No. 123038

In the
Supreme Court of Illinois

FIRST MIDWEST BANK,
as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB

Plaintiff- Appellant,

v.

ANDRES COBO and AMY M. RULE,

Defendants-Appellees.

On Appeal from the Appellate Court, First Judicial District, No. 1-17-0872.
There Heard on Appeal form the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 2015 L 007759.
The Honorable **Raymond L. Mitchell**, Judge Presiding

BRIEF OF DEFENDANTS-APPELLEES

Arthur C. Czaja
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

Attorney for Defendants-Appellees
Andres Cobo and Amy M. Rule

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POINTS AND AUTHORITIES

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STATEMENT OF FACTS

Prior to the filing of this Complaint, on December 8, 2011, Waukegan Savings Bank ("Waukegan"), represented by attorney Ted Bond, Jr. filed a mortgage foreclosure case ("First Case") against the Defendants-Appellees Andres Cobo and Amy M. Rule ("Defendants"). R. V1, C. 168 – C. 191. The First Case alleged that the Defendants were in default under a certain promissory note ("Note") secured by a certain mortgage ("Mortgage") upon by the real property located at and commonly known as 625 S. 12th Avenue, Maywood, IL 60153 ("Property"). *Id.* Specifically, Waukegan's complaint alleged that the Defendants failed to pay the monthly installments of principal and interest due July 1, 2011 and those coming due thereafter. *Id.* A copy of the Note was attached as an exhibit to the complaint. *Id*. The complaint sought a judgment against the Defendants in the amount due under the Note, a judgment of foreclosure and sale of the Property, and a deficiency judgment against the Defendants. *Id*. On April 2, 2013, Waukegan voluntarily dismissed the First Case. R. V1, C. 193.

On April 16, 2013, Plaintiff-Appellant First Midwest Bank ("Plaintiff"), as agent for the Federal Deposit Insurance Corporation, receiver for Waukegan Savings Bank, also represented by attorney Ted Bond, Jr., filed a second case against the Defendants in the circuit court of Cook County, Illinois alleging the very same July 1, 2011 breach of the same Note ("Second Case"). R. V1, C. 196 – C. 202. The Second Case sought a judgment against the Defendants in the amount due under the Note. *Id.* The Note was attached as an exhibit to the Complaint. *Id.* On April 3, 2015, the date of the scheduled trial, the Plaintiff voluntarily dismissed the Second Case. R. V1, C. 205.

On July 30, 2015, the Plaintiff, now represented by the law firm of Klein, Daday, Aretos & O'Donoghue, LLC, filed the instant complaint ("Complaint) in the circuit court of Cook County, Illinois. R. V1, C. 2 – C. 57. This Complaint contained two counts, breach of contract and unjust enrichment. R. V1, C. 2 – C. 6. Both Counts alleged that the Defendants failed to make any payments to the Plaintiff or its predecessor in interest since July 1, 2011. R. V1, C. 2 – C. 6. Count I specifically alleged that the Defendants breached the Note by failing to make payments "due July 1, 2011 and each payment thereafter." R. V1, C. 3. A copy of the alleged Note was attached to the Complaint. R. V1, C. 7 – C. 23.

On May 2, 2016, the Defendants timely filed their section 2-619 motion to dismiss the Complaint arguing that this Complaint, the third lawsuit filed against them, constituted an impermissible second refiling of a voluntarily dismissed lawsuit in violation of the single refiling rule provided for in 735 ILCS 5/13-217. R. V1, C. 101 – 205. Specifically, the Defendants argued that the Plaintiff brought two prior lawsuits (the First Case and the Second Case) alleging the same breach of the same Note and voluntarily dismissed both of those prior lawsuits. *Id*.

The Defendants further argued that the operative facts of all three lawsuits were identical. R. V1, C. 101 – 205. All three lawsuits involved the same parties or their privies, the same transaction, the same Note and alleged the same default. *Id*. Moreover, the Defendants argued that even though the relief sought in the First Case and the Second Case may have been slightly different, the Plaintiff could have obtained a money judgment against the Defendants in the amount due under the Note in both of its prior

lawsuits, including any deficiency that resulted from the sale of the Property. *Id*. Therefore, the Defendants maintained that this case was an impermissible second refiling of a previously dismissed lawsuit in violation of the single refiling rule found in section 13-217, which is guided by a *res judicata* analysis. *Id*.

On June 23, 2016 in a written opinion order, the trial court denied the Defendants' motion to dismiss. R. V1, C. 246 – R. V2, C252.

On July 22, 2016, the Defendants filed a motion to reconsider the order of June 23, 2016 denying their motion to dismiss. R. V2, C. 253 – C. 412. On September 20, 2016, in a written order, the trial court denied the Defendants' motion to reconsider. R. V2. C.428 – C. 430.

On November 16, 2016, the Defendants filed their Answer to the Complaint and four Affirmative Defenses. R. V2, C. 441 – R. V3, C. 551. In their First Affirmative Defenses, the Defendants argued, in order to preserve the issue for Appeal, that this third lawsuit was an impermissible second refiling of a voluntarily dismissed lawsuit in violation of section 13-217. R. V2, C.450 – C. 452.

On December 8, 2016, Plaintiff filed a section 2-619 motion to strike Defendants' Affirmative Defenses. R. V3, C. 552 – C. 593.

On January 27, 2017, Plaintiff filed its amended motion for summary judgment. R. V4, C. 930 – R. V5, C. 1241.

On March 2, 2017 in a written opinion order, the trial court granted the Plaintiff's motion to strike the Defendants' Affirmative Defenses. R. V6, C. 1311 – C. 1314.

On March 23, 2017 in a written opinion order, the trial court granted Plaintiff's amended motion for summary judgment and entered a final money judgment in favor Plaintiff in the amount of $308,192.56. R. V6, C.1492-C.1494.

On April 4, 2017, the Defendants timely filed their Notice of Appeal and Request for Preparation of the Record. R. V6, C.1495 – C. 1499.

On November 6, 2017, a unanimous panel of the First District Appellate Court reversed, vacated the order granting summary judgment in favor of the Plaintiff and dismissed Plaintiff's Complaint. A67, ¶1. The Appellate Court found that same group of operative facts gave rise to all three lawsuits (A76, ¶25) and that the Complaint in this case was an impermissible second refiling in violation of section 13-217. A78, ¶28.

