IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR CIT MORTGAGE LOAN TRUST 2007-1,

Appellant,

DCA Case No. 2D14-5841
L.T. Case No. 52-2012-CA-011719

vs.

RICHARD L. JACOBS,

Appellee.
_____/

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

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INTRODUCTION

The Appellant, THE BANK OF NEW YORK MELLON, AS TRUSTEE FOR CIT MORTGAGE LOAN TRUST 2007-1 (the "Bank"), was the Plaintiff in the lower court. The Appellee, Richard L. Jacobs ("Borrower"), was the defendant in lower court. The symbol "R" will identify the Record on Appeal. The symbol "T" will identify the transcript of the non-jury trial in this action.

STATEMENT OF THE CASE AND FACTS

On December 21, 2006, Borrower executed and delivered a note in favor of Accredited Home Lenders, Inc., A California Corporation in the principal sum of $260,000.00 ("Note"). R. at 2 (¶ 5), 25-33, 92 (¶ 3). To secure repayment of the Note, Borrower executed and delivered a mortgage ("Mortgage") on real property located at 6942 Grande Vista Way S, S Pasadena, Florida 33707 ("Property"). R. at 2 (¶ 5), 5-24, 92 (¶ 3). Plaintiff is the owner and holder of the Note. R. at 2 (¶ 6), 92 (¶ 5), 165 (¶ 4); T. at p. 10, Ln. 14-18.

Borrower defaulted under the terms of the Note and Mortgage, by failing to make payments due on and since April 1, 2008. R. at 2(¶ 7), 92 (¶ 6); T. at p. 9-18. As a result of Borrower's default, a foreclosure complaint was filed in a previous action on September 5, 2008 (the "2008 Complaint") in The Bank of New York on Behalf of CIT Mortgage Loan Trust, 2007-1, Pinellas County Case No. 522008CA013113XXCICI (the "2008 Case"). R. at 284-287. A non-jury trial was

scheduled for January 4, 2012 in the 2008 Case. R. at 288. The Bank of New York on Behalf of CIT Mortgage Loan Trust, 2007-1 failed to produce a witness or evidence at the trial. *See id.* On January 5, 2012, Final Judgment was entered for the Borrower in the 2008 Case ("2008 Final Judgment"). *See id.*

Borrower never cured his default under the terms of the Note and Mortgage and on May 7, 2012, a demand letter was sent to Borrower advising of his "failure to make the required payment due on April 1, 2008 and subsequent payments" and that the Borrower owed "the sum of $116,714.96" ("Demand Letter"). R. at 324-325, 151-152, 166 (¶ 8), 168-169. The Demand Letter provided the requisite thirty-day notice to the Borrower prior to acceleration pursuant to paragraph 22 of the Mortgage. R. at 18 (¶ 22). On September 24, 2012, the Bank then filed its complaint for foreclosure in the instant action ("Complaint"). R. at 1-40.

Borrower filed a Motion to Dismiss the Complaint on October 11, 2012. R. at 50-70. The Motion to Dismiss did not seek dismissal of the Complaint under the doctrine of res judicata or collateral estoppel. *See id.* The Bank filed a Response in Opposition to the Motion to Dismiss. R. at 81-86. On November 7, 2013, the trial court entered an order denying the Borrower's Motion to Dismiss and requiring an answer to be filed within 10 days. R. at 87-88. Borrower filed an Answer and Affirmative Defenses on December 3, 2013. R. at 120-130. The

Bank subsequently filed its Reply to the Borrower's Answer and Affirmative Defenses.

On December 3, 2013, the Bank filed its Motion for Final Summary Judgment of Foreclosure and supporting affidavits. R. at 89-106. The same day, the Bank filed the original Note and Mortgage with the trial court. R. at 131-141. On January 7, 2014, the Bank filed a non-resident cost bond with the trial court. R. at 143-146. On March 3, 2014, the Bank filed its Affidavit in Support of its Motion for Summary Judgment. R. at 163-169. The Borrower subsequently filed a Reply and Objection to the Bank's Motion for Summary Judgment. R. at 188-206. The Reply does not allege that the Bank's cause of action is barred by res judicata or collateral estoppel. *See id.*

