

ORDERED.

Dated: May 01, 2018



Karen S. Jennemann  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
[www.flmb.uscourts.gov](http://www.flmb.uscourts.gov)

In re	)	
	)	
SHARI HELMER,	)	Case No. 6:17-bk-02658-KSJ
	)	Chapter 13
Debtor.	)	
_____	)	

**ORDER OVERRULING DEBTOR’S OBJECTION TO CLAIM**

Debtor objects to Claim 3 filed by Nationstar Mortgage, LLC.<sup>1</sup> Nationstar filed responses in opposition.<sup>2</sup> The Objection is overruled.

Debtor filed this Chapter 13 bankruptcy case in April 2017.<sup>3</sup> Nationstar timely filed its proof of claim and its amended proof of claim based on a mortgage and promissory note encumbering the Debtor’s home.<sup>4</sup> Before the bankruptcy, the Debtor and Nationstar were parties to two state court foreclosure actions. The “First Foreclosure” started in 2013, and ended with an involuntary dismissal in the Debtor’s favor.<sup>5</sup> The state court granted the Debtor’s Motion for

<sup>1</sup> Doc. No. 38 (the “Objection”). A hearing was held on February 20, 2018.  
<sup>2</sup> Doc. Nos. 39, 41.  
<sup>3</sup> Doc. No. 1, filed April 24, 2017.  
<sup>4</sup> Claim 3 in the Claims Register, filed on May 31, 2017, and December 15, 2017, respectively. The property address is 10 Fairglen Drive, Titusville, Florida, 32796. See Doc. No. 38-1, pp. 7-9 (promissory note), pp. 18-29 (mortgage).  
<sup>5</sup> Debtor’s Exh. 1, pp. 2-5. Case No. 2013-CA-038092 in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida. The dismissal order was entered on January 20, 2015.

Summary Judgment and dismissed the foreclosure because Nationstar failed to provide the Debtor with certain required information, a condition precedent to proceeding with the First Foreclosure.<sup>6</sup> The state court specifically provided the dismissal was without prejudice to file a new action<sup>7</sup> and awarded the Debtor fees and costs.<sup>8</sup> Debtor states she attempted to pay Nationstar after the dismissal and Nationstar improperly refused payments.<sup>9</sup>

Nationstar filed the “Second Foreclosure” in 2016.<sup>10</sup> The Second Foreclosure alleges “the same default” as the First Foreclosure.<sup>11</sup> No judgment has been entered in the Second Foreclosure, in part, because this bankruptcy case was filed.

Debtor now asks this Court to determine the allowable amount of Nationstar’s claim. Debtor and Nationstar primarily disagree over the amount it would take for the Debtor to cure the arrearages on the mortgage and become current (the “Cure Amount”). Debtor argues the dismissal of the First Foreclosure was an adjudication on the merits, so the Cure Amount should be calculated from the dismissal forward. Debtor also contends Nationstar’s claim should be reduced because the payments attempted after the dismissal were improperly rejected by the lender, and the Debtor seeks attorneys’ fees for bringing the Objection. (Debtor had objected to a portion of Nationstar’s original claim because it included attorneys’ fees from the First Foreclosure. Nationstar filed its amended claim to remove those attorneys’ fees.) Nationstar argues that the Cure Amount properly includes all the missed payments that occurred before, during, and after the

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<sup>6</sup> Debtor’s Exh. 1, p. 8.

<sup>7</sup> Doc. No. 38-1, p. 37.

<sup>8</sup> Doc. No. 38-1, pp. 38-41.

<sup>9</sup> Doc. No. 38, ¶¶ 7-8.

<sup>10</sup> Doc. No. 39, Exh. B. Case No. 2016-CA-024236 in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Florida.

<sup>11</sup> Doc. No. 41, p. 1. In both the First Foreclosure and Second Foreclosure, Nationstar alleges the January 1, 2013 “and all subsequent payments” were missed. Doc. No. 41, p. 2.

First Foreclosure. From counsel's representations at the February hearing, the difference is *about* \$25,000.<sup>12</sup>

Debtor's main argument is premised on the doctrine of *res judicata*. "The general principle of *res judicata* prevents the relitigation of issues and claims already decided by a competent court. 'Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.' *Res judicata* comes in two forms: claim preclusion (traditional '*res judicata*') and issue preclusion (also known as 'collateral estoppel'). In considering whether to give preclusive effect to state-court judgments under *res judicata* or collateral estoppel, the federal court must apply the rendering state's law of preclusion."<sup>13</sup> Here, the Court will apply Florida preclusion law.

*Res judicata* prevents parties to an action from re-litigating matters that were or could have been litigated in a previous lawsuit.<sup>14</sup> "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."<sup>15</sup> "Thus matters that arise from the same facts, occurrences or transactions that were the basis of a prior action may be within the scope of claim preclusion by that action."<sup>16</sup> For *res judicata* to apply, there must be a judgment on the merits and four items must be present: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality [or capacity] of the persons for or against whom the claim is made."<sup>17</sup>

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<sup>12</sup> The Proceeding Memorandum of the hearing held on February 20, 2018, is Doc. No. 44.

