

Third District Court of Appeal

State of Florida

Opinion filed July 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-56
Lower Tribunal No. 15-2706

PNC Bank, N.A.,
Appellant,

vs.

Gardenia Otero, et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, Beatrice Butchko,
Judge.

McGlinchey Stafford, William L. Grimsley, N. Mark New, II, and Kimberly
Held Israel, (Jacksonville), for appellant.

Corona Law Firm, P.A., Ricardo M. Corona and Dennis A. Donet, for
appellee Gardenia Otero.

Before FERNANDEZ, LOGUE, and MILLER, JJ.

MILLER, J.

Appellant, PNC Bank, N.A. (“PNC”) appeals from an involuntary dismissal entered in favor of appellees, Gardenia Otero and Orlando Otero, following a non-jury trial. After an initial foreclosure action against the Oteros was dismissed without prejudice, PNC filed a second foreclosure action predicated upon the same default. The trial court dismissed the second action, concluding it was barred by the doctrine of res judicata and that the failure of the bank to transmit a new default notice to the Oteros constituted a fatal defect to prosecution.

It is well-established that a “dismissal without prejudice will not support a claim of res judicata,” as it does not constitute an adjudication on the merits, and here, the initial order of dismissal specified it was indeed without prejudice. Froman v. Kirland, 753 So. 2d 114, 116 (Fla. 4th DCA 1999) (“One of the requirements for res judicata to apply is that the claim must have been adjudicated on the merits.”) (citations omitted). Thus, the trial court erred in concluding the instant action was barred by res judicata.¹ See Fla. R. Civ. P. 1.420(b) (“**Unless the court in its order for dismissal otherwise specifies**, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.”) (emphasis added); see also U.S. Bank Nat’l Ass’n v.

¹ We are cognizant that at the time the learned lower tribunal rendered its ruling in this case, it did not have the benefit of our decision in U.S. Bank National Ass’n v. Amaya, 254 So. 3d 579 (Fla. 3d DCA 2018).

Amaya, 254 So. 3d 579, 583 (Fla. 3d DCA 2018) (“Generally, an involuntary dismissal without prejudice does not operate as an adjudication on the merits.”) (citation omitted); Drady v. Hillsborough Cty. Aviation Auth., 193 So. 2d 201, 205 (Fla. 2d DCA 1966) (“The dismissal of a cause of action can either be with prejudice, same being an adjudication on the merits, or without prejudice, which is not an adjudication on the merits and is no bar to a subsequent suit on the same cause of action.”).

Further, following an involuntary dismissal without prejudice, “there [is] no practical purpose in requiring an additional notice [of default],” and here, “[t]he mortgage does not require that a new notice of default be sent.” Sill v. JPMorgan Chase Bank, Nat’l Ass’n, 182 So. 3d 851, 852-53 (Fla. 4th DCA 2016) (“[As the first complaint was] dismissed without prejudice, . . . [the original] notice of default remained valid and a second notice of default was not required before filing the second complaint based on the same default.”); see HSBC Bank USA, N.A. v. Leone, 271 So. 3d 172, 176 (Fla. 2d DCA 2019) (“[T]he dismissal was without prejudice and was, therefore, not an adjudication on the merits. As such, the Bank was not required to send a new default notice prior to filing the second foreclosure action, and the trial court erred in concluding otherwise.”). Thus, as the Oteros “had not made any payments between receipt of the . . . notice of default and the filing of the second complaint. . . . [PNC’s] notice of default remained valid and a second

notice of default was not required before filing the second complaint based on the same default.” Sill, 182 So. 3d at 853. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed.