

**In the District Court of Appeal  
Second District of Florida**

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CASE NO. 2D14-5841

(Circuit Court Case No. 12-11719-CI-33)

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

Appellant,

v.

RICHARD L. JACOBS, et al.,

Appellees.

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

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**ANSWER BRIEF OF APPELLEE**

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## STATEMENT OF THE CASE AND FACTS

### I. Introduction

The Bank of New York Mellon, as trustee for CIT Mortgage Loan Trust 2007-1 (“the Bank”) appeals the trial court’s order granting Richard L. Jacob’s (“the Homeowner”) motion for involuntary dismissal made after the nonjury trial below. The Bank argues that the trial court erred when it concluded that the Bank’s second foreclosure action, which was based upon the same default alleged in a prior lawsuit that resulted in a final judgment in the Homeowner’s favor after a nonjury trial in that case, was barred by the doctrines of *res judicata* and collateral estoppel. The issue, then, is whether there is competent, substantial evidence to support this finding.

### II. Appellee’s Statement of the Facts

The Bank’s statement of the case and facts<sup>1</sup> is chockfull of glaring omissions and borderline misrepresentations. For instance, the Bank baldly states that the Homeowner “stipulated that the date of his default under the Note and Mortgage is April 1, 2008.”<sup>2</sup> But then it completely disregards the trial transcript which unequivocally reflects that the Homeowner only stipulated that was the default date reflected in one of the Bank’s trial exhibits:

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<sup>1</sup> Initial Brief, pp. 1-6.

<sup>2</sup> *Id.* at 5.

MR. WEIDNER (counsel for the Homeowner): I – so the record is clear, Your Honor, I’m stipulating the date of default was asserted in their Exhibit 5, the default letter, and in their books and records, and that’s the same date of default that’s asserted in their complaint, April 1, 2008.<sup>3</sup>

Consequently, this section is wholly unsatisfactory, requiring the Homeowner’s to present his own statement of the facts. See Fla. R. App. P. 9.210(c).

### **A. The Pleadings and Pre-Trial Filings**

The Bank initiated this action when it filed its verified one-count mortgage foreclosure complaint.<sup>4</sup> This pleading alleged that the Homeowner defaulted by failing to make the April 1, 2008 payment due under the note.<sup>5</sup>

The Homeowner answered the Bank’s complaint, and alleged that he was without knowledge and therefore denied the Bank’s allegation regarding the default.<sup>6</sup> And as affirmative defenses, the Homeowner alleged that Bank’s claims were barred by *res judicata*<sup>7</sup> and collateral estoppel<sup>8</sup> based on the prior lawsuit that

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<sup>3</sup> Transcript of Trial Before Judge Marion Fleming, November 5, 2014 (R. 422; “T. \_\_\_”), at 12-13.

<sup>4</sup> Complaint, September 24, 2012 (R. 1-40).

<sup>5</sup> Complaint, September 24, 2012, ¶ 7 (R. 2).

<sup>6</sup> Answer, December 3, 2013, ¶ 7 (R. 120).

<sup>7</sup> Affirmative Defenses, December 3, 2013, ¶ 11 (R. 128).

<sup>8</sup> Affirmative Defenses, December 3, 2013, ¶ 12 (R. 128).

resulted in a judgment on the merits in the Homeowner's favor. The Bank did not file a reply which sought to avoid any of these defenses.

Seven months before the trial began, the Homeowner also requested that the trial court take judicial notice of the certified copy of the final judgment rendered the prior lawsuit and a certified copy of the complaint filed in that case.<sup>9</sup> According to the judgment attached to this filing, the prior case was tried before the court but the plaintiff failed to produce any witnesses or evidence and therefore judgment was rendered in the Homeowner's favor.<sup>10</sup> And the certified copy of the complaint filed in that case alleged that the Homeowner defaulted under the note and mortgage by failing to pay the April 1, 2008 payment.<sup>11</sup> The complaint also alleged that the plaintiff was entitled to \$260,000.00 in principal along with "other costs of this action" which it alleged included "taxes, insurance, mortgage insurance, late charges, property inspections, property preservation and

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<sup>9</sup> Defendant's Request to Take Judicial Notice, April 3, 2014 (R. 170-171).

<sup>10</sup> Final Judgment attached to Defendant's Request to Take Judicial Notice, April 3, 2014 (R. 172).

