

Mortgage Holder Allowed to Proceed with Second Foreclosure Action after the First was dismissed with Prejudice

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In *Federal National Mortgage Association v. Thompson*, the Wisconsin Supreme Court permitted a lender to pursue a second judicial foreclosure action after the first case was dismissed *with prejudice*. In the first foreclosure action, the lower court agreed with borrower Cory Thompson that his lender had failed to present evidence that a notice of intent to accelerate was mailed and that the servicer was in possession of the original note. After an unsuccessful appeal of the dismissal, the lender sent Thompson a new notice of intent to accelerate payment of the note and filed a second foreclosure action when no payments were received in response to the letter. Following trial of the second foreclosure action, the lower court granted judgment in favor of the lender. Thompson appealed, asserting that claim preclusion barred the second action.

The Wisconsin Supreme Court determined that claim preclusion did not bar the lender from initiating a second foreclosure action, because there was no identity of causes of action between the first and second foreclosure lawsuits. While the parties remained in the same contractual relationship as in the first lawsuit, the borrower's default on the mortgage loan, after he failed to make an installment payment once the first lawsuit was dismissed, was not—and could not have been—litigated in the first suit. The borrower's default following dismissal of the first lawsuit, created a new set of operative facts upon which the lender could file a subsequent and second foreclosure action. The Court distinguished its holding from two decisions the borrower relied on: *Johnson v. Samson Construction Corp.* from the Maine Law Court, and *U.S. Bank National Ass'n v. Gullota* from the Ohio Supreme Court. In each of those decisions, the court determined there was a valid acceleration of the note, whereas here, the lender had not proven Thompson was in default, so the entire balance of the note was never validly accelerated.

By determining that a mortgagee is not barred from bringing a second judicial action after a new default on a mortgage, the Wisconsin Supreme Court upheld the right of a mortgage lender to enforce its interest in the note and mortgage, even after a first failed foreclosure attempt.

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