The Borrower moved for summary judgment on April 11, 2014. R. at 207-213. The Borrower's Motion for Summary Judgment again does not raise res judicata or collateral estoppel as a basis for the motion. *See id.* On April 3, 2014, the Borrower filed a Request to Take Judicial Notice of the 2008 Final Judgment and the 2008 Complaint. R. at 170-178. The Borrower filed an Affidavit on April 4, 2014. R. at 179-187. On April 11, 2014, the Borrower filed a Supplemental Affidavit. R. at 214-215. The Bank filed it Response in Opposition to the Borrower's Motion for Summary Judgment on May 2, 2014. R. at 219-230. On May 22, 2014, the Borrower filed a Supplemental Memoranda in Favor of

Summary Judgment. R. at 232-236. This memorandum also fails to raise res judicata and collateral estoppel. The Bank filed its Memorandum of Law in Opposition to the Borrower's Motion for Summary Judgment on May 27, 2014. R. at 237-243. The Borrower's Motion for Summary Judgment was denied on June 5, 2014. R. at 244.

On July 31, 2014, an Order Scheduling Non-Jury Trial for November 5, 2014 was entered (the "Trial Order"). R. at 249-250. A non-jury trial was held before the Honorable Marion Fleming on November 5, 2014. T. at p. 1. At the trial, Borrower stipulated to the admission of the Bank's exhibits. T. at p. 5, Ln. 12-15. The following exhibits were admitted into evidence by the Bank: (1) original Note; (2) the original Mortgage; (3) a screen shot showing the Bank's acquisition of the Note prior to the filing of the Complaint; (4) a composite exhibit consisting of a recorded assignment of mortgage from Mortgage Electronic Registration Systems to The CIT Group/Consumer Finance, Inc., a recorded assignment of mortgage from The CIT Group/Consumer Finance, Inc. to The Bank of New York Mellon formerly known as The Bank of New York on Behalf of CIT Mortgage Loan Trust 2007-1, and an assignment of mortgage from The Bank of New York Mellon formerly known as The Bank of New York on Behalf of CIT Mortgage Loan Trust 2007-1 to The Bank of New York Mellon, as Trustee for CIT Mortgage Loan Trust 2007-1; (5) the Demand Letter; (6) proof of mailing the

Demand Letter; (7) a name change document changing the name of Vericrest Financial, Inc. to Caliber Home Loans, Inc.; (8) a name change document changing the name of The CIT Group/Sales Financing, Inc. to Vericrest Financial, Inc.; (9) a February 28, 2013 hardship letter from the Borrower; (10) a composite exhibit consisting of the Power of Attorney to Caliber Home Loans, Inc. dated December 4, 2013 and the Power of Attorney to Caliber Home Loans, Inc. dated May 21, 2014; and (11) the payment history. T. at P. 5, Ln. 24-25; T. at P. 6, Ln. 1-15, 22-25; R. at 263-283, 316-354. The Borrower further stipulated that the Bank was the owner of the Note when the Complaint was filed and that the Bank has standing to enforce the Note. T. at P. 10, Ln.14-17; T. at P. 11, Ln. 1-2. The Borrower also stipulated that the date of his default under the Note and Mortgage is April 1, 2008. T. at P. 11, Ln. 9-18. In addition, the Borrower stipulated that the Demand Letter was sent by the Bank and that it was received by the Borrower. T. at P. 13, Ln. 16-20.

Once the Bank rested, the Borrower presented his case and admitted the following into evidence: (1) the Complaint; (2) the 2008 Complaint; and (3) the 2008 Final Judgment. T. at P. 26, Ln. 6-7. At the conclusion of the non-jury trial, Borrower moved for involuntary dismissal under the doctrines of res judicata and collateral estoppel, arguing that the 2008 Final Judgment prevented the Bank from

bringing another foreclosure action with the same default date. T. at p. 20, Ln. 16-17. The Court granted Defendant's Motion for Involuntary Dismissal. R. at 257.

On November 20, 2014, the Bank filed a Motion for a New Trial, Rehearing and Reconsideration of the Order Granting Defendant's Motion for Involuntary Dismissal (the "Motion for Rehearing"). R. at 355-377. The Borrower filed a Reply to the Motion for Rehearing. R. at 378-384. The Bank's Motion for Rehearing was denied. R. at 413-414. The Bank filed its Notice of Appeal on December 8, 2014. R. at 385-412.

SUMMARY OF THE ARGUMENT

The trial court erred in granting the Borrower's Motion for Involuntary Dismissal under the doctrines of res judicata and collateral estoppel. The doctrine of res judicata is inapplicable to this action because: (1) the Borrower did not satisfy his required burden of proof because there is no evidence that the 2008 Final Judgment constituted a clear-cut former adjudication on the merits; and (2) the cause of action in the instant case is separate and distinct from the cause of action in the 2008 Case. The doctrine of collateral estoppel is inapplicable to this action because the Borrower did not present any evidence regarding what if any issues were identical in the two cases, and what if any issues were actually litigated in the 2008 Case. As such, the trial court erred in Granting Motion for Involuntary Dismissal and the trial court's Order should be reversed.

STANDARD OF REVIEW

The standard of review for denial of a motion for involuntary dismissal at trial is de novo. *Holt v. Calchas*, LLC, 155 So. 3d 499, 503 (Fla. 4th DCA January 28, 2015). The standard of review of a trial court's legal conclusions is de novo. *Jasser v. Saadeh*, 91 So. 3d 883, 884 (Fla. 4th DCA 2012).

ARGUMENT

I. Borrower Did Not Satisfy the Required Burden of Proof under the Doctrine of Res Judicata Because the Borrower Failed to Present Clear-Cut Evidence that the Instant Action was Formerly Adjudicated on the Merits by the 2008 Final Judgment

Res judicata is an affirmative defense. Fla. R. Civ. P. 1.110(d). The Florida Supreme Court has held that it is the burden of the party asserting res judicata to establish that a particular matter was formerly adjudicated on the merits. *deCancino v. Eastern Airlines, Inc*., 283 So. 2d 97, 99 (Fla. 1973) (holding "that the burden of establishing the certainty of the matter formerly adjudicated is on the party claiming the benefit of it."); *see Excel Ins. Co. v. Brown*, 406 So. 2d 534, 536 (Fla. 5th DCA 1981) ("A party seeking to assert res judicata has the burden of affirmatively proving this defense.") (*citing Gulf Tampa Drydock Co. v. Germanischer Lloyd*, 634 F.2d 874 (5th Cir. 1981); *deCancino*, 283 So. 2d 97; *Coleman v. Coleman*, 26 So. 2d 445 (Fla. 1946)). "If there is any uncertainty to

the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of the former judgment." *Bagwell v. Bagwell*, 14 So. 2d 841, 843 (Fla. 1943) (*citing Prall v. Prall*, 50 So. 867 (Fla. 1909); *Gray v. Gray*, 107 So. 261 (Fla. 1926); *City of Miami Beach v. Miami Beach Improvement Co.*, 14 So. 2d 172 (Fla. 1943)). Merely pleading res judicata is insufficient. *Excel Ins. Co.*, 406 So. 2d at 536. Rather, the affirmative defense of res judicata must be established "by affidavit, verified motion, or other manner." *Id.*

In the instant case, the Borrower's Affirmative Defense XI only generally alleged that "Plaintiff's claims are barred by the doctrine of res judicata." R. at 128. It did not reference the 2008 Case. R. at 128. It went on to state that "[s]pecifically, Plaintiff's claims actually were or could have been litigated in the prior litigation between the parties which resulted in a judgment on the merits in Defendant's favor." R. at 128. The Affirmative Defense XI then generally reiterated, without any attribution or citation, the res judicata test in the form of legal conclusions: "there exists: (1) an identity of the thing sued upon; (2) an identity of the cause of action; (3) an identity of persons or parties to the action; and (4) an identity of the quality or capacity of the person for or against whom the claim is made." R. at 128. "Certainty is required when pleading defenses and claims alike, and pleading conclusions of law unsupported by allegations of

ultimate fact is legally insufficient." *Bliss v. Carmona,* 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982) (citations omitted); *see Cady v. Chevy Chase Sav. & Loan,* 528 So. 2d 136, 137-38 (Fla. 4th DCA 1988) ("Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient."). The Affirmative Defense XI did not actually state with any specificity how the facts of the 2008 Case compare to the instant case. R. at 128. Rather, it simply gives legal conclusions. R. at 128.

The Borrower also did not meet the required burden of establishing the affirmative defense of res judicata by affidavit, verified motion, or by other means including testimony at the actual non-jury trial. *See deCancino,* 283 So. 2d 97; *Excel Ins. Co.*, 406 So. 2d at 536. The Borrower never filed any motions directed to the issue of res judicata. The Borrower also never presented any testimony regarding the issue of res judicata and the issues in the 2008 Case as compared to those in the instant case.