<sup>11</sup> Certified Copy of Complaint attached to Defendant's Request to Take Judicial Notice, April 3, 2014, ¶ 12 (R. 177).

maintenance.”<sup>12</sup> The Bank did not file any objection to the Homeowner’s request for judicial notice.

On these pleadings and filings the matter was set for trial.<sup>13</sup>

## **B. The Trial**

As the Bank notes in its brief,<sup>14</sup> the Homeowner did stipulate to the admission of the Bank’s trial exhibits. Once the Bank rested, the trial court accepted into evidence the following the following documents which comprised the Homeowner’s case:

- A certified copy of the prior lawsuit;<sup>15</sup>
- A copy of the final judgment rendered in the Homeowner’s favor in that case;<sup>16</sup>
- A copy of the Bank’s complaint.<sup>17</sup>

When confronted with the Homeowner’s motion for involuntary dismissal on *res judicata* and collateral estoppel grounds, the Bank refused to acknowledge

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<sup>12</sup> Certified Copy of Complaint attached to Defendant’s Request to Take Judicial Notice, April 3, 2014, ¶ 14 (R. 177).

<sup>13</sup> Order Scheduling Non-Jury Trial, August 6, 2014 (R. 249).

<sup>14</sup> Initial Brief, p. 4.

<sup>15</sup> Defendant’s Exhibit 1 (R. 284-287).

<sup>16</sup> Defendant’s Exhibit 2 (R. 288).

<sup>17</sup> Defendant’s Exhibit 3 (R. 289-306).

that the two lawsuits were identical. Rather, it argued that it could “reaccelerate” the loan and claim the same default date.<sup>18</sup> The trial court was unmoved by this argument and granted the Homeowner’s motion.<sup>19</sup> It subsequently denied the Bank’s motion for rehearing.<sup>20</sup>

The Bank timely appealed.<sup>21</sup>

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<sup>18</sup> T. 26-27; T. 29-30.

<sup>19</sup> T. 32; Order Granting Defendant’s Motion for Involuntary Dismissal, November 20, 2014 (R. 376).

<sup>20</sup> Order Denying Plaintiff’s Motion for New Trial, Rehearing and Reconsideration of the Order Granting Defendant’s Motion for Involuntary Dismissal After Trial, December 9, 2014 (R. 413)

<sup>21</sup> Notice of Appeal, December 8, 2014 (R. 385).

## SUMMARY OF THE ARGUMENT

There is competent, substantial evidence in the record which supports the trial court's finding that the Bank's subsequent lawsuit, based upon the same default as the first case, was barred by the *res judicata* and collateral estoppel doctrines. First, the Homeowner presented ample evidence that the first case was a "clear-cut" adjudication on the merits when the trial court admitted the prior lawsuit's complaint and final judgment and compared those documents against the complaint filed in this case.

Additionally, the identity of the thing sued for in both cases was identical – mortgage foreclosure based on the same mortgage and the same default date. And the Bank's attempt to confuse the issue by arguing that a new default notice (claiming the same default date adjudicated against it in the first case) should be rejected. This is especially true since case law is clear that *res judicata* bars a subsequent foreclosure lawsuit based on a previously adjudicated default.

Finally, even if the causes of action between the two lawsuits was different, collateral estoppel barred the Bank from relitigating issues that had been decided against it in the first case.

Therefore, the order should be affirmed.

## STANDARD OF REVIEW

“The standard of review on appeal of a trial court’s ruling at a bench trial on a motion for involuntary dismissal is the same as the test used by the trial court in ruling on a directed verdict at a jury trial; a motion for directed verdict should be granted when there is no reasonable evidence upon which a jury could legally predicate a verdict in favor of the non-moving party.” *Tylinski v. Klein Automotive, Inc.*, 90 So. 3d 870, 873 (Fla. 3d DCA 2012).

Thus, on appeal of a judgment entered after a bench trial, while the parties are entitled to *de novo* review of the trial court’s legal rulings, an appellate court is bound by the trial court’s findings of fact where competent, substantial evidence supports the findings. *Id.* (citing *Craigside, LLC v. GDC View, LLC*, 74 So. 3d 1087 (Fla. 1st DCA 2011)).

