DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BAYVIEW LOAN SERVICING, LLC,

Appellant,

v.

ADAM BROWN and HANA R. BROWN a/k/a HANA BROWN; CITY OF SARASOTA; ANY AND ALL UNKNOWN PARTIES CLAIMING BY, THROUGH, UNDER, AND AGAINST THE HEREIN NAMED INDIVIDUAL DEFENDANT(S) WHO ARE NOT KNOWN TO BE DEAD OR ALIVE, WHETHER SAID UNKNOWN PARTIES MAY CLAIM AN INTEREST AS SPOUSES, HEIRS, DEVISEES, GRANTEES, OR OTHER CLAIMANTS,

Appellees.

No. 2D20-1824

October 21, 2021

Appeal from the Circuit Court for Sarasota County; Hunter W. Carroll, Judge.

Shawn Taylor of DeLuca Law Group, PLLC, Fort Lauderdale; and Brandi Wilson, DeLuca Law Group, PLLC, Fort Lauderdale (substituted as counsel of record), for Appellant.

Scott D. McKay of McKay Law Firm, P.A., Bradenton, for Appellees Adam Brown and Hana R. Brown.

No appearance for remaining appellees.

ATKINSON, Judge.

Bayview Loan Servicing, LLC (Bayview), appeals the trial court's final order dismissing its foreclosure complaint with prejudice. Bayview argues that the trial court erred by considering information outside the four corners of its complaint—judicially noticed records from a prior foreclosure action—in ruling on Adam and Hana Brown's (the Browns) motion to dismiss. We agree and reverse.

In 2013, Bayview's predecessor, the original lender, filed an action (2013 foreclosure action) seeking to foreclose on the Browns' residence. The complaint alleged the Browns defaulted by failing to make their mortgage payment on January 1, 2013, and all subsequent payments. Ultimately, on January 8, 2015, the trial court dismissed the 2013 foreclosure action with prejudice as a sanction for the lender's repeated mediation abuses.

In 2017, Bayview filed a new action (2017 foreclsosure action) seeking to foreclose on the same residence that was the subject of the 2013 foreclosure action. In its complaint, Bayview alleged that the Browns had defaulted by failing to make their mortgage

payment on February 1, 2013, and all subsequent payments. Bayview's complaint and its attachments do not refer to the 2013 foreclosure action. Before the Browns filed a response to Bayview's complaint, the trial court referred the 2017 foreclosure action to mediation.

During the course of mediation, the Browns filed two motions for sanctions against Bayview for alleged mediation abuses. Together with their first motion, the Browns filed a request for judicial notice of records from the 2013 foreclosure action, including the final order of dismissal with prejudice as a sanction for mediation abuses. Bayview did not object to the Browns' request for judicial notice at that time, and the trial court took judicial notice of the records for purposes of resolving the Browns' motions for sanctions.

On May 2, 2018, the Browns filed an amended motion to dismiss Bayview's complaint with prejudice, arguing that Bayview's 2017 foreclosure action was barred by collateral estoppel because the 2013 foreclosure action had been dismissed with prejudice. Bayview filed a response, arguing that the trial court could only consider the complaint and its attachments in ruling on a motion to

dismiss. It argued that the trial court could not take judicial notice of the 2013 foreclosure action records in ruling on the motion to dismiss because the complaint and its attachments did not refer to the prior lawsuit. At a hearing on the motion, the Browns' attorney addressed Bayview's argument against taking judicial notice in ruling on a motion to dismiss.

The trial court dismissed Bayview's complaint without prejudice, finding the dismissal of the 2013 foreclosure action with prejudice collaterally estopped Bayview from seeking damages for missed mortgage payments that had been alleged in the 2013 foreclosure action. In its order, the trial court explained that it could take judicial notice of prior lawsuits to address claim preclusion issues on a motion to dismiss even if the complaint did not reference the prior case. The trial court ordered Bayview to amend its complaint to allege a default date after the dismissal of the 2013 foreclosure action or risk dismissal with prejudice. Bayview chose not to amend its complaint and unsuccessfully moved for reconsideration. Bayview appealed the trial court's nonfinal orders dismissing its complaint without prejudice and denying reconsideration. This court dismissed that appeal because

the order was nonfinal and nonappealable. *See Brandal v. State Farm Mut. Auto. Ins. Co.*, 310 So. 2d 780 (Fla. 1st DCA 1975). On remand, the trial court entered a final order dismissing Bayview's complaint. Bayview timely appealed.