At the non-jury trial, the Borrower's Motion for Involuntary Dismissal never specified what if any claim was allegedly adjudicated on the merits in the 2008 Case. Additionally, the Borrower did not present evidence establishing that any of the claims raised in the Complaint were allegedly adjudicated on the merits in the 2008 Case. The Borrower never moved to admit the default letter from the 2008 Case into evidence, even though the default letter is an essential component

of the cause of action for the 2008 Case. The only exhibits the Borrower presented at the non-jury trial were a copy of the 2008 Complaint that appears to be incomplete and missing the attached exhibits referenced therein, a copy of the 2008 Final Judgment, and a copy of the Complaint in the instant action. R. at 284-306. Of the Borrower's trial exhibits, only the 2008 Final Judgment vaguely alludes to what if any issues might have been adjudicated in the 2008 Case.

However, a party's burden of establishing that a particular matter was adjudicated on the merits is not met where that party merely presents a copy of a final judgment. *deCancino*, 283 So. 2d at 98 ("… generally, the effect of a judgment as res judicata must be determined from the entire record of the case, and not just the judgment itself;"); *Weit v. Rhodes*, 691 So. 2d 1108, 1109 (Fla. 4th DCA 1997). This is especially true where the four corners of a final judgment are silent as to what matters were actually adjudicated by the court. Specifically, the First District Court of Appeal states:

> In order for the defense of res judicata to prevail, the final judgment or decree relied upon must reflect within its four corners matters from which it can be determined that the second suit is (1) upon the same cause of action, (2) between the same parties as the first, and (3) **that the final judgment in the first suit upon the merits is conclusive in the second suit as to every question that was presented or might have been presented and determined in the first suit.**

Reynolds v. Reynolds, 117 So. 2d 16, 20 (Fla. 1st DCA 1959)(emphasis added).

In the instant case, the 2008 Final Judgment only indicates that "Plaintiff failed to produce any witnesses or evidence" and does not state what, if any, arguments were considered or what, if any, issues were heard and decided. *See id.* Moreover, it is silent as to what if any issues were actually adjudicated on the merits. *See id.* It merely indicates that the Borrower "shall go hence without day." *See id*. The doctrine of res judicata requires the record to clearly establish what matters were adjudicated, and the 2008 Final Judgment fails to meet this requirement. *deCancino*, 283 So. 2d at 98 (the doctrine of res judicata "is not applicable to a judgment which might have rested on either of two grounds, only one of which goes to the merits;").

Moreover, the face of the 2008 Final Judgment provides no guidance as to what if any issues were adjudicated by the 2008 Judgment. Speculation based on the facts in the instant case is inappropriate because the two actions are fundamentally different. The 2008 Case sought to re-establish a lost Note whereas the instant case did not seek that relief because the original Note was located and surrendered to the court. The 2008 Case would have sought a different amount of past due payments as the instant Complaint was filed years later. Accordingly, there would have been an increased amount of interest due on the loan along with late charges, and advances made for the payment of taxes and insurance.

Additionally, the 2008 Final Judgment could have been entered for numerous reasons that at this point are mere conjectures because the Borrower never presented any evidence regarding the same. For example, the 2008 Final Judgment could have been entered if the Plaintiff could not produce any testimony to reestablish the lost note, or could not produce testimony to establish standing in general or the damages sought in the complaint. It could have been entered because the trial court found the prior default letter insufficient. These are just some of the many hypothetical reasons that could have formed the basis for the court's decision in the 2008 Case. It is this lack of certainty or clarity in the 2008 Final Judgment that does not bar the instant action based upon the doctrine of res judicata.

For res judicata to apply, there must be a **"'*clear-cut* former adjudication' on the merits."** *State St. Bank & Trust Co. v. Badra*, 765 So. 2d 251, 254 (Fla. 4th DCA 2000) (quoting *Suniland Assocs. v. Wilbenka, Inc.*, 656 So. 2d 1356, 1358 (Fla. 3d DCA 1995)) (emphasis added); *Department of Health & Rehab. Svcs. v. LaPlante*, 470 So. 2d 832, 834 (Fla. 2d DCA 1985) ("Finally, the trial judge erred in applying the doctrine of res judicata, since there had been no clear-cut former adjudication."). Where the judgment is "silent as to what was adjudicated, it was incumbent upon the appellees to establish by extrinsic evidence their affirmative defense of res judicata." *North Shore Realty Corp. v. Gallaher*,

99 So. 2d 255, 257 (Fla. 3d DCA 1957). If there has not been "an unquestionable, direct and official adjudication" of an issue by the court, the doctrine of res judicata should not be invoked. *Universal Const. Co. v. Ft. Lauderdale*, 68 So. 2d 366, 370 (Fla. 1953).

Here, the 2008 Final Judgment is silent as to what if any matters were adjudicated on the merits. R. at 288. The Record indicates that the Borrower failed to establish by extrinsic evidence the affirmative defense of res judicata. On the evidence presented at the non-jury trial, there has not been "an unquestionable, direct and official adjudication" of the issues in the 2008 Case. *Universal Const. Co.*, 68 So. 2d at 370. Therefore, the Borrower's defense of res judicata is inapplicable to the case at bar and this Court should reverse the decision below and remand with directions to enter foreclosure judgment in the Bank's favor

II. Res Judicata is Inapplicable Because the Cause of Action in the Instant Case is Separate and Distinct from the Cause of Action in the 2008 Case

The Supreme Court of Florida has held that for a party to meet its burden of establishing res judicata, it must prove that "four identities" are the same in both the previous action and the current one: "(1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action, and (4) identity of the quality in the person for or against whom the claim is made." *Donahue v. Davis*, 68 So. 2d 163, 169 (Fla. 1953) (*citing Brundage v. O'Berry*,

134 So. 520 (Fla. 1931); *Gray*, 107 So. 261; *Coral Realty Co. v. Peacock Holding Co.*, 138 So. 622 (Fla. 1931); *City of Miami Beach*, 14 So. 2d 172); *see Jones v. State ex rel. City of Winter Haven*, 870 So. 2d 52, 55 (Fla. 2d 2003) (reaffirming the *Donahue* test) (citations omitted); *Holt v. Brown's Repair Serv., Inc.*, 780 So. 2d 180, 181-82 (Fla. 2d 2001) (*citing State Street Bank & Trust Co. v. Badra*, 765 So. 2d 251, 253 (Fla. 4th DCA 2000)); *Cole v. First Development Corp*., 339 So. 2d 1130, 1131 (Fla. 2d DCA 1976) (*citing Matthews v. Matthews*, 133 So. 2d 91 (Fla. 2d DCA 1961)).

In the case at bar, the cause of action in the 2008 Case is not the same as the cause of action in the instant case. In determining if the causes of action are identical, **"[t]he operative question is whether the same facts are necessary to prove each cause of action."** *Del Campo Bacardi v. De Lindzon*, 845 So. 2d 33, 36 (Fla. 2002) (emphasis added); *Cole v. First Development Corp.*, 339 So. 2d 1130, 1131 (Fla. 2d DCA 1976) ("Identity of the causes of action is established **where the facts which are required to maintain both actions are identical.**") (citing *Gordon v. Gordon*, 36 So. 2d 774 (Fla. 1948)) (emphasis added); *Badra*, 765 So. 2d 251 ("In Florida, the test for deciding whether there is identity of causes of action rests upon a comparison of the facts constituting the underlying transaction."); *see Variety Children's Hosp. v. Mt. Sinai Hosp. of Greater Miami,*

Inc., 448 So. 2d 546, 547 (Fla. 3d DCA 1984), *review denied*, 458 So. 2d 274 (Fla. 1984).

The facts in *State St. Bank & Trust Co. v. Badra* are analogous to the instant case. In *Badra*, the plaintiff filed a foreclosure action against the defendants for failure to make payments under a promissory note. 765 So. 2d at 252. At trial, the court held that the plaintiff failed to comply with all conditions precedent because the "notices dated December 15, 1992 and March 22, 1993 were sent to incorrect addresses, and thus, were never received by the borrowers." *Id*. at 252-53. The court ordered that the plaintiff "take nothing by this action and that Defendants, Jubran A. Badra and Emily Badra, go hence without day." *Id*. at 253. Six days after judgment was entered for the defendants, the plaintiff sent a new notice of acceleration to the defendants, and subsequently filed an identical complaint for foreclosure. *Id*. The defendants filed a motion for summary judgment on the grounds of res judicata and collateral estoppel, and the trial court granted the defendants' motion. *Id.*