## ARGUMENT

### **I. The trial court properly granted the Homeowner's motion for involuntary dismissal.**

#### **A. The subsequent action based on the same default date was barred under the doctrine of *res judicata*.**

*Res judicata* is defined as

A judgment on the merits in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.

*Kimbrell v. Paige*, 448 So.2d 1009, 1012 (Fla.1984). Four identities are required for *res judicata* to be applicable to a case: “1) identity in the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the actions; and 4) identity of the quality or capacity of the persons for or against whom the claim is made.” *Freehling v. MGIC Fin. Corp.*, 437 So.2d 191, 193 (Fla. 4th DCA 1983) (citations omitted).

The Bank attempts a two-fold attack on the trial court's finding that *res judicata* barred its lawsuit. The first is an assertion that the final judgment from the prior case was not a “clear-cut” adjudication on the merits. The second is an

attack on the second identity of *res judicata* – the identity of the cause of action.

Both of these arguments fail.<sup>22</sup>

***There was a clear-cut adjudication in favor of the Homeowner in the prior case.***

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The Bank’s threshold argument – or that there was not a “clear-cut” adjudication in the prior suit<sup>23</sup> – should be swiftly disregarded. Initially, the Bank argues that Homeowner’s *res judicata* affirmative defense was insufficiently pled because it “did not reference the 2008 case.”<sup>24</sup> The Bank’s factual and legal analysis, however, is unconvincing.

First, the Bank’s assertion that the affirmative defense did not reference the prior case is contradicted by the next sentence of its brief which admits that the Homeowner’s affirmative defense pled that the Bank’s claim was “or could have been litigated in the prior litigation between the parties which resulted in a

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<sup>22</sup> Because these were the only attacks the Bank made on the trial court’s *res judicata* finding, any other challenge is waived. *See Tillery v. Fla. Dep’t of Juvenile Justice*, 104 So. 3d 1253, 1255-56 (Fla. 1st DCA 2013) (“[A]n argument not raised in an initial brief is waived and may not be raised for the first time in a reply brief.”); *J.A.B. Enters. v. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) (noting same).

<sup>23</sup> Initial Brief, pp. 7-13.

<sup>24</sup> *Id.* at 8.

judgment on the merits in [the Homeowner’s] favor.”<sup>25</sup> (emphasis added). Clearly, the Bank was put on notice that the Homeowner’s *res judicata* defense was predicated on the prior lawsuit.

But even had the Homeowner not alleged this, the Bank did not move to strike the defense as legally insufficient. Fla. R. Civ. P. 1.140(b) (“[T]he objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply.”). Furthermore, if a plaintiff seeks to avoid an affirmative defense, it must file a reply asserting that avoidance. Fla. R. Civ. P. 1.100(a). Failure to file a reply waives this “affirmative defense to the affirmative defense.” *See e.g. Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981). This rule logically arises from the due process consideration that the Homeowner must be put on notice that the insufficiency of his defense is an issue to be tried – which he was not since the Bank did not file any reply. In either event, the Bank failed to assert that the Homeowner’s affirmative defense was conclusory pled in the trial court and therefore has waived any challenge to this on appeal. *Chamberlain v. State*, 881 So. 2d 1087, 1100 (Fla. 2004) (“[T]o be preserved for appeal, the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on

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<sup>25</sup> *Id.*

appeal.”); *Miller v. Miller*, 709 So. 2d 644, 645 (Fla. 2d DCA 1998) (“We cannot address on appeal an issue not ruled upon by the circuit court.”).

Next, the Bank incorrectly claims that the Homeowner failed to meet his burden of proving *res judicata* by “affidavit, verified motion, or by other means...”<sup>26</sup> But this argument fails to consider that the trial court accepted into evidence a certified copy of the prior lawsuit (Defendant’s Exhibit 1), a copy of the judgment rendered in that case (Defendant’s Exhibit 2), and a copy of the complaint filed in this case (Defendant’s Exhibit 3).

By tendering these exhibits, the Homeowner made it abundantly clear what issues “would have” or “could have” been adjudicated in the prior lawsuit. First, the complaint in the prior lawsuit requested foreclosure of a mortgage<sup>27</sup> executed by the Homeowner on December 21, 2006 and recorded on January 3, 2007 in Book 15564, Page 1392 of the official Records of Pinellas County.<sup>28</sup> According to

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<sup>26</sup> Initial Brief, p. 9. Outrageously, the Bank goes so far as to assert that the Homeowner “never filed any motions directed to the issue of *res judicata*...,” (*Id.*), despite the fact that the order under review was the product of a motion for involuntary dismissal on *res judicata* grounds.

<sup>27</sup> Complaint admitted as Defendant’s Exhibit 1, ¶ 7 (R. 285).

<sup>28</sup> Complaint admitted as Defendant’s Exhibit 1, ¶ 9 (R. 285).

that pleading, the basis for default was the failure to make the April 1, 2008 payment and all subsequent payments thereafter.<sup>29</sup>

And the final judgment was equally as clear that the matter was tried before the court in a non-jury trial; that the plaintiff in that case failed to present any evidence or testimony; and that therefore judgment was rendered in the Homeowner's favor.<sup>30</sup> In short, there is competent, substantial evidence to support a finding that the prior lawsuit adjudicated a foreclosure action based on an April 1, 2008 default of the same mortgage at issue in this case.

Competent, substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [or]...such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Holden v. Holden*, 667 So. 2d 867, 869 (Fla. 1st DCA 1996) (citations omitted). The admission of the complaint in the prior lawsuit and the final judgment declaring that the plaintiff failed to introduce any evidence or witnesses was evidence that established a substantial basis for the conclusion that

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<sup>29</sup> Complaint admitted as Defendant's Exhibit 1, ¶ 12 (R. 286).

<sup>30</sup> Final Judgment admitted as Defendant's Exhibit 2 (R. 288). The Bank appropriately concedes in its brief that the final judgment was the product of a nonjury trial that occurred on January 4, 2012 (Initial Brief, p. 2).

the prior lawsuit adjudicated a mortgage foreclosure claim of the subject mortgage based on an April 1, 2008 default.

Nor were the two actions “fundamentally different” as the Bank asserts in its appellate brief.<sup>31</sup> The Bank’s complaint in this case requested foreclosure of the same mortgage the plaintiff in the prior case requested.<sup>32</sup> And it did so based on the same default that was alleged in the prior lawsuit.<sup>33</sup> Finally, the Bank’s assertion that “there would have been an increased amount of interest due on the loan along with late charges, and advances”<sup>34</sup> was something the Bank waived at trial when its attorney represented that the Bank would be willing to forego accrued interest and only seek the principal balance on the loan:

MS. PASCAL (the Bank’s counsel): The interest that accrued or – actually I have to – to consult with my witness – but the interest that had accrued up to the date of the judgment we would be willing to forego for the new acceleration or even to just stay with the principal amount that is outstanding and due and owing.<sup>35</sup>

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<sup>31</sup> Initial Brief, p. 11.

<sup>32</sup> Complaint, September 24, 2012, ¶ 5 (R. 2).

<sup>33</sup> Complaint, September 24, 2012, ¶ 7 (R. 2).

<sup>34</sup> Initial Brief, p. 11.

<sup>35</sup> T. 28.

Thus, the prior judgment was a “clear cut” adjudication that the plaintiff in that case failed to present a *prima facie* case for foreclosure which requires a foreclosing lender to prove its contract, a default, proper acceleration of the debt, and its damages. *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979) (holding that foreclosure plaintiffs must show: 1) an agreement, 2) a default, 3) an acceleration of debt to maturity, and 4) the amount due). The plaintiff in the prior case did not present any evidence or any testimony to the court during the trial in the prior case. It therefore failed to prove: 1) its agreement; 2) a default; 3) an acceleration of the debt to maturity; and 4) the amount due. Nothing more could possibly be necessary to prove what the judgment adjudicated.

***The identity of the thing sued for was identical in the two cases.***

Likewise, the Bank’s argument that the causes of action were “separate and distinct”<sup>36</sup> does not hold water. Under Florida law, claims are considered the “same cause of action” if the facts between the two lawsuits are essentially the same; this does not require, however, that the facts or testimony be “word for word” the same. *Gordon v. Gordon*, 59 So. 2d 40, 44-45 (Fla. 1952); *CitiBank, N.A. v. Data Lease Financial Corp.*, 904 F. 2d 1498, 1503 (11th Cir. 1990) (interpreting Florida law regarding *res judicata* and holding “if a case arises out of

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<sup>36</sup> Initial Brief, pp. 13-18.

the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, the two cases are really the same ‘claim’ or ‘cause of action’ for purposes of *res judicata*.”)

The Bank relies heavily on the Fourth District’s opinion in *State St. Bank and Trust Co. v. Badra*, 765 So. 2d 251 (Fla. 4th DCA 2000).<sup>37</sup> But that opinion is inapposite to the case at hand. There, the trial court in the first foreclosure suit granted judgment upon the pleadings in favor of the borrower solely because the bank failed to establish compliance with conditions precedent to the lawsuit. *Id.* at 253. The Fourth District held that this determination meant that the first suit was “premature” and therefore not an adjudication on the merits of the action so as to invoke the doctrine of *res judicata*. *Id.* at 255. And this conclusion comports with well-established Florida law that where the mere passage of time cannot cure a premature element of a claim, the correct course of action is to dismiss the action without prejudice instead of with prejudice. *See Shuck v. Bank of America, NA*, 862 So. 2d 20 (Fla. 2d DCA 2003).

Here, however, prior judgment was for a complete want of evidence. And where there is a complete want of evidence after a nonjury foreclosure trial, the trial court is obligated to involuntarily dismiss the case. *May v. PHH Mortgage*,

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<sup>37</sup> Initial Brief, pp. 15-17.

150 So. 3d 247, 249 (Fla. 2d DCA 2014) (“The bank's failure to prove a prima facie case warrants dismissal.”). Unless specified otherwise in the order or dismissed because of lack of jurisdiction, improper venue, or failure to join an indispensable party, this dismissal acts as an adjudication on the merits. Fla. R. Civ. P. 1.420(b).

The only “factual differences” between the two cases the Bank points to in its brief are the fact that there may have been two different demand notices sent.<sup>38</sup> This argument is unavailing. In fact, if the Bank’s argument is taken to its logical conclusion than any litigant who has been conclusively defeated in a prior foreclosure lawsuit can simply send a new default letter and then claim that it could foreclose on the same default alleged in the prior lawsuit. This would make a mockery of the doctrine of *res judicata* and would result in the same colossal waste of judicial resources that occurred in this case. The Court should reject the Bank’s proffer just as it has rejected a borrower’s post-judgment attack on a lender’s standing to sue. *Dage v. Deutsche Bank Nat. Trust Co.*, 95 So. 3d 1021 (Fla. 2d DCA 2012) (holding that a bank’s alleged lack of standing at the time it filed a foreclosure action did not render default judgment void).

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<sup>38</sup> Initial Brief, p. 17.

***Established case law holds that res judicata bars a subsequent foreclosure action based on the same default.***

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It is undisputed that both foreclosure lawsuits filed against the Homeowner were based upon the same factual predicate: a failure to pay the April 1, 2008 payment. And case law is clear that *res judicata* bars a subsequent foreclosure lawsuit unless the second lawsuit is based on a different default. *Singleton v. Greymar Associates*, 882 So. 2d 1004 (Fla. 2004) (*res judicata* does not necessarily bar a subsequent foreclosure lawsuit after dismissal with prejudice of the first suit if the second action is based upon a subsequent and different default under the note and mortgage); *Wells Fargo Bank, N.A. v. Robinson*, \_\_\_ So. 3d \_\_\_, 2015 WL 4486524, \* 1 (Fla. 1st DCA July 24, 2015) (“[T]he dismissal does not preclude a new foreclosure action based on different acts or dates of default.”); *Star Funding Solutions, LLC v. Krondes*, 101 So. 3d 403, 403 (Fla. 4th DCA 2012) (“We affirm and write only to address the impact of the dismissal with prejudice on any subsequent act of default of the terms of the mortgage between Star Funding and the Krondes. A new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action.”); *PNC Bank, N.A. v. Neal*, 147 So. 3d 32 (Fla. 1st DCA 2013) (affirming order granting mortgagor's motion to dismiss foreclosure action with prejudice; noting, however, that “the dismissal with prejudice of PNC Bank's foreclosure action against the

Neals does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action”).

In fact, this is exactly what was held in a recent case that the Bank was also involved in, *Schindler v. Bank of New York Mellon Trust Co.*, \_\_\_ So. 3d \_\_\_, 2015 WL 1545225 (Fla. 4th DCA April 8, 2015). There, the bank’s first foreclosure lawsuit was dismissed pursuant to Fla. R. Civ. P. 1.420(b) and then bank filed a new lawsuit based on the same default date. *Id.* at \* 1. The trial court granted judgment in the bank’s favor but the appellate court reversed “[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 that default under the doctrine of *res judicata*.” *Id.* at \* 3.