"A motion to dismiss does not concern fact issues; rather, it tests the legal sufficiency of the complaint. In ruling on a motion to dismiss, a trial court is limited to considering the four corners of the complaint along with the attachments incorporated into the complaint." *Neapolitan Enters., LLC v. City of Naples*, 185 So. 3d 585, 589 (Fla. 2d DCA 2016) (first citing *Hussey v. Collier County*, 158 So. 3d 661, 664 (Fla. 2d DCA 2014); and then citing *May v. Salter*, 139 So. 3d 375, 376 (Fla. 1st DCA 2014)). "Normally affirmative defenses such as res judicata and collateral estoppel must be raised in an answer, not in a motion to dismiss, unless the face of the complaint demonstrates the defense." *Id.*; *see also Bolz v. State Farm Auto. Ins. Co.*, 679 So. 2d 836, 837 (Fla. 2d DCA 1996).

For a trial court to take judicial notice, it must necessarily consider information outside of the four corners of the complaint. And this court has consistently held that the trial court may not

consider information outside the four corners of the complaint when ruling on a motion to dismiss. *See, e.g.*, *Thews v. Wal-Mart Stores East, LP*, 210 So. 3d 723, 724–25 (Fla. 2d DCA 2017); *Hussey*, 158 So. 3d at 664; *Baycon Indus., Inc. v. Shea*, 714 So. 2d 1094, 1095 (Fla. 2d DCA 1998).[1]

Granted, this court has not held that a trial court may *never* take judicial notice of prior proceedings in ruling on a motion to dismiss based on collateral estoppel or another affirmative defense. We have suggested that judicial notice may be appropriate in ruling

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[1] *But cf., e.g.*, *Seminole Tribe of Fla. v. McCor*, 903 So. 2d 353, 357 (Fla. 2d DCA 2005) (holding a trial court may consider facts outside the four corners of the complaint when ruling on a motion to dismiss based on the defense of lack of subject matter jurisdiction). In *McCor*, this court held that a trial court may consider facts outside the four corners of the complaint when ruling on a motion to dismiss based on the defense of lack of subject matter jurisdiction, which is one of the enumerated defenses under Florida Rule of Civil Procedure 1.140(b) which may be raised by a motion to dismiss. Collateral estoppel, on the other hand, is an affirmative defense that generally must be raised in a responsive pleading. *See Neapolitan Enters., LLC*, 185 So. 3d at 589; *see also* Fla. R. Civ. P. 1.140(b) ("Every defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties.").

on a motion to dismiss after the defendant properly requests judicial notice and the parties stipulate to the trial court taking judicial notice. *See, e.g.*, *Migliazzo v. Wells Fargo Bank, N.A.*, 290 So. 3d 577, 579 (Fla. 2d DCA 2020) ("Even if the trial court were permitted to take judicial notice of a fact, . . . there is no indication that Wells Fargo gave Migliazzo timely written notice of the request for judicial notice." (citation omitted)); *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214 (Fla. 2d DCA 1998) (reversing the order granting the defendant's motion to dismiss based on an affirmative defense where the defense was not apparent from the face of the pleading and the trial court did not properly take judicial notice of pleadings from a prior proceeding); *Holland v. Anheuser Busch, Inc.*, 643 So. 2d 621, 623 (Fla. 2d DCA 1994) ("[T]here is nothing in the record to establish that Holland consented or stipulated to the trial court treating the motion to dismiss as a motion for summary judgment.").

It appears from our record that the Browns did not properly request judicial notice because they did not file a timely written request together with their amended motion to dismiss or attach their earlier request for judicial notice to the amended motion to

dismiss. Regardless, Bayview did not stipulate to taking judicial notice of records from the 2013 foreclosure action; instead, it opposed taking judicial notice in its response to the amended motion to dismiss.[2]