The plaintiff in *Badra* appealed, and the summary judgment in favor of the defendants was reversed and remanded. *Id.* at 255. In reversing the trial court, the appellate court held "that the second action was not barred by res judicata because 'identity of the cause of action' had not been met and there had been no adjudication on the merits." *Id*. at 253. The appellate court rested its decision on

two separate but equally sufficient grounds for reversal. *See id.* at 254. First, it held that "[w]hile the two complaints filed by State Street Bank in the first and second actions were identical, the notices of acceleration, differed significantly between the two cases" because they were sent on different dates and gave different amounts due and owing. *Id.* "Since the first and second actions involved different **notices of acceleration** and such letters **were essential to the maintenance of each action**, there existed **essential facts between the two cases which differed**." *Id.* (emphasis added). Second, the appellate court noted that where a judgment "did not specify the grounds upon which it relied, it was unclear whether the trial court intended the final judgment to be an adjudication on the merits …" *Id.* at 254-55 (citing with approval *Tampa Pipeline Transport Co. v. IMC Fertilizer, Inc.*, 614 So. 2d 675 (Fla. 2d DCA 1993). The appellate court found that "the final judgment did not act as an adjudication on the merits," and reversed and remanded with directions to enter foreclosure judgment. *Id.*

Here, as in *Badra*, this Court should reverse the decision below and remand with directions to enter foreclosure judgment in the Bank's favor. This is so because, as in *Badra*, "other facts or conditions intervene[d] before the second suit, furnishing a new basis for the claims and defenses of the respective parties." *Badra*, 765 So. 2d at 254. The issues are, therefore, "no longer the same and the former judgment cannot be pleaded in bar of the second action." *Id.*

In particular, as in *Badra*, maintaining both the prior and instant foreclosure action required the Bank to provide the Borrower with a thirty-day notice before acceleration of the Mortgage. R. at 18 (¶22). Like the mortgagee in *Badra*, the Bank, in the form of the Demand Letter, provided the borrower with this requisite notice. R. at 324-25. Since the notice of intent to accelerate provided in the Demand Letter was essential to the maintenance of this and the prior action, and must have differed from any notice of intent to accelerate sent in the prior case, there exist different essential facts between the two cases that precludes the application of res judicata. *See id.* The Demand Letter's contents contain essential facts that are unique to the instant action, i.e., the new amount due and owed under the Mortgage since the dismissal of the prior action and now at issue in the instant case, and a new cure date for that amount before acceleration. R. at 324-25. Further, the Complaint in the instant case is not identical to the 2008 Complaint because the instant Complaint does not contain a count to re-establish a lost note. R. at 1-40; 284-287. These factual differences between the two causes of action are compelling enough that the Court should reverse the decision below and remand with directions to enter foreclosure judgment in the Bank's favor.

The Borrower's position in the instant case that res judicata applies merely because the April 1, 2008 default date is the same in both the 2008 Case and the present action is incorrect. T. at P. 20, 21-25. The Borrower predicates

this supposition on the Florida Supreme Court's decision in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004). T. at P. 32, Ln. 1. There, the mortgagee brought two consecutive foreclosure actions based on the same note and mortgage. *Id.* at 1005. After the trial court dismissed the first action with prejudice, the mortgagee brought the second action, alleging a default date subsequent to that alleged in the first action. *Id.* The Florida Supreme Court held that res judicata did not apply because the subsequent and separate alleged default date created a new and independent right to accelerate the mortgage. *See id.* at 1008. The Florida Supreme Court did **not** hold, as the Borrower contends, that a second foreclosure action **must** allege a subsequent default date to avoid the application of res judicata after an adjudication on the merits. *See id.* Rather, it held that, in such an instance, the application of res judicata is avoided. *See id.*[1]

[1] Florida's Fourth District Court of Appeal recently released its decision in *Schindler v. Bank of N.Y. Mellon Trust Co.*, 2015 Fla. App. LEXIS 51009 (Apr. 8, 2015). There, the Fourth District, in relying on Singleton¸ held that "[b]ecause Bank's second foreclosure action was predicated upon the same default raised in the first action, the prior adjudication on the merits barred Bank from relying on the default under the doctrine of res judicata." See *id.* Under this analysis, the Bank contends that any interpretation that this proposition represents a bright-line rule that the application of res judicata is required merely because two foreclosure actions have the same default date is a misreading of the Florida Supreme Court's decision in Singleton. Further, Schindler is factually different than the instant case. In Schindler, the bank did not send the borrower a new demand letter. See id. Instead, the bank filed a second foreclosure action based upon the same demand letter in the first foreclosure action. See *id*. Further, in Schindler the first foreclosure action was involuntarily dismissed Pursuant to Rule 1.420(b) of the Fla. R. Civ. P. and was not based on a final judgment. See *id*.