On December 27, 2017, the Plaintiff filed its Petition for Leave to Appeal (A2-A50) which was allowed by this Honorable Court on March 21, 2017 (A1) and this Appeal followed.

Introduction

In this case, the Supreme Court must decide the following question: How many times can a mortgagee dismiss and refile a lawsuit alleging the same breach of the same promissory note? According to the Plaintiff, the answer is two. According to section 13-217, the answer is one. 735 ILCS 5/13-217 (West 2018).

The single refiling rule is just that, the ***single*** refiling rule. For purposes of Section 13-217, a complaint is said to be a refiling of a previously filed complaint if it contains the same cause of action as defined by *res judicata* principles. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶22; *Schrager v. Grossman*, 321 Ill.App.3d 750, 755 (1st Dist.

2000); *D'Last Corp. v. Ugent*, 288 Ill.App.3d 216, 220 (1st Dist.1997). Separate claims are considered the same cause of action for purposes of Section 13-217 and *res judicata* if they arise from a single group of operative facts, otherwise known as the "transactional test". *Id.*; *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 310-11 (1998). "While a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one kind of recovery, 'assertions of different kinds of theories of relief arising out a single group of operative facts constitute but a single cause of action." *Marbry*, 2012 IL App (1st) 111464, ¶22; *Schrager*, 321 Ill.App.3d at 755.

The theory advanced by the Plaintiff in this Appeal is that a mortgage and note are separate and distinct contracts giving rise to separate and distinct remedies. This argument, however, ignores the fact that the principles of *res judicata*, which guide this analysis, bar to not only what was raised in the earlier lawsuits, but also what could have been raised.

First, in every mortgage foreclosure action, the court must first determine the amount of the debt before it can order a sale of the property. As the liability of the Defendants under the promissory note can be decided in a foreclosure case, it strains credulity to think that an action on a promissory note is a separate and distinct cause of action for the purposes of the single refiling rule. Here, the liability of the Defendants under the Note was raised and could have been decided in the First Case (the foreclosure action).

Second, nothing in the Illinois Mortgage Foreclosure Law, 735 ILCS 5/15-1101, *et seq.* ("IMFL") prevents a mortgagee from adding an additional cause of action under

the promissory note or guaranty to a complaint for foreclosure. Indeed, it is quite the opposite. The IMFL specifically provides that a complaint for foreclosure may be joined with other counts. 735 ILCS 5/15-1504(b) (West 2018).

Therefore, even if this Honorable Court were to find that a mortgage foreclosure action and a suit on a note are two separate and distinct causes of action, the fact that the Plaintiff could have raised its action on the Note in the First Case (the foreclosure action) should be the beginning and end of this Court's analysis. If the matter could have been raised in the earlier lawsuit, it is barred.

Moreover, it is axiomatic that a mortgage foreclosure and an action on a promissory note seek to accomplish the very same thing: the payment of money. As stated by the Court in *Bedian v. Cohn*, 10 Ill. App. 2d 116, 117 (4th Dist. 1956), "A mortgage cannot exist without a debt." The mortgage stands merely as security for the debt. *Id.*

No matter how the issue is framed, this lawsuit, the third in number, was the Plaintiff's third attempt to sue the Defendants as a result of their July 1, 2011 breach of the Note. Having twice dismissed and refiled a lawsuit that arose from quite literally the same group of operative facts, this lawsuit was the third version, and second refiling, of the same debt collection action. The First District Appellate Court correctly decided this case and the Defendants ask this Honorable Court to affirm that decision in every respect.

ARGUMENT

I. The single refiling rule allows a party to voluntary dismiss and refile its lawsuit once, not twice.

Section 13-217 of the Illinois Code of Civil Procedure allows a plaintiff to refile a voluntarily dismissed lawsuit within one year of the dismissal or within the remaining time of the statute of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2018). This section expressly permits one, ***and only one***, refiling of a claim even if the statute of limitations has not expired. (emphasis added) *Flesner v. Youngs Dev. Co.*, 145 Ill. 2d 252, 254 (1991). Once the plaintiff commences this one new action, ***any further action*** is barred. (emphasis added) *See, e.g., Timberlake v. Illini Hosp.*, 175 Ill. 2d 159, 163 (1997).

Despite the rule being the ***single*** refiling rule, Plaintiff here ***twice*** voluntarily dismissed and refiled its lawsuits against the Defendants. The second voluntary dismissal came on the day of trial. In all three lawsuits, the liability of the Defendants under the Note could have been determined.

All three lawsuits involved the same parties or their privies.[1] R. V1, C. 2 – C. 57; R. V1, C.161 – C. 191; R. V1, C.196 – C.202. All three lawsuits were based on the same July 1, 2011 default under the same Note. *Id*. The same Note was attached as an exhibit to every complaint. *Id*. All three lawsuits sought recovery of money pursuant to the Note. *Id*. And, most importantly, in all three lawsuits the trial court could have determined the liability of the Defendants under the Note.

[1] The 2011 mortgage foreclosure action was brought by Waukegan Savings and Loan, SB ("Waukegan"). Plaintiff is the successor in interest to Waukegan.

Section 13-217 does not authorize an endless recycling of litigation. *Gendek v. Jehangir*, 119 Ill. 2d 338, 343 (1988). Despite the labels assigned to the Plaintiff's three lawsuits, all three lawsuits arose from the same group of operative facts and in all three lawsuits the liability of the Defendants under the Note could have been determined. The Appellate Court correctly decided that this lawsuit arose from the same group of operative facts as the First Case and the Second Case, and therefore constituted an impermissible second refiling. This Honorable Court should affirm the Appellate Court's decision.

II. Claims are considered the same for the purposes of the one refiling rule if they arise from the same group of operative facts.

