IN THE COURT OF APPEALS OF IOWA

No. 2-1172 / 12-1394
Filed February 13, 2013

ONEWEST BANK, FSB,
Plaintiff-Appellee,

vs.

NORMA K. BARBER-CALLISON a/k/a
NORMA KAY BARBER-CALLISON and
DOUGLAS ALAN CALLISON a/k/a DOUG CALLISON,
Defendants-Appellants,

and

JP MORGAN CHASE BANK, N.A.,
FIRST GENERAL, INC. d/b/a FIRST
GENERAL SERVICES, WAGSHCAL
FURNITURE and PARTIES IN POSSESSION,
Defendants.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel (motion to dismiss) and D.J. Stovall (foreclosure decree), Judges.

Norma Barber-Callison and Douglas Callison appeal from the district court rulings denying their motion to dismiss and granting summary judgment to the bank in this mortgage foreclosure action. **AFFIRMED.**

David A. Morse of Rosenberg & Morse, Des Moines, for appellants.

Robert J. Douglas Jr., Deborah M. Tharnish, and Sarah K. Franklin of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

DOYLE, P.J.

Norma Barber-Callison and Douglas Callison appeal from the district court's rulings denying their motion to dismiss and granting summary judgment to OneWest Bank, FSB in this mortgage foreclosure action. The Callisons argue Iowa Rule of Civil Procedure 1.943, Iowa's double-dismissal rule, bars OneWest's foreclosure action. We affirm the district court.

***I. Background Facts and Proceedings*.**

In 2001, Norma Barber-Callison executed a $196,000 promissory note in favor of lender IndyMac Bank, FSB. The note was secured by a mortgage executed by the Callisons in favor of IndyMac. The Callisons failed to make payments as required by the note.

On August 8, 2007, IndyMac filed a foreclosure petition against the Callisons seeking unpaid principal of $184,983.08 plus interest, costs, and attorney fees. It appears without dispute in the record that shortly after the petition was filed, IndyMac advised its counsel that the Callisons were in an active loan modification plan. Nevertheless, a trial date was set for August 2008. On July 10, 2008, counsel for IndyMac was again advised the Callisons were still in an active loan modification plan, and IndyMac voluntarily dismissed the foreclosure action without prejudice the same day.

In October 2008, IndyMac advised its counsel to initiate foreclosure proceedings "due to a broken loan modification plan." On November 19, 2008, IndyMac filed a second foreclosure petition against the Callisons. It once again asserted an unpaid principal of $184,983.08 plus other costs. The Callisons filed an answer and affirmative defense alleging they did not receive a thirty-day

notice of right to cure as required by Iowa Code section 654.2D (2007). A notice to cure letter was then sent to the Callisons. Trial was later set for October 2009; however, IndyMac voluntarily dismissed the second foreclosure action by filing a dismissal without prejudice on May 20, 2009.

A third foreclosure action against the Callisons was filed on July 7, 2009 by OneWest, then IndyMac's assignee of the Callisons' note and mortgage.[1] OneWest asserted the same unpaid balance as twice previously asserted: $184,983.08. OneWest also sought other costs and attorney fees.

In response to this third suit, the Callisons filed a pre-answer motion to dismiss arguing the action was barred by the application of the double-dismissal rule of Iowa Rule of Civil Procedure 1.943. OneWest resisted the motion, claiming each foreclosure action arose from different defaults by the Callisons and therefore the two-dismissal rule was inapplicable.[2] The district court denied the motion to dismiss, holding OneWest "was not a party to the prior filings and thus [did] not fall within [rule 1.943]." Furthermore, the court concluded that

> to find otherwise, even if OneWest could be considered a party, would discourage banks and those who have mortgages from attempting to work out a payment plan for the existing mortgages and then dismiss foreclosure actions on such resolutions. This would be disadvantageous to all parties in today's economic climate and is not the purpose for which the rule was enacted.

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[1] According to OneWest's statement of undisputed material facts, on "November 7, 2011, [the] FDIC as [r]eceiver for IndyMac . . . sold, assigned and delivered to OneWest . . . the [n]ote and [m]ortgage." Because the assignment documents are not a part of the record before us, we assume the reference to "2011" is a typographical error since OneWest's foreclosure petition was filed in 2009.