In fact, the court in *Singleton* made clear that such bright-line rules regarding the application of res judicata in the foreclosure context must be avoided, as "[t]he ends of justice **require** that the doctrine of res judicata not be applied so strictly as to prevent mortgagees from being able to challenge multiple defaults on a mortgage." *Id.* (emphasis added). It declared that, in the foreclosure context, res judicata is a more fluid concept than the "traditional law of res judicata." *Id.* at 1007. This is so because the "unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship" may risk "unjust enrichment or other inequitable results." *Id.* Specifically, if res judicata prevented a mortgagee from acting on a default even after an earlier claimed default could not be established, "the mortgagor would have no incentive to make future timely payments on the note." *Id.* The prior adjudication on the merits would then "essentially insulate [the mortgagor] from future foreclosure actions on the note—merely because she prevailed in the first action." *Id.* at 1007-08.

Thus, here, as in *Badra*, equity demands that this Court reverse the decision below and remand with directions to enter foreclosure judgment in the Bank's favor, even though the prior and instant foreclosure action rely on the same default date, as "other facts or conditions intervene[d] before the second suit, furnishing a new basis for the claims and defenses of the respective parties." *Badra*, 765 So. 2d at 254.

III. Collateral Estoppel is Inapplicable to the Instant Case Because the Borrower Failed to Present Any Evidence that the Issues in the 2008 Case are Identical to those in the Instant Case, and that these Issues were Actually Litigated in the 2008 Case

Collateral estoppel, known as issue preclusion, "applies only where: (1) the identical issues were presented in a prior proceeding; (2) there was a full and fair opportunity to litigate the issues in the prior proceeding; (3) the issues in the prior litigation were a critical and necessary part of the prior determination; (4) the parties in the two proceedings were identical; and (5) the issues were actually litigated in the prior proceeding." *Prof'l Roofing & Sales. Inc. v. Flemmings*, 138 So. 3d 524, 527 (Fla. 3d DCA 2014); *Holt v. Brown's Repair Serv., Inc*., 780 So. 2d 180, 182 (Fla. 2d DCA 2001) ("[F]or the doctrine of collateral estoppel to apply, an identical issue must be presented in a prior proceeding; the issue must have been a critical and necessary part of the prior determination; there must have been a full and fair opportunity to litigate that issue; the parties in the two proceedings must be identical; and the issues must have been actually litigated.").

In the instant case, the 2008 Final Judgment explicitly says no evidence was presented at the trial. R. at 288. Moreover, it is silent as to what if any issues were actually litigated. *See id*. It merely awards judgment to the Borrower on unspecified grounds. *See id*. The Borrower did not present any evidence at the non-jury trial establishing that the issues in the 2008 Case were the same as those in the current action. The Borrower also did not present any evidence regarding

which issues were actually litigated in the 2008 Case. Therefore, the doctrine of collateral estoppel is inapplicable to the instant action.

CONCLUSION

Borrower did not satisfy the burden of proof necessary to invoke the affirmative defense of res judicata because there is no evidence that the 2008 Final Judgment constituted a clear-cut adjudication on the merits. Absent such proof, res judicata does not apply. Further, the Borrower's affirmative defense of res judicata is inapplicable because the cause of action in the instant case is separate and distinct from the cause of action in the 2008 Case. Additionally, the doctrine of collateral estoppel is inapplicable because the Borrower did not present any evidence regarding what if any issues were identical in the two cases, and what if any issues were actually litigated in the 2008 Case. Thus, this Court should reverse and remand with directions to the trial court to enter foreclosure judgment in favor of the Bank.

DATED: May 4, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing has been furnished by E-Mail to: Matthew D. Weidner, Esq., 250 Mirror Lake Drive N., St. Petersburg, FL 33701. Primary e-mail: service@mattweidnerlaw.com, this 4th day of May, 2015.

/s/ David Rosenberg
DAVID ROSENBERG

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ David Rosenberg
DAVID ROSENBERG