For the purposes of a *res judicata* analysis, claims need not be identical to be considered the same. A *res judicata* analysis is applicable in determining what constitutes the "same" cause of action for the purposes of the single refiling rule found in section 13-217. In *Schrager*, 321 Ill. App. 3d 750, 755 (1st Dist. 2000), the Court explained what constitutes a "refiling" of a previously dismissed complaint for the purposes of section 13-217 when it stated,

> "This court has held the filing of a complaint is considered a 'refiling' of a previously filed complaint if it contains the same cause of action as defined by *res judicata* principles"

In the past, to determine whether separate complaints involved the same cause of action Illinois courts utilized two tests: the same evidence test and the transactional test. *River Park*, 184 Ill. 2d 290, 307 (1998). The same evidence test "is tied to the theories of relief asserted by a plaintiff" so that two claims that may be part of the same transaction are "considered separate causes of action because the evidence

needed to support the theories on which they are based differs." *Id.* at 309. In contrast, the transactional test "is more pragmatic" and views a claim in "'factual terms.'" *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)).

In a transactional analysis, a claim is considered "'coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; *** and regardless of the variations in the evidence needed to support the theories or rights.'" *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)). In other words, claims can "be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* at 311.

In *River Park*, the Illinois Supreme Court "adopted the more liberal transactional test" for determining the identity of causes of action. *Id.* at 310. In doing so, the court expressly rejected "the more stringent standards of the same evidence test." *Id.* at 310-11. Pursuant to the transactional test, separate claims are "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.

III. All three lawsuits here arose from the same group of operative facts and each lawsuit was based upon the same July 1, 2011 default on the Note.

The parties do not dispute a total of three lawsuits were filed by the Plaintiff against the Defendants. R. V1, C. 2 – C. 57; R. V1, C.161 – C. 191; R. V1, C.196 –

C.202. All three lawsuits were based on the same July 1, 2011 default under the same Note. *Id.* The same Note was attached as an exhibit to every complaint. *Id*.

The labels assigned by the Plaintiff to three lawsuits in its Statement of Facts is telling. Plaintiff refers to the second and third lawsuits as the First Collection Action and the Second Collection Action. However, a proper examination of the first lawsuit (the foreclosure action), reveals that, like the two subsequent lawsuits on the Note, it was also a debt collection action.

If a money judgment is sought against the debtor in connection with the foreclosure, there has been debt collection, because there was an attempt to collect money. The focus on the underlying mortgage loan transaction indicates that whether an obligation is a "debt" depends not on whether the obligation is secured, but rather upon the purpose for which it was incurred. To collect a debt or claim is to obtain payment or liquidation of it, either by foreclosure proceedings, personal solicitation or legal proceedings. *Black's Law Dictionary* 263 (6th ed. 1990); *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453, 461 (6th Cir. 2013).

Foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt. *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992). In fact, *every* mortgage foreclosure, judicial or otherwise, is undertaken for the very purpose of obtaining payment on the underlying debt, either by persuasion (*i.e.*, forcing a settlement) or compulsion (*i.e.*, obtaining a judgment of foreclosure, selling the home at auction, and applying the proceeds from the sale to pay down the outstanding debt). *Glazer*, 704 F.3d at 461. As one commentator has observed, the

existence of redemption rights and the potential for deficiency judgments demonstrate that the purpose of foreclosure is to obtain payment on the underlying home loan. Such remedies would not exist if foreclosure were not undertaken for the purpose of obtaining payment. *See* Eric M. Marshall, Note, *The Protective Scope of the Fair Debt Collection Practices Act: Providing Mortgagors the Protection They Deserve From Abusive Foreclosure Practices*, 94 Minn. L. Rev. 1269, 1297-98 (2010). There can be no serious doubt that the ultimate purpose of foreclosure is the payment of money. *Glazer*, 704 F.3d at 463.

Despite this, Plaintiff argues that the First Case (the foreclosure action) constituted a separate and distinct cause of action from the two subsequent lawsuits which Plaintiff alleges were only on the Note. Under the Plaintiff's theory of the case, the Second Case was a separate action and its voluntary dismissal of the First Case had no bearing on its ability to dismiss its Second Case and refile the instant lawsuit.

However, what the Plaintiff fails to acknowledge is that in all three lawsuits the trial court could have determined the liability of the Defendants under the Note. Under the transactional test, that is all that is required. If the relief sought in the subsequent lawsuit could have been obtained in the earlier case, then a plaintiff has one and only one opportunity to refile its claims no matter how many different theories of relief it elects to plead in its subsequent case. While a single group of operative facts could give rise to multiple theories of relief, those facts constitute but a single cause of action. *River Park*, 184 Ill. 2d at 311.

The trial court incorrectly applied the transactional test to the facts of this case and the Appellate Court corrected the error. This Honorable Court should affirm the unanimous decision of the Appellate Court which correctly concluded that this lawsuit, the third in number, based on the very same breach of the very same Note, arose from the same group of operative facts and was therefore barred. *See First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872, ¶25 ("…[W]e find that for purposes of *res judicata*, the same set of operative facts gave rise to the causes of action in the foreclosure complaint and the breach of note complaint.").

IV. The one refiling rule extends to not only those matters that were raised in the prior lawsuit, but also to matters that could have been raised.

To determine whether a suit is a refiling, Illinois state law looks to "whether, had its predecessor been dismissed with prejudice, it would be barred by principles of *res judicata*." *Carr v. Tillery*, 591 F.3d 909, 915 (7th Cir. 2010). The fact that the Defendants' liability under the Note could have been determined in the First Case (the foreclosure action) is all that matters. Here, if the Plaintiff's complaint in the First Case (the foreclosure action) would have dismissed with prejudice, any subsequent lawsuit alleging the same default on the same Note would certainly be barred by *res judicata*.

Res judicata, and by extension the one refiling rule, also bars whatever could have been decided in the first action. *La Salle National Bank v. County Board of School Trustees*, 61 Ill. 2d 524, 529 (1975). Therefore, even if the Plaintiff's two subsequent lawsuits on the promissory note were only based on the promissory note, the trial court in the First Case (the foreclosure action) could have, and would have, determined the liability of the Defendants under the Note before the Property could have been ordered to

be sold to satisfy the judgment. Because that determination could have been made in the First Case, Plaintiff had one, and only one, chance to dismiss and refile any cause of action it wanted to bring against the Defendants as a result of their July 1, 2011 breach of the Note.

