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# What Lenders Should Know Before Dismissing a Foreclosure Complaint

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A 2008 ruling by the Ohio Supreme Court may surprise mortgage lenders. It may also impact compromises with defaulting borrowers. The decision, *U.S. Bank Nat'l Assoc. v. Gullotta* (2008), 120 Ohio St.3d 399, may limit the number of times a lender may file a foreclosure action seeking to recover the full amount due on a note and mortgage.

Rule 41(A) of the Ohio Rules of Civil Procedure allows a plaintiff to voluntarily dismiss a lawsuit, without prejudice. "Without prejudice" means that the plaintiff may re-file the lawsuit within one year of the dismissal and is not prejudiced by the fact the lawsuit was once dismissed. However, a plaintiff cannot file his lawsuit or cause of action more than twice. According to Rule 41, a second dismissal of a lawsuit operates as an "adjudication on the merits." That means that the second time a plaintiff dismisses his claim, he is barred from re-filing it.

Prior to the *Gullotta* decision, the voluntary dismissal rule did not severely impact mortgage foreclosures. Most lenders and their attorneys believed that each missed payment gave rise to a new claim and a new right to file a foreclosure complaint. There was ample authority to support such a belief.[1] Under that line of reasoning, it did not matter how many previous foreclosure complaints had been filed (and dismissed) against a borrower. Each time the borrower missed a payment, a new cause of action or new potential complaint was born. If a lender filed a foreclosure action, but the defaulting borrower expressed interest in reaching a settlement, the foreclosure lawsuit could be voluntarily dismissed without consequence to filing a subsequent lawsuit if he defaulted again.

The Supreme Court of Ohio's decision in *Gullotta* changed the game. It interpreted the voluntary dismissal rule to limit the number of foreclosure lawsuits to recover the balance due on the same note and mortgage. In *Gullotta*, the Ohio Supreme Court held that each missed payment under a promissory note and mortgage *does not* give rise to a new claim. Therefore, a lender's dismissal of a second foreclosure action may operate as an "adjudication on the merits," prohibiting a third complaint.

The facts of the *Gullotta* deserve attention. U.S. Bank filed a foreclosure complaint on April 19, 2004, against Gullotta, its borrower, and sought a monetary judgment, when Gullotta defaulted on the note and mortgage. Presumably when attempting to reach some resolution, U.S. Bank voluntarily dismissed its complaint pursuant to Rule 41(A) a few months later.

Either because loss mitigation efforts failed or because *Gullotta* failed again to make timely payments, U.S. Bank re-filed its complaint against *Gullotta* on September 9, 2004, which was within one year of the first dismissal. A different lawyer represented U.S. Bank at the time it voluntarily dismissed the second complaint on March 15, 2005.

Apparently, Gullotta again failed to make his required payments and U.S. Bank filed a third foreclosure complaint that sought the full balance due on the note on October 26, 2005. The trial court denied Gullotta's

Motion for Summary Judgment, finding that the U.S. Bank's third complaint was not prohibited by the prior two dismissals. Gullotta appealed to the Fifth District Court of Appeals. The Court of Appeals affirmed the trial court, holding, "We find that each new missed payment on an installment note is a new claim."[2]

Gullotta appealed to the Ohio Supreme Court. It disagreed with the Fifth District Court of Appeals and held in favor of Gullotta. Although the Court noted circumstances where exceptions may occur,[3] it held that the second dismissal by U.S. Bank barred any future lawsuit to recover the balance due on Gullotta's note.

The High Court zeroed in on a few key facts. First, it focused on the fact that U.S. Bank had accelerated the note upon the initial default pursuant to the "acceleration clause" contained in the note. It reasoned, "In a contract with an acceleration clause, a breach constitutes a breach of the entire contract. Once Gullotta defaulted and U.S. Bank invoked the acceleration clause of the note, the contract became indivisible. The obligations to pay each installment merge into one obligation to pay the entire balance on the note." *Id.* at ¶31.

The Court also pointed out that the note and mortgage never changed. The bank did not reinstate or amend the note and mortgage in any way after the first default. A final important fact that may distinguish the *Gullotta* decision from others is that the borrower never made another payment after his initial default.[4]

In light of the *Gullotta* decision, a lender must carefully consider its options before voluntarily dismissing a foreclosure action. A second voluntary dismissal, without any change in the transaction, may prohibit any future attempt to collect the balance owed on a note and mortgage. Rather than allowing the borrower to resume monthly payments, the terms of the note and mortgage should be amended in writing or the lender and borrower should come up with an entirely new agreement, i.e., a new note and mortgage.

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(1) *See*, e.g., *Citizens Bank of Logan v. Marzano*, 4th Dist. no. 04CA4, 2005-Ohio-163, 2005 WL 103165.
(2) The Fifth District Court of Appeals reached its conclusion in spite of a 2005 decision from the Tenth District Court of Appeals in *EMC Mtge. Corp. v. Jenkins* (2005), 164 Ohio App.3d 240, which held that each missed payment under a promissory note and mortgage did not yield a new claim. *Id.* at ¶6.
(3) *See Midfed Sav. Bank v. Martin* (July 13, 1992), Butler App. No. CA91-12-202, 1992 WL 165143, (which differed because the entry in the first foreclosure action stated that the lender's claim only related to the delinquency that had arisen up to the date of judgment) and *Homecoming Fin. Network, Inc. v. Oliver*, Hamilton App. No. C-020625, 2003-Ohio-2668, 2003 WL 21202732 (which was distinguished because two different mortgagors were involved as well as differing interest rates and amounts of principal).
(4) The Ohio Supreme Court did not specifically state that the outcome or holding would be different if the borrower had made other payments after his initial default. Nonetheless, that fact may distinguish *Gullotta, supra*, from other decisions.