<sup>13</sup> *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011) (internal citations omitted).

<sup>14</sup> *Shurickv. Boeing Co.*, 623 F.3d 1114, 1116 (11th Cir. 2010).

<sup>15</sup> *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

<sup>16</sup> *Cummings v. Nichols (In re Nichols)*, Adv. No. 3:10-ap-260 (Bankr. M.D. Fla. 2011) (quoting 18 J. Moore, et al., *Moore's Federal Practice* § 131.10[3][c], p. 131-19 (3d ed. 2011)).

<sup>17</sup> *Certex USA, Inc. v. Vidal*, 706 F. Supp. 2d 1291, 1293 (S.D. Fla. 2010) (internal citations omitted).

Debtor argues the dismissal of the First Foreclosure is an adjudication on the merits by virtue of Florida Rule of Civil Procedure 1.420(b). The Rule provides: “*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.”<sup>18</sup> Despite this language, Florida courts have held that *res judicata* does not apply when a case is dismissed on procedural grounds and not on the merits.<sup>19</sup>

The nature of the relationship between the Debtor and Nationstar makes the matter more unique. In *Bartram*,<sup>20</sup> the Florida Supreme Court noted: “Foreclosure is an equitable remedy, [so] [t]he ends of justice require that the doctrine of *res judicata* not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage.”<sup>21</sup> *Bartram* noted also that “a dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default as long as the action was brought within five years of the default.”<sup>22</sup> This is so because a dismissal without prejudice returns the parties to their previous positions as if the suit had never been filed.<sup>23</sup> And, *Bartram* clarifies that a lender may seek to foreclose based on later defaults because each later default creates a new cause of action, whether the dismissal was entered with or without prejudice.<sup>24</sup>

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<sup>18</sup> Fla. R. Civ. P. 1.420(b) (emphasis added).

<sup>19</sup> *Certex USA, Inc.*, 706 F. Supp. 2d at 1293.

<sup>20</sup> *Bartram v. U.S. Bank Nat. Ass'n*, 211 So. 3d 1009, 1012 (Fla. 2016), *reh'g denied sub nom. Bartram v. U.S. Bank Nat'l Ass'n*, No. SC14-1265, 2017 WL 1020467 (Fla. Mar. 16, 2017).

<sup>21</sup> *Bartram*, 211 So.3d at 1017 (quoting *Singleton v. Greymar Associates*, 882 So.2d 1004, 1008 (Fla. 2004)).

<sup>22</sup> *Bartram*, 211 So. 3d at 1020; *but see In Forero v. Green Tree Servicing, LLC*, 223 So.3d 440 (Fla. 1st Dist. Ct. App. 2017) (The First District Court of Appeal commented that a lender’s ability to bring suit based on installment payments at issue in a previous foreclosure suit (prior to an adjudication on the merits) may be affected by *res judicata*).

<sup>23</sup> *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938, 946 (Fla. 3d Dist. Ct. App. 2016).

<sup>24</sup> *Bartram*, 211 So. 3d at 1020.

Either way, the Debtor's Objection is overruled. Debtor has not made a mortgage payment since January 2013. Nationstar had the right to file the Second Foreclosure based on the defaults alleged in the First Foreclosure under *Bartram*.

Under Rule 1.420(b), the state court "otherwise provided" that the dismissal was without prejudice. The state court specifically stated Nationstar could file a new action and dismissed the First Foreclosure case for a procedural reason. The Court finds the dismissal was not an adjudication on the merits, and *res judicata* does not apply.

Even if the Court found the dismissal was an adjudication on the merits and all elements of *res judicata* were met, the Court still would not apply the doctrine because of the injustice that would result. Courts have routinely declined to apply *res judicata* when its application would work an injustice.<sup>25</sup> Because of the unique relationship between mortgagee and mortgagor, the Court finds, on these facts, that *res judicata* would work an injustice. Again, the state court specifically provided the dismissal was *without* prejudice.

On the payments due after the dismissal, the Court finds no credence in the Debtor's argument that the payments she tendered but Nationstar did not accept are somehow not due. Debtor made absolutely no showing of waiver, equitable estoppel, or "other equitable arguments" referenced in her Objection that would lessen her liability for these post-dismissal payments. Debtor simply has not carried her burden. The Cure Amount should be calculated from the first missed payment forward.

Accordingly, it is **ORDERED**:

1. The Objection (Doc. No. 38) is **OVERRULED**.
2. Nationstar's Amended Claim 3 is allowed in full.

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<sup>25</sup> *Certex USA, Inc.*, 706 F. Supp. 2d at 1296 (citing *Shell v. Schwartz*, 357 Fed. App'x 250 (11th Cir. 2009)).

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Attorney, Melbalynn Fisher, is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of the order.