In *United Central Bank v. KMWC 845, Ltd. liability Co.*, 800 F.3d 307 (7th Cir. 2015), the plaintiff (UCB) made a similar argument to the one advanced by the Plaintiff in this Appeal. In *UCB*, the plaintiff argued that the single refiling rule did not bar it from foreclosing on a mortgage because a mortgage foreclosure action is not the same cause of action as an action on the underlying note. Therefore, *UCB* argued that it could proceed with a foreclosure action after it had first filed and voluntarily dismissed two lawsuits on the promissory note. The Seventh Circuit Court of Appeals squarely rejected this argument concluding that UCB could not foreclose on its mortgage because it was barred by Illinois statute (the single refiling rule) from filing any action to enforce its note. *Id.*

The same logic should apply in this case. Having twice filed and dismissed actions seeking to determine the liability of the Defendants under the Note, this lawsuit was the Plaintiff's second refiling of the same cause of action in violation of the single refiling rule.

The only difference between a mortgage foreclosure case and a lawsuit on a promissory note is that in a foreclosure case the trial court can order a sale of the property to satisfy the judgment. For the purposes of this Appeal however, that distinction is without a difference.

What the Plaintiff fails to acknowledge is that the Second Case was the second time the Plaintiff filed a lawsuit seeking relief pursuant to the Note. While Plaintiff was free to dismiss its First Case and file its Second Case, it was not allowed to do that twice. This third lawsuit, like the plaintiff's claim in *UCB*, was barred by the single refiling rule.

Plaintiff's argument also fails to appreciate that if the First Case (the foreclosure action) proceeded, the liability of the Defendants under the promissory note could have been determined. In fact, it would have had to have been determined before the court could have ordered a sale of the Property to satisfy that judgment.

The IMFL provides that in all cases, "evidence of the indebtedness and the mortgage foreclosed shall be exhibited to the court and appropriately marked, and copies thereof shall be filed with the court." 735 ILCS 5/15-1506(b) (West 2018). The evidence of the indebtedness is the promissory note. In every foreclosure case, the amount of the indebtedness must be proven up by affidavit. 735 ILCS 5/15-1506(a)(2) (West 2018). The amount of indebtedness is proven up at the time of the court enters a judgment of foreclosure and sale. And, in a foreclosure action, a court can also award a personal money judgment if the proceeds of the sale are insufficient to satisfy the amount due under the note. *See* 735 ILCS 5/15-1508(b)(2) (West 2018) ("The confirmation order may also: **** provide for a personal judgment against any party for a deficiency.")

Because a trial court can and must determine the amount due under the note in any foreclosure action and award a money judgment against any defendant for the amount of the deficiency, any subsequent action on the promissory note after a completed

foreclosure is barred. *See LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, ¶ 29.

Moreover, under Section 15-1509(c) of the IMFL, once title to the property has passed by deed, all claims of all parties to the foreclosure are also barred. *See* 735 ILCS 5/15-1509(c) (West 2018) ("Claims Barred. Any vesting of title by a consent foreclosure pursuant to Section or by deed pursuant to subsection (b) of Section 15-1509, unless otherwise specified in the judgment of foreclosure, shall be an entire bar of (i) all claims of parties to the foreclosure…").

Therefore, the fact that the liability of the Defendants under the Note in the First Case is all that matters. Once Plaintiff voluntarily dismissed its First Case, it had one, and only one, opportunity to refile any cause of action seeking to determine the Defendants' liability under the Note, no matter how many different theories of relief it chose to plead.

V. In the Foreclosure Action, the Plaintiff pursued concurrent relief under a note and mortgage.

In support of its argument that a mortgage foreclosure and an action on the note constitute separate and distinct causes of action, the Plaintiff points out that well settled Illinois precedent allows a mortgagee, upon default, to pursue an action on the note or an action to foreclose the mortgage and that these remedies may be pursued consecutively or concurrently. *See* Pl.'s Brief, pgs. 10 -11; see also *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 852 (4th Dist. 1985).

However, Plaintiff overlooks the practical reality that in a foreclosure action, a mortgagee can pursue concurrent relief under the mortgage and the note. The Note must

be attached to the Complaint. 735 ILCS 5/15-1506(b) (West 2018). The court must then decide the amount due under the promissory note and enter judgment in that amount before it can order the property to be sold to satisfy that judgment.

In the First Case (the foreclosure action), both the Note and the Mortgage were attached as exhibits to the complaint. R. V1, C. 168 – C. 191. Moreover, that complaint alleged that the Defendants were liable for the deficiency and sought a personal deficiency judgment against them. *Id*. Had the Plaintiff proceeded with that case instead of dismissing it, it would have been required to prove up the amount due under the Note. And, of critical importance, the trial court could have determined the amount due under the Note in that action and awarded a personal money judgment against the Defendants.

A foreclosure action is thus an action against the mortgagor seeking to enforce a mortgagee's rights against the mortgagor, and against, a specific property. Here, the First Case (the foreclosure action) involved the Note and sought to enforce the Plaintiff's rights against the Defendants in the note and against the Property. As stated by the Court in *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 536 (2010), in a foreclosure action,

> "[t]he mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage. The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. The object of the foreclosure action is to enforce the obligation created by that contract, through the property, but against a specific person."

See also MB Financial Bank, N.A. v. Allen, 2015 IL App (1st) 143060, ¶ 32 (finding that the mortgage provides the right to obtain a deficiency judgment and the promissory note allows the pursuit of personal monetary judgments).

Cases in Illinois dating back to 1895 have held that the Note is the debt and the mortgage is merely an incident thereto. "[I]t has been repeatedly decided by this court that the mortgage is a mere incident of the debt…" *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 524 (Ill. 1895); see also *United Central Bank v. KMWC 845, Ltd. liability Co.*, 800 F.3d 307 (7th Cir. 2015). As a mere incident to the note, there can be no serious doubt that the First Case (the foreclosure action) was an action on both the Note and the Mortgage, and especially because the Plaintiff also sought a personal deficiency judgment against the Defendants.

In this case, a unanimous panel of the First District Appellate Court correctly decided that in this case, "A single-count complaint, requesting foreclosure of the mortgage as well as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note." *First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872, ¶ 22, 90 N.E.3d 567.

