

COA Concludes Successive Defaults are Distinct for Purposes of Two Dismissal Rule in Foreclosures

Article By:

Litigation

In an opinion filed on June 2, 2015, the Court of Appeals considered application of the so-called “two dismissal rule” under [Rule 41\(a\) of the Rules of Civil Procedure](#) to power of sale foreclosure proceedings. Specifically, the Court considered whether successive foreclosure proceedings share an “identity of claims” such that a second voluntary dismissal operates to bar any future power of sale foreclosure.

In practice, the issue arises with some frequency. A borrower defaults on payment, the lender commences foreclosure, the borrower cures, and the lender dismisses the foreclosure. If this cycle occurs more than once, the question becomes whether Rule 41(a), which provides that a second voluntary dismissal “operates as an adjudication upon the merits,” prohibits the lender from commencing another foreclosure proceeding based upon a subsequent default.

In [In re Foreclosure by Rogers Townsend & Thomas](#) (14-387), after a prior foreclosure and dismissal, the borrower again defaulted and the lender commenced a second power of sale foreclosure. On the eve of the second foreclosure hearing, the lender entered a second voluntary dismissal. Despite the lender’s dismissal, the court proceeded to hold a hearing and entered an order finally dismissing the foreclosure with prejudice. The court found that the lender’s second dismissal operated as an adjudication on the merits under Rule 41(a), barring any future power of sale foreclosure.

On appeal, the Court of Appeals held as a threshold matter that the trial court lacked jurisdiction after the lender’s dismissal and its post-dismissal order was void as a matter of law. The Court then considered the effect of the lender’s second dismissal under Rule 41(a) and found that a successive foreclosure based upon a different default involves different operative facts. The Court concluded that because the operative facts were distinct, Rule 41(a)’s two dismissal rule does not apply.

The Court’s ruling is logical and consistent with precedent in other jurisdictions. While there is comfort in knowing there is now precedent in North Carolina, lenders might consider avoiding the issue altogether by having the debtor stipulate to the terms of dismissal or moving the court to enter an order for dismissal based upon reinstatement.

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