IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: DECEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 1-12-06 ELLA Grau, D.C.

2005-SC-000166-MR

ROBERT C. HAMLIN, ADMINISTRATOR
OF THE ESTATE OF WILLIAM BAILEY — APPELLANT

V.

ON APPEAL FROM THE COURT OF APPEALS
2004-CA-002087
BOYLE CIRCUIT COURT NO. 04-CI-00251

HON. DARREN W. PECKLER,
PRESIDING JUDGE IN BOYLE CIRCUIT
COURT, 50TH CIRCUIT — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case presents a question of whether a prior dismissal under CR 41.02 amounts to *res judicata* and thus bars subsequent litigation of the same case. The issue arises in the form of an appeal from an original action for an extraordinary writ brought in the Court of Appeals and denied by that court.

In 1999, Decision One Mortgage Company, L.L.C. (Decision One) brought a mortgage foreclosure action against William Bailey and subsequently added Robert C. Hamlin, the Executor of Bailey's Estate, as a defendant. Decision One's successor in interest, Mortgage Electronic Registration Systems, Inc. (MERS) was substituted as a party plaintiff for Decision One. The claim asserted default on a promissory note and sought enforcement of a mortgage lien securing payment of the note. Discovery disputes occurred and the trial court placed MERS on terms to comply with discovery or

risk involuntary dismissal. The court's terms were not met and dismissal of the claim was ordered. In the order of dismissal there was no indication that it was without prejudice and no appeal was taken from the order of dismissal.

In 2004, a subsequent action was brought by MERS asserting a new claim under the note and mortgage. The only difference between the 1999 claim and the 2004 claim was that MERS asserted a subsequent default on the note. Significantly, however, the 1999 complaint and the 2004 complaint allege that the entire debt became due on the same date, May 23, 1998. Hamlin pled *res judicata* and the trial court initially sustained this plea in open court and dismissed the subsequent action. Under authority of CR 60.02, however, the trial court, *sua sponte,* vacated its dismissal order and reinstated the 2004 claim. From this order, Hamlin sought a writ of prohibition.

These facts present several interesting questions of law. The first such question is whether the order dismissing the 1999 claim may be asserted as *res judicata* in subsequent litigation. The answer to this question would appear to be obvious. CR 41.02(3) provides that:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, other than a dismissal for lack of jurisdiction, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

In Commonwealth v. Hicks[1] we held that an order of dismissal unaccompanied by a notation that the dismissal was without prejudice would be deemed to be with prejudice.

[1] 869 S.W.2d 35 (Ky. 1994).

Thus, there is little doubt that the dismissal of the 1999 claim is an order of the type that would support a plea of *res judicata*.

Despite the foregoing, MERS insists that the 2004 claim was brought on different grounds than the 1999 claim. It concedes that the parties are identical and that the dismissal of the 1999 claim served as an adjudication on the merits, but it urges this Court to adopt the view that there may be multiple defaults arising out of the same underlying indebtedness, each of which gives rise to a separate claim. For this proposition mortgagee cites Singleton v. Greyman Associates[2] and Rousselle v. Jewett,[3] decisions of two other jurisdictions' highest courts.

In the 1999 case, a claim was asserted for recovery upon a note and enforcement of a mortgage lien that secured the note. That case appears to have been in all respects a garden-variety mortgage foreclosure.[4] As the note provided for installment payments and both the note and the mortgage contain an acceleration clause, the mortgagee's claim that the mortgagor was in default and demand for payment of the entire indebtedness would appear to place in issue all contract claims arising out of the transaction. Prior to litigation such claims amounted to choses in action. Upon the filing of the complaint, the choses in action were transformed into a claim for relief. Upon entry of the order of dismissal, the claim for relief was thereby extinguished and merged into the final order of dismissal.[5]

No Kentucky case appears to squarely address whether there can be subsequent defaults after suit is brought on an accelerated debt. However, the answer

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[2] 882 So.2d 1004 (Fla. 2004).
[3] 421 P.2d 529 (Ariz. 1966).
[4] See KRS 426.005.
[5] 46 Am. Jur. 2d Judgments § 501.

would appear to be "no" as one of the principal purposes of pleadings is to develop the precise point in dispute by formulating the true issues.[6] Thus, when the mortgagee sought recovery of the entire unpaid indebtedness and sought to subject the real property upon which the mortgage lien had been granted to payment of the indebtedness, a default was asserted with respect to every installment of the debt, foreclosing assertion of some subsequent claim of default.

In the present posture of this litigation, however, we will be unable to reach the merits of the case. The trial court determined that its initial dismissal of the 2004 claim by mortgagee had been improvident and vacated the order. Thus, under the trial court's order, the litigation with respect to the 2004 claim would go forward. In the petition for extraordinary relief in the Court of Appeals, Hamlin asserted that the trial court was acting without jurisdiction or acting erroneously within its jurisdiction and that he will suffer immediate and irreparable harm and would be without an adequate remedy by appeal. With this, we cannot agree. *Res judicata* is an affirmative defense and has no jurisdictional dimension.[7] Furthermore, if the 2004 case is prosecuted to a judgment adverse to the Hamlin, and if that adverse judgment is incorrect, it will be subject to appellate correction. Our cases firmly hold that mere inconvenience, cost, annoyance, etc., are insufficient to justify extraordinary relief.[8]

For the foregoing reasons, the Court of Appeals' denial of extraordinary relief is affirmed.

Lambert, C.J., and Graves, Johnstone, Scott, and Wintersheimer, JJ., concur. Cooper and Roach, JJ., concur in result only.

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[6] Perry v. Livingston, 296 S.W.2d 217 (Ky. 1956).
[7] Yeoman v. Commonwealth, Health Policy Bd., 983 S.W.2d 439 (Ky.1998).
[8] National Gypsum Company v. Corns, 736 S.W.2d 325 (Ky. 1987).

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