There is no just reason to disturb the opinion of the Appellate Court which concluded that in the First Case the Plaintiff sought concurrent relief under the Note and Mortgage. Had the First Case proceeded, the Plaintiff would have had to determine the liability of the Defendants under the Note and the trial court would have had to determine this amount before it could have ordered the Property to be sold to satisfy the judgment.

Having decided to dismiss its First Case (the foreclosure action), the Plaintiff had one, and only one, remaining opportunity to sue the Defendants under the Note (or under the Note and Mortgage if it chose to file another foreclosure action), as a result of their July 1, 2011 breach. The Second Case was the Plaintiff's single refiling. This case was

the Plaintiff's second refiling. The Appellate Court correctly applied the transactional test and found that this lawsuit was barred by the single refiling rule.

VI. This Court need not disturb the decision in *Farmer City State* Bank to affirm the decision of the Appellate Court.

This Court can but does not need to disturb the decision in *Farmer City State Bank*, 138 Ill. App. 3d 847, in order to affirm the decision of the Appellate Court in this case. At the outset, though, it is worthy of noting that *Farmer City State Bank* was decided before the enactment of the IMFL. This is important to consider because prior to the enactment of the IMFL it was unclear whether chancery courts in which foreclosure cases were heard had the authority to enter personal deficiency judgments. *See* Note, *Mortgage Deficiency Acts and the Impairment of Contract Clause*, 35 Ill. L. Rev. of Northwestern University 594, 596 (1941) ("Under original equity practice, a foreclosure action was strictly *in rem* and the court had no authority to render a personal judgment for a deficiency. Since this practice was followed by states generally, most courts of equity refused to render deficiency judgments unless authorized by statute.").

In 1987, our legislature formally integrated the IMFL into the Illinois Rules of Civil Procedure. *Metrobank v. Cannatello*, 2012 IL App (1st) 110529, ¶27. The enactment brought together various statutory provisions relating to foreclosure that previously had been spread throughout various codes and governs actions commenced after its effective date. 735 ILCS 5/15-1106(f) (West 2018). *Id*. One of the provisions of the IMFL permits foreclosure courts to issue a deficiency judgment "against any party … to the extent requested in the complaint …" 735 ILCS 5/15-1508(e) (West 2018). While chancery courts historically had the authority under statute to provide deficiency

judgments, the IMFL integrated the ability to recover a deficiency judgment into the pleadings, the foreclosure judgment, and confirmation of sale portions of the foreclosure proceeding. *Cannatello*, 2012 IL App (1st) 110529 at ¶¶28 - 29. The ability to fully recover in the revised foreclosure process marked the distinction from the days when a creditor would have to maneuver through both law and equity to recover the unpaid portion of the debt. *Id.* at ¶35.

Farmer City State Bank, 138 Ill. App. 3d 847, was also decided prior to this Court's adoption of the transactional test in *River Park*, 184 Ill. 2d 290. Therefore, it is unclear if *Farmer City State Bank* would be decided differently if it were decided today.

Farmer City State Bank, however, can be read harmoniously with the Appellate Court's decision in this case should this Court decide to do so. In *Farmer City State Bank,* the mortgagee first filed its action on the note and then filed a lawsuit to foreclose its mortgage. After the mortgagee obtained its judgment on the note, the mortgage stood as security for the judgment on the note. As the Court in *Farmer City State Bank* explained:

> "Where the mortgagee takes a judgment upon the note, the mortgage stands as security for the judgment. (*citation omitted*). If the mortgagee then forecloses the mortgage and obtains a deficiency judgment against the mortgagor, the judgment on the note is merged into the second judgment. *(citation omitted).*"

Allowing a mortgagee to pursue a foreclosure action after it obtained a judgment in a lawsuit on the promissory note also makes practical sense. It would make little difference if a mortgagee was barred from foreclosing its mortgage after it obtained a judgment on the note, because the mortgagee could simply levy the debtor's property and

sell that property via a levy sale, without a need to resort to foreclosing its mortgage for relief.

However, the Plaintiff here conflates the holding in *Farmer City State Bank* and believes that after a default, a mortgagee can pursue a mortgage foreclosure and an action on the note in any order it pleases. However, that is not what *Farmer City State Bank* holds. The holding actually says something quite different. In *Farmer City State Bank*, the Court held that, upon default, a mortgagee can pursue an action on the note or an action to foreclose the mortgage and that these remedies may be pursued consecutively or concurrently. The sequence of lawsuits, however, is important.

If, upon default, a mortgagee elects to file an action on the note first, then it can later file a mortgage foreclosure action. That is what the Court in *Farmer City State Bank* held.

However, what a mortgagee cannot do is the reverse. That is, a mortgagee cannot first file and complete a foreclosure action and then file a lawsuit on the note. *Coleman*, 2015 IL App (1st) 140184, ¶28. Once a mortgagee files a foreclosure action and obtains a judgment of foreclosure, the amount due on the note has already been decided. In fact, it has to be before the mortgagee can take the property to a foreclosure sale. Any further action on a promissory note after a foreclosure case is barred.

The Court, in *Coleman*, illustrated this point. In *Coleman*, the plaintiff's predecessor in interest filed a single-count foreclosure complaint seeking as relief a judgment to foreclose the mortgage and a personal judgment for deficiency. *Id.* at ¶4. The plaintiff brought the complaint in its capacity as legal holder of the mortgage and

promissory note, and both documents were attached as exhibits. The complaint also alleged that the defendant was personally liable for the deficiency. *Id.* The court entered a judgment of foreclosure in favor of the plaintiff, who subsequently purchased the subject property at the judicial sale. *Id. at* ¶6. The court also entered an order for an "IN REM deficiency judgment." *Id.* Approximately one year later, the plaintiff filed a complaint seeking to enforce the promissory note against the defendant, that is, to collect the balance due on the note. *Id. at* ¶7.