The Bank attempts to distinguish this case on two grounds. First, it asserts that “[i]n *Schindler*, the bank did not send the borrower a new demand letter.”<sup>39</sup> But *Schindler* does not hold that sending a new demand letter with the same default date is adequate for *res judicata* purposes. Rather, it stands for the opposite: that not only must a new demand letter be sent, but the letter must notify the borrower of a different default.

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<sup>39</sup> Initial Brief, p. 18, n. 1.

Second, the Bank asserts that the “in *Schindler*, the first foreclosure action was involuntarily dismissed [p]ursuant to Rule 1.420(b) of the Fla. R. Civ. P. and was not based on a final judgment.”<sup>40</sup> But the Bank misses the point of the Rule, which is actually addressed in the opinion: that an order dismissing a case under Fla. R. Civ. P. 1.420(b) is an adjudication on the merits. *Id.* at \* 2. And since the final judgment rendered in the prior case acted as an adjudication on the merits, there is absolutely no factual distinction between this case and *Schindler*.

\* \* \*

In summary, reversing the trial court would require that there is no competent, substantial evidence that the final judgment in the prior case acted as an adjudication on the merits and that the two causes of action were not identical. Since this is clearly not the case, the trial court’s order should be affirmed.

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<sup>40</sup> *Id.*

**B. The subsequent action based on the same default date was also barred under the doctrine of collateral estoppel.**

Additionally, the order should be affirmed on collateral estoppel grounds. The Bank appropriately cites the definition of collateral estoppel.<sup>41</sup> Unlike *res judicata*, however, collateral estoppel will apply even if the two causes of action are different. *Bradenton Group, Inc. v. State*, 970 So. 2d 403, 408 (Fla. 5th DCA 2007). Therefore, even if the Bank's argument that the causes of action between the two lawsuits were different is well taken (which it is not) the Court should still affirm the order under the collateral estoppel doctrine.

The issue before the trial court in the first lawsuit was the failure to pay the April 1, 2008 payment and all subsequent payments.<sup>42</sup> The complaint also alleged that the plaintiff was entitled to \$260,000.00 in principal and interest along with "other costs of this action" which it alleged included "taxes, insurance, mortgage insurance, late charges, property inspections, property preservation and maintenance."<sup>43</sup>

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<sup>41</sup> Initial Brief, p. 20. See also *Holt v. Brown's Repair Service, 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.").

<sup>42</sup> Complaint admitted as Defendant's Exhibit 1, ¶ 12 (R. 286).

<sup>43</sup> Complaint admitted as Defendant's Exhibit 1, ¶ 12 (R. 286).

In other words, the issues before the trial court in the first case were: 1) whether the plaintiff was entitled to foreclose based on any missed payments between April 1, 2008 and January 1, 2012 (the first day of the month the nonjury occurred); and 2) whether the plaintiff was entitled to \$260,000.00 in principal, interest through January 4, 2012 (the day of the nonjury trial), and any “other costs” incurred through the day of the trial. And since these issues were all adjudicated in the Homeowner’s favor pursuant to the final judgment, collateral estoppel barred relitigation of these issues in the second lawsuit even if the causes of action were different. *See e.g. M.C.G. v. Hillsborough County School Board*, 927 So. 2d 224 (Fla. 2d DCA 2006) (although subsequent claim was not barred by *res judicata* because it involved a different time period, collateral estoppel applied to estop the parties from relitigation an issue that had been decided against them.).

## CONCLUSION

The Court should affirm the order under review without a written opinion.

Dated: July 29, 2015

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**CERTIFICATE OF COMPLIANCE WITH FONT STANDARD**

Undersigned counsel hereby certifies that the foregoing Brief complies with Fla. R. App. P. 9.210 and has been typed in Times New Roman, 14 Point.

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## **CERTIFICATE OF SERVICE AND FILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served this July 29, 2015 to all parties on the attached service list. Service was by email to all parties not exempt from Rule 2.516 Fla. R. Jud. Admin. at the indicated email address on the service list, and by U.S. Mail to any other parties. I also certify that this brief has been electronically filed this July 29, 2015.

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