[2] OneWest relied upon *Bloom v. Steeve*, 165 N.W.2d 825 (Iowa 1969), in asserting the foreclosures arose from different defaults by the Callisons. The district court did not consider this ground in ruling on the motion to dismiss, and we do not address the issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

The Callisons then filed an answer to the suit, again asserting the application of rule 1.943 as an affirmative defense.

On May 7, 2012, OneWest filed its motion for summary judgment. The Callisons resisted but did not deny that they had failed to pay the amounts due and owing on the underlying note and mortgage. Instead, they again raised the rule 1.943 double-dismissal defense, and the district court again rejected the defense. The court thereafter granted OneWest's summary judgment motion and entered a foreclosure decree as prayed for by OneWest.

The Callisons now appeal. They assert, as they did before the district court, that under the double-dismissal rule, dismissal of the two previous foreclosure actions operate as an adjudication on the merits such that the third foreclosure action is barred.

II. Scope and Standards of Review.

"Foreclosure proceedings are typically tried in equity." *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 806 (Iowa 2011). However, our review of a denial of a motion to dismiss is for the correction of errors at law. *See Dier v. Peters*, 815 N.W.2d 1, 4 (Iowa 2012). Similarly, we review a grant of summary judgment in a foreclosure proceeding for the correction of errors at law. *Freedom Fin. Bank*, 805 N.W.2d at 806.

III. Discussion.

Iowa Rule of Civil Procedure 1.943 reads, in relevant part:

> A dismissal under this rule shall be without prejudice, unless otherwise stated; but *if made by any party who has previously dismissed an action against the same defendant* . . . including or *based on the same cause*, such dismissal *shall operate as an*

> *adjudication against that party* on the merits, *unless otherwise ordered by the court*, *in the interests of justice*.

(Emphasis added.) "The purpose of the rule is to prevent indiscriminate dismissals of actions by litigants." *Smith v. Lally*, 379 N.W.2d 914, 916 (Iowa 1986). Before triggering operation of the double-dismissal rule, three prerequisites must be met: (1) both dismissals are filed by the same party; (2) both causes of action are the same; and (3) both causes of action are against the same defendants. *See* Iowa R. Civ. P. 1.943.

Here, the same party, IndyMac, filed the first and second dismissals. The causes of action were the same as both involved the same note and mortgage. The underlying note and mortgage never changed. Upon the initial default, the bank accelerated the payments owed and demanded the same principal payment that it demanded in each petition. The Callisons never made another payment after the initial default. IndyMac never reinstated the loan. The defendants, the Callisons, were the same in both causes of action. We thus conclude all three prerequisites of the double-dismissal rule were met.

When its prerequisites have been met, the rule further provides the second dismissal operates as an adjudication on the merits against "that party" who previously filed the dismissal. *See id.* Because OneWest had not yet entered the picture and did not previously dismiss the two prior petitions, the district court determined OneWest had not been a "party" to the prior filings, rendering rule 1.943 inapplicable. This is a reasonable reading of the rule. "There is no provision as to standing in privity and to read such into the rule would be a plain departure from its terms." *Hamdorf v. Corrie*, 101 N.W.2d 836,

839 (Iowa 1960) (interpreting the "same defendant" language of the rule). But, we need not decide this issue as we have decided the case on another ground.

As noted above, rule 1.943 provides that the second prior voluntary dismissal operates as an adjudication "unless otherwise ordered by the court, in the interests of justice." *Id.* Alluding to the efforts of IndyMac and the Callisons to work out a loan modification plan, the district court further concluded that if OneWest's foreclosure action were to fall within the purview of the rule, it

> would discourage banks and those who have mortgages from attempting to work out a payment plan for the existing mortgages and then dismiss foreclosure actions on such resolutions. This would be disadvantageous to all parties in today's economic climate and is not the purpose for which the rule was enacted.

Although the district court did not specifically use the words "in the interests of justice" in its ruling, we find inherent in the ruling, regardless of whether OneWest and IndyMac are the same "party," a finding that the prior voluntary dismissal did not operate as an adjudication against OneWest on the merits "in the interests of justice." Upon our review, we conclude the district court's determination is supported by the record. We therefore find no error on the part of the district court in denying the motion to dismiss and in granting summary judgment in favor of OneWest. Having so decided, we need not consider OneWest's other arguments urging affirmance.

AFFIRMED.