The trial court granted the defendant's motion to dismiss the complaint based on *res judicata*. *Id.* at ¶ 9. On appeal, the plaintiff argued that no identity of the causes of action existed because it sought separate, consecutive proceedings for adjudicating the mortgage and the promissory note. *Id.* at ¶12. The First District Appellate Court, however, affirmed the dismissal of plaintiff's complaint, finding that "[i]n the foreclosure action, plaintiff sought to foreclose on defendant's property, but also explicitly sought a personal deficiency judgment against defendant. Plaintiff sought the personal deficiency judgment based on defendant's obligations under both the promissory note and the mortgage" pursuant to section 15-1508(e) of the IMFL. 735 ILCS 5/15-1508(e) (West 2018). *Coleman,* 2015 IL App (1st) 140184, ¶14. Therefore, under the transactional test, an identity of the causes of action existed between the foreclosure complaint and the subsequent complaint to enforce the terms of the promissory note. *Id.*

The most recent published decision to have followed the analysis in *Farmer City State Bank* was *Turczak v. First American Bank & Lebow*, 2013 IL App (1st) 121964. In *Turczak*, the mortgagee like the mortgagee in *Farmer City State Bank*, first filed its

lawsuit on the note which proceeded to judgment. *Turczak*, 2013 IL App (1st) 121964, ¶ 6. Thereafter, the attorneys representing the mortgagee who obtained a judgment on the note stated to the borrower that its client had a valid and enforceable mortgage lien. *Id.* at ¶9. The Court in *Turczak* found that this statement, that a valid and enforceable mortgage lien still existed after a judgment on the note was entered, did not violate the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq*. or the federal Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq*. *Id*. at ¶37.

The same logic should apply in this Appeal, but with even more force. The Plaintiff here first filed its foreclosure action, unlike the mortgagees in *Farmer City State Bank* and *Turczak*. The Plaintiff's complaint in the First Case attached the Mortgage and the Note. The Defendants were served with summons and filed an appearance through the undersigned counsel. The complaint alleged the Defendants were personally liable for the deficiency judgment and prayed for a personal deficiency judgment in its prayer for relief. The trial court could have entered a personal money judgment against the Defendants in the First Case.

Since the trial court could have determined the liability of the Defendants under the note and mortgage in the First Case (the foreclosure action), the Plaintiff had one and only one opportunity to dismiss and refile any action seeking a judgment on the Note. The Plaintiff's Second Case was Plaintiff's second chance. This lawsuit, the third in number, was an impermissible second refiling of the same cause of action as defined by *res judicata* principles.

The Plaintiff's interpretation of the holding in *Farmer City State Bank* is fundamentally flawed. After a foreclosure, a mortgagee cannot pursue an action on the note. The amount due on the note has already been decided. Once title to the property has passed by deed, all claims of all parties to the foreclosure are barred. *See* 735 ILCS 5/15-1509(c) (West 2018). Therefore, despite Plaintiff's argument to the contrary, the sequence of the lawsuits is important.

The Appellate Court here correctly decided that when the Plaintiff voluntarily dismissed the Second Case, the Plaintiff was barred from refiling another action involving the Note. This case was Plaintiff's third bite at the apple and the Appellate Court properly concluded that this lawsuit was barred by section 13-217.

VII. The lack of a final judgment is irrelevant to this Court's analysis.

Both the Plaintiff and the trial court seemingly placed emphasis on the fact that no final judgment had been entered in the 2011 foreclosure action and attempted to distinguish *Coleman*, 2015 IL App (1st) 140184 on that basis.

However, as the Appellate Court in this case correctly noted, "*Coleman*'s analysis on the identity of causes of action for *res judicata* purposes did not depend upon a final judgment, nor is one required to perform the transactional test pursuant to section 13-217." *Cobo*, 2017 IL App (1st) 170872, ¶ 25.

The one-refiling rule is an extension of the doctrine of *res judicata* to a class of cases in which the decision deemed to be *res judicata* is a dismissal without prejudice. *Carr*, 591 F.3d 909, 915 (7th Cir. 2010). Here, when the Plaintiff took its second voluntary dismissal in the Second Case, even though this dismissal was without

prejudice, it was its second voluntary dismissal of a cause of action seeking to determine the Defendants' liability under the same Note. Even though this dismissal was voluntary and without prejudice, it became a dismissal with prejudice because of the application of the single refiling rule.

The lack of a final order is irrelevant to a disposition of this case. In almost every conceivable case involving the single refiling rule, a final order will not be present. While the lack of a final order is relevant in a purely *res judicata* analysis, as noted above, the single refiling rule is an extension of the doctrine of *res judicata* and applies to cases such as this one where a dismissal was voluntary and without prejudice.

VIII. This case does not involve a guaranty or a loan modification; therefore, Plaintiff's reliance on *Goldstein* and *Norris* is misplaced.

In support of its argument that an action on the note and a foreclosure are different causes of action, Plaintiff also relies on *LP XXVI, LLC v. Goldstein,* 349 Ill. App. 3d 237 (2nd Dist. 2004). However, the opinion in *Goldstein* involved a guaranty which is simply not applicable here.

This Court need not overrule *Goldstei*n in order to affirm the decision of the Appellate Court. *Goldstein* involved a guaranty and decided that a mortgagee could pursue a separate cause of action on a guaranty after the mortgage pursued a foreclosure case to its conclusion. This case does not involve a guaranty and therefore *Goldstein* is distinguishable.

To allow for an action on a guaranty to proceed after a foreclosure action where the guarantor was not named in the foreclosure case, would not conflict with the Appellate Court's decision in this case.

First, the Court can observe that an action on a guaranty against guarantor not named in a foreclosure action would necessarily involve a party not before the court in the foreclosure case. Second, this Court can note that a mortgagee may not initially want to, or be able to, pursue a guarantor until the mortgagee has exhausted all other collection remedies to collect its debt. As explained by the Seventh Circuit Court of Appeals in *Freedom Mortgage Corp. v. Burnham Mortgage, Inc.*, 569 F.3d 667, 672 (7th Cir. 2009),

> "A claim on a note depends on the borrower's promise to pay; a claim on a guaranty depends on the lender's inability to collect from the borrower. Most guarantees are discharged when the borrower pays (or the collateral proves to be sufficient); that's enough to show that claims on the note and guaranty don't rest on the same transaction. Often a claim on a guaranty must wait until other sources of payment have been exhausted, and the deficiency judgment in the foreclosure action resolves how much the guarantor owes."