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[2] In 2018, in connection with a motion for sanctions, the Browns filed a timely written request for judicial notice with the pertinent records attached which was unopposed by Bayview. Over a year later, in 2019, the Browns filed their motion to dismiss. They did not file a separate request for judicial notice; instead, the first sentence of the motion to dismiss indicated that the trial court had granted their request for judicial notice earlier in the proceedings and incorporated the request for judicial notice by reference. The Browns did not attach the earlier request for judicial notice or its attachments to the motion to dismiss. Even if the Browns had properly requested that the trial court take judicial notice in ruling on their amended motion to dismiss, Bayview did not stipulate to the trial court taking judicial notice of the 2013 foreclosure action records in ruling on the motion to dismiss. In its response to the Browns' motion to dismiss and briefly in its arguments at the hearing on the motion to dismiss, Bayview opposed taking judicial notice in ruling on the motion to dismiss, arguing that "[t]he trial court is restricted to a review of the allegations within the four corners of the Complaint. . . . While Defendants have requested this Court take judicial notice of prior proceedings, . . . [a]bsolutely nothing in Plainitff's Complaint identifies a prior lawsuit" and "the entire reason why [the Browns' collateral estoppel argument in the amended motion to dismiss] doesn't work is because [the prior action] must be present on the face of the complaint. The complaint does not mention the prior action." Counsel for the Browns acknowledged Bayview's opposition to judicial notice at the hearing on the motion to dismiss and argued that the trial court could and should take judicial notice of the records from the 2013 foreclosure action. This court is confident this resolves any doubt, cast by appellate counsel for the

The trial court concluded it was able to take judicial notice over Bayview's objection based on *All Pro Sports Camp, Inc. v. Walt Disney Co.*, 727 So. 2d 363, 366 (Fla. 5th DCA 1999) (holding that collateral estoppel is "proper basis for dismissal where, though the defense was not evident from the complaint, the court took judicial notice of the record in prior proceedings" (citing *City of Clearwater v. U.S. Steel Corp.*, 469 So. 2d 915 (Fla. 2d DCA 1985))). To the extent the trial court relied on the Fifth District's *All Pro Sports Camp* opinion in support of its conclusion that judicial notice not agreed to by the parties can be taken in consideration of a motion to dismiss a complaint in which the judicially noticed matter is not referenced, that proposition exceeds the holding of this court's *City of Clearwater* decision, upon which the Fifth District's opinion was ostensibly based. *See City of Clearwater*, 469 So. 2d at 916 (reaffirming that, "[i]n considering a motion to dismiss, the court must confine itself solely to the allegations within the four corners of the complaint," but concluding that, even though the relevant

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Browns at oral argument, about whether Bayview sufficiently opposed the taking of judicial notice for purposes of resolution of the motion to dismiss.

proceedings were not mentioned in the complaint, the trial court did not err by dismissing it because the parties *stipulated* to the trial court taking judicial notice of prior proceedings between the parties and explaining that "the defense of res judicata could not be raised by [defendant] in its motion to dismiss" and the dismissal would have been reversed if the parties had not so stipulated (citing *Ecological Sci. Corp. v. Boca Ciega Sanitary Dist.*, 317 So. 2d 857 (Fla. 2d DCA 1975))); *All Pro Sports Camp*, 727 So. 2d at 366 (citing *City of Clearwater* for the proposition that "[r]es judicata has been held a proper basis for dismissal where, though the defense was not evident from the complaint, the court took judicial notice of the record in prior proceedings").

The trial court also reasoned that judicial notice was appropriate in this case because taking judicial notice at the motion to dismiss stage was in the interest of judicial economy. As understandable as that aspiration might be, it is no justification for casting aside the established procedural prohibition on considering matters not apparent on the face of the complaint. Notably, such a rationale has been rejected by this court. *See Migliazzo*, 290 So. 3d at 579 ("Even though it appears that the trial court was attempting

to expeditiously decide the issue on the merits, the trial court was not permitted to consider or take judicial notice of matters outside of the counterclaim to which the motion to dismiss was directed." (citing *Norwich v. Global Fin. Assocs., LLC*, 882 So. 2d 535, 537 (Fla. 4th DCA 2004))).

The Browns raised only one ground in their amended motion to dismiss—collateral estoppel based on the dismissal of the 2013 foreclosure action. Collateral estoppel is an affirmative defense and, thus, generally must be raised in an answer unless the defense is apparent from the face of the complaint or its attachments. *See Neapolitan Enters., LLC*, 185 So. 3d at 589. Neither Bayview's complaint nor its attachments referred to the 2013 foreclosure action. Therefore, the trial court erred by granting the Browns' amended motion to dismiss because the face of Bayview's complaint did not demonstrate the Browns' defense.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

MORRIS, C.J. and LUCAS, J., Concur.
