fail to consider the nature of a default under a promissory note. Under Illinois case law, each missed payment due under the promissory note is a new cause of action. *Thread & Gage Co., Inc. v. Kucinski*, 116 Ill.App.3d 178, 184 (1983) ("The general rule is that where a money obligation is payable in installments, a separate cause of action arises on each installment and the statute of limitations begins to run against each installment as it becomes due."). A lender is entitled to seek repayment for each missed payment as a new cause of action and filing a subsequent lawsuit on a subsequent default does not run afoul of the single refiling rule or the principles of *res judicata* as long as there has been no adjudication on the merits.

While there has been no claim of harassment in this case, Plaintiff agrees with Defendants that endless litigation is untenable to both defendants and plaintiffs. However, there are mechanisms in place to deal with harassing behavior such as a request for sanctions, or actions pursuant to the Illinois Fair Debt Collection Practices Act or the Consumer Fraud Act. For instance, in *Carr v. Tillery*, 591 F.3d 909 (7th Cir. 2010), the court considered whether the single refiling rule had been breached where a plaintiff attorney filed multiple complaints against his former law firm regarding attorneys' fees owed pursuant to a memorandum of understanding. *Carr*, 591 F. 3d 909, 914-916 (7th Cir. 2010). The court found that plaintiff's filings rose to the level of harassment. "We see no obstacle therefore to invoking the common law ground for sanctions for misconduct in litigation, especially since the common law principle, like its statutory counterpart, is as much concerned with protecting the courts from being overwhelmed by baseless litigation as with protecting litigants from harassment." *Id.* at 920. Notably, the Court in *Carr* left the door open for future litigation on the same contractual relationship based on future instances of default. "We mention this because some of the fees to which Carr may be entitled under the Memorandum of Understanding have not yet been paid. Should the defendants refuse to pay him his share on a ground not placed in issue in this case or any of the previous litigation between Carr and the defendants, he would be entitled to bring a new suit." *Id.* at 921. There are safeguards in place to protect defendants from harassing or unwarranted litigation and a sweeping new rule that hampers a lender's ability to recover under its contracts is unreasonable.

The instant matter deals with a single residential real estate transaction. However, the logical conclusion of Defendants' proposition requires all possible claims arising out of a loan transaction to be named and litigated at once, for fear of violating the single refiling rule. Plaintiffs will be compelled to include any and all remedies available in an initial action, including but not limited to an assignment of rents, pledge of collateral, pledge of a bank account or receivables, pledge of personal property, in addition to an action on the mortgage, note, and guaranty. If the very purpose of having multiple security agreements in place is to ensure that a lender will be able to recoup its investment, then the unintentional effect of the Appellate Court's decision is that it prevents lenders from getting what they bargained for.

Further, if Defendants proposition is taken to its logical conclusion, there could be a series of unintended consequences to matters involving more complex transactions. Consider a real estate transaction where multiple mortgages on separate parcels of property secure a single indebtedness. Upon the borrower's default, a plaintiff may be required to file separate foreclosure actions for each parcel. *See* Cook County General Order No. 3.4 ("In foreclosure suits a separate action shall be filed for each parcel of Real Estate involved except where one mortgage is covered by several parcels."). Voluntary dismissals of any of these actions would jeopardize the plaintiff's ability to recover, because subsequent actions may be barred. The new rule proposed by Defendants provides little clarity to the broader issues of complex real estate transactions. A ruling of law should provide more clarity to an area of law rather than more uncertainty. Defendants' proposition goes too far.

Defendants argue that finding that a mortgage foreclosure case and a breach of note matter are separate causes under the transactional test results in preferential treatment to the mortgagee. It is unclear how allowing a plaintiff to enforce its various bargained-for contracts and remedies in an effort to be made whole creates preferential treatment. Plaintiff is not arguing for the right to endless litigation. Rather, Plaintiff seeks only the rights granted to it by law and contract. An appropriate analysis of the single refiling rule allows Plaintiff to enforce these rights.

Defendants' proposal will drastically alter the way that foreclosures are administered in the state of Illinois. If this court adopts Defendants' position, it will prevent plaintiffs from enforcing their bargained for contractual rights. The impact on the adjudication of mortgage foreclosure cases cannot be understated. For example, there may be business reasons why a plaintiff would choose not to name a guarantor in an action on a mortgage, and wait until after the foreclosure is complete to raise any action against other parties, or file a suit on a note before filing a foreclosure. If all of the contractual agreements must be raised in a single action for fear of violating the single refiling rule, then the distinction between causes of action and the rights and responsibilities detailed in each contract will be obliterated.

Further, if each time a lender files a mortgage foreclosure action, they are concerned that voluntarily dismissing the suit could result in them losing their ability to recover what's due and owing to them; it could seriously chill a lender's willingness to engage in loan modifications, forbearance agreements, or other forms of loan workouts with a borrower. If a default is brought current and a mortgage foreclosure action is dismissed, then under Defendants' reasoning, the next default must be pursued to a completed foreclosure. There could be no subsequent reinstatement of the loan for fear that a second voluntary dismissal would bar the plaintiff from being able to foreclosure a subsequent default. This result seems in conflict with the IMFL which permits reinstatement under section 15-1602 of the Code, 735 ILCS 5/15-1602, and the public policy of the State of Illinois as evidenced by the court-administered foreclosure mediation programs throughout the state.

This court should decide this case on narrow grounds and find that Plaintiff's second collection action was not barred by the single refiling rule, confirming the distinctions between the mortgage and note in a foreclosure action and the distinctions between a cause of action for a breach of note and a mortgage foreclosure case. This court should find that Plaintiff did not breach the single refiling rule, and reverse the decision of the First District Appellate Court.

CONCLUSION

WHEREFORE, Plaintiff-Appellant First Midwest Bank respectfully requests that this Honorable Court reverse the order of the Appellate Court entered on November 6, 2017 granting Defendants-Appellee's Appeal, reinstate the order of the trial court of March 23, 2017 granting summary judgment entered in favor of Plaintiff, and provide for any further relief this Honorable Court deems equitable and just.

Respectfully submitted,

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: June 13, 2018

Respectfully submitted,

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