Like *Goldstein*, Plaintiff's reliance on *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, is also misplaced. *Norris* correctly decided that a breach of a loan modification did not involve the same set of operative facts as a breach of an original agreement. This case did not involve a loan modification. Therefore, *Norris* has no application here and the Appellate Court correctly rejected the Plaintiff's reliance on *Norris*. This Court should reject the Plaintiff's reliance on *Norris* once again.

IX. The Court should not disturb its long-standing precedent in *Skolnik v. Petella.*

To accept the Plaintiff's interpretation of *res judicata* and the single refiling rule, this Court would need to carve out an exception to the long-standing and well-established principles guiding this analysis in the context of a mortgagor-mortgagee relationship. However, giving preferential treatment to mortgagees is simply not warranted. All litigants should be held to the same standards. No litigant should be given free reign to

endlessly file and dismiss lawsuits, each time incurring thousands of dollars in legal fees and court costs. At some point, the litigation must end.

"The purpose of *res judicata* is to promote judicial economy." *River Park*, 184 Ill. 2d at 896-97. Its purpose is also to protect "the defendant from harassment and the public from multiple litigation." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 343 (1996). *Res judicata* is founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits. *Id.* at 1207.

Moreover, courts would become overwhelmed with a myriad of lawsuits predicated on the same operative facts if a rule against claim-splitting did not exist. Thus, *res judicata* and, by extension the one refiling rule, should prevent parties from seeking relief which could have been decided in the prior action.

The only time the Illinois Supreme Court discussed the application of *res judicata* in a situation similar to the facts of this case was in *Skolnik v. Petella*, 376 Ill. 500 (1941). This Court should again apply the rule announced in *Skolnik* in the context of a mortgagor-mortgagee relationship to this case and in order to provide for a cohesive body of caselaw in the context of *res judicata* and the single refiling rule.

In *Skolnik*, the defendant, Ms. Petella, purchased property and agreed to pay the indebtedness which was secured by the property. *Id.* at 500 - 501. When the defendants defaulted, the creditors filed a foreclosure action against all debtors, including the debtors who originally executed the indebtedness and Ms. Petella who assumed liability for and agreed to pay the debt. *Id.* at 501. In the foreclosure suit, the creditors sought a deficiency judgment against the original debtors, but not against Ms. Petella even though

the creditor's foreclosure pleadings alleged that Ms. Petella assumed liability to pay the debt. *Id*. The creditor subsequently filed a deficiency suit against Ms. Petella for the remainder of the unpaid debt. *Id*. at 502.

The Illinois Supreme Court held that the deficiency suit against Ms. Petella must be barred under *res judicata*. *Id*. at 507. The Court stressed that "*res judicata* embraces not only what actually was determined … but it extends to any other matters properly involved which might have been raised or determined." *Id*. In the prior foreclosure case, the court had jurisdiction to issue a deficiency decree against "any one liable for any deficiency over whom it had personal jurisdiction," including Ms. Petella. *Id*. The creditor had control over the issues that were adjudicated in the foreclosure case and could have adjudicated the issue of Ms. Petella's liability under the indebtedness, but chose not to. *Id.* Because the creditor chose not to raise Ms. Petella's liability in the foreclosure suit, and "piecemeal litigation is not to be permitted," the case was properly dismissed under *res judicata*. *Id*.

According to the Plaintiff, a mortgagee could endlessly file and dismiss lawsuits, each time adding or removing claims, parties, or changing default dates, calling each lawsuit a different cause of action. Although each lawsuit might ask for different relief, include different parties or allege a different default, such a result would be untenable. A mortgagee should not be allowed to unilaterally change default dates or allege a reinstatement where none was made.

Under the Plaintiff's analysis, a plaintiff could file four lawsuits for every possible claim that could be derived from a single group of facts without violating the

single refiling rule. The Plaintiff could have filed and dismissed two foreclosure actions, then filed and dismissed a lawsuit on the promissory note, and then filed another lawsuit on the promissory note and litigated that case to conclusion.

Moreover, if a mortgagee unilaterally decided to change a default date or "reinstate" a loan where no reinstate was made, a mortgage could literally file as many lawsuits as it wished, four for each and every month that if it elected to simply change the date of default or unilaterally "reinstate" a loan when no such reinstatement was made. The rule suggested by the Plaintiff would create a unique and untenable situation where a mortgagee would be immune from the application of the single refiling rule because it could simply manipulate a default date and call each subsequent lawsuit a new cause of action. Since each manipulated default date would constitute a "new" action, a mortgagee would have four opportunities to get it right under every "new" cause of action without violating the single refiling rule.

Section 13-217 does not, however, authorize an endless recycling of litigation. *Gendek*, 119 Ill. 2d 338, 343 (1988). However, according to the Plaintiff's position, that is precisely what could happen.

X. This Court should apply the principles of *res judicata* uniformly in the context of a mortgagor-mortgagee relationship.

However, the Defendants maintain that this Court should take its analysis one step further and overrule the decisions in *Farmer City State Bank,* 138 Ill. App. 3d 847, *Turzcak*, 2013 IL App (1st) 121964, and *Goldstein*, 349 Ill. App. 3d 237, and other cases which have relied on the flawed analysis that a mortgagee can pursue separate actions on the note, mortgage and guaranty. As noted by Elizabeth Martin, "Since a guaranty, note,

and mortgage all arise from the same literal transaction, it is difficult to believe that the *Goldstein* court correctly applied the transactional test when they held that these instruments are not within the same transaction." Elizabeth Martin, Note, *Getting A Second Bite at the Apple: The Res Judicata Exception for Seeking Foreclosure Deficiencies in Illinois*, 2016 U. Ill. L. Rev. 2271, 2302-04 (2016).

Although one approach would be to allow a lawsuit on a guaranty to proceed after a foreclosure action where the guarantor was not named in the foreclosure action, this approach maintains that such an application of the transactional test is error. Even though *Goldstein* is factually distinguishable from the case at bar because *Goldstein* involved a guaranty and this case does not, it is the Defendants' position that the *Goldstein* court misapplied the transactional test.

The *Goldstein* court correctly noted that a creditor could not obtain a judgment against a guarantor in a single-count foreclosure action, but failed to appreciate that a creditor could simply add another count to its action and seek a judgment against the guarantor. Under section 15-1501(b)(5) of the IMFL, a guarantor is a "permissible party" who could have been named as a defendant in the foreclosure proceeding, and under section 15-1508(b)(2) the court could have granted a "personal judgment against any party for a deficiency," including a guarantor. 735 ILCS 5/15-1501(b)(5) (West 2018); 735 ILCS 5/15-1508(b)(2) (West 2018). And since *res judicata* bars not only what was decided, but also what could have been decided, a correct application of the transactional test should have resulted in a dismissal of the lawsuit against a guarantor after a foreclosure of the collateral.

Moreover, the decision in *Farmer City State Bank*, which as noted above was decided before the enactment of the IMFL and this Court's adoption of the transactional test in *River Park*, is questionable. If *res judicata* bars not only what was decided in a prior lawsuit, but also what could have been decided, it is difficult to think that a mortgagee can circumvent this long-standing and well-established principle by merely failing to include certain counts or certain parties in order to preserve its ability to bring a multiplicity of lawsuits based on the same operative facts. This view maintains that when a borrower breaches a promissory note that is secured by a mortgage and backed up with by a personal guaranty, the mortgagee can draft its lawsuit however it wants to and plead as many, or as few, counts as it chooses. However, a mortgagee ought to be held to the same standards as any other litigant and should be given only one chance after a voluntary dismissal to get it right.

If the facts are the same, then the plaintiff cannot get a second do-over simply by hiring better lawyers to draft better complaints (or more lawyers to draft yet more complaints). *Skibbe v. United States Bank Trust, N.A.*, No. 16 C 192, 2017 U.S. Dist. LEXIS 88757, at *20 (N.D. Ill. June 9, 2017); see *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 294 (1992) ("The doctrine [of *res judicata*] extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit.").

This approach would not result in more litigation. If anything, it would lead to less. Although this Court need not disturb *Farmer City State Bank, Turzcak, Goldstein* in order to affirm the unanimous decision of the First District Appellate Court, in the

interest of judicial economy and in the interest of creating a uniform and cohesive body of law, it should.

This Honorable Court should rule that a mortgagee has one and only one chance to dismiss and refile a cause of action based on a breach of a promissory note, regardless of the number of theories of relief asserted in those actions. To hold otherwise, would create an endless recycling of litigation. A mortgagee could file up to four lawsuits based on each and every conceivable date of default under a promissory note. Two foreclosures, followed by two suits on a promissory note, would not violate the single refiling rule if the Plaintiff's argument carries the day in this Appeal.

Moreover, if the Court were to find that simply changing the date of default, by for instance, alleging a new default one month later, the number of possible lawsuits that could arise from the same group of operative facts is endless. At some point, a mortgagee is out of options. No defendant should be subjected to such a multiplicity of lawsuits.

In this Appeal, this Court has the power and the opportunity to set the bar straight and announce a rule that will serve the interests of all parties who appear before Courts in this State. No person, rich or poor, ought to be subjected to and required to defend multiple and repetitive lawsuits over those matters that could have been decided in the first two lawsuits. All the Defendants here ask this Court to do is offer them the same protection afforded to every other litigant. Every plaintiff should have two, and only two, bites at the proverbial apple. There is no just reason to carve out an exception to the single refiling rule for mortgage lenders. Such an exception would only serve to hurt

those who can least afford it and who are least likely to complain. This Honorable Court has the power to ensure that all litigants are treated the same. This Court should affirm the decision of the unanimous First District Appellate Court which correctly decided that enough is enough.

CONCLUSION

WHEREFORE, the Defendants-Appellees, Andres Cobo and Amy M. Rule, respectfully request that this Honorable Court affirm the decision of the First District Appellate Court and for any further relief this Honorable Court deems equitable and just.

Respectfully submitted,

Andres Cobo and
Amy M. Rule

By:_____
Arthur C. Czaja
Attorney for Defendants-Appellees

Arthur C. Czaja
ARDC #: 6291494
Attorney for Defendants-Appellees
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme 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) statements of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 32 pages.

Respectfully submitted,

Andres Cobo and
Amy M. Rule

By:_____
Arthur C. Czaja
Attorney for Defendants-Appellees

Arthur C. Czaja
ARDC #: 6291494
Attorney for Defendants-Appellees
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

Case No. 123038

IN THE SUPREME COURT OF THE STATE ILLINOIS

First Midwest Savings Bank, as successor In interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ASS'N	)	**On Petition for Leave to Appeal From the Appellate Court, First Judicial District**
Plaintiff-Petitioner	)	**Docket No. No. 1-17-0872**
v.	)	**There Heard on Appeal From The Circuit Court of Cook County, Illinois**
Andres Cobo and Amy M. Rule	)	**County Department, Law Division**
Defendants-Respondents	)	**No. 15 L 007759**
	)	**The Honorable Raymond L. Mitchell, Presiding**

NOTICE OF FILING

To: Klein, Daday, Aretos, Odonoghue, LLC, Attorney for Plaintiff-Appellee, 2550 W. Golf Road, Suite 250, Rolling Meadows, IL 60008 (via electronic mail transmission to DRdzanek@kdaolaw.com, jrepple@kdaolaw.com and sdaday@kdaolaw.com)

PLEASE TAKE NOTICE that on **May 25, 2018**, Defendants-Respondents, ANDRES COBO and AMY M. RULE, served and filed electronically on the Clerk's Office for the Supreme Court of Illinois, a **BRIEF OF DEFENDANTS-APPELLEES** in the above-captioned matter, a copy of which is attached hereto and hereby served upon you.

Arthur C. Czaja
Attorney for Defendants-Appellees
Andres Cobo and Amy Rule
Cook County Attorney #: 47671

7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

CERTIFICATE OF SERVICE

I, ARTHUR C. CZAJA, an attorney, under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certify that the statements set forth in this instrument are true and correct, and state that on May 25, 2018, I served copies of the **BRIEF OF DEFENDANTS-APPELLEES** upon the parties indicated above by attaching copies to an electronic mail transmission as indicated above to the parties identified above at the electronic mail addresses identified above in accordance with Illinois Supreme Court Rule 11, before the hour of 6:00 p.m.

_____

Arthur C. Czaja
Attorney for Defendants-Appellees
Andres Cobo and Amy Rule
Cook County Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com