ILLINOIS STATE BAR ASSOCIATION

MAY 2020 VOL 50 NO 7

Bench & Bar

The newsletter of the Illinois State Bar Association's Bench & Bar Section

The Illinois Two-Step: The Forbidden Dance?

BY MICHAEL G. CORTINA

Ideas have emerged in real estate litigation when there is a dispute as to the validity of a mortgage and the mortgagee wants to foreclose. Some lawyers may consider filing declaratory judgment actions that seek a declaration that the mortgage is valid so that they can later file another action to foreclose the judicially-declared valid mortgage. This method, however, is contrary to the spirit of the Illinois Mortgage Foreclosure Law, and also may violate the tenets of *res judicata*.

Why do the dance? Step one of the dance is obtaining a declaration that the mortgage is valid, and step two is foreclosing on the mortgage. It makes little economic sense to file two lawsuits when

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Virtual Courtrooms Since 2014

BY JUDGE MIKE CHMIEL

Through a webinar produced in April 2020 by the National Center for State Courts on the handling of remote hearings, the chief justice of the Michigan Supreme Court suggested the situation we face through the pandemic of 2020 is "the disruption that our industry needed." While no person likes the situation, the comments of Justice Bridget McCormack resonate with most in that they encourage the judiciary to think out of the box in providing access to justice through appropriate forums.

In the 22nd judicial circuit of the state of Illinois, a pilot program commenced back in 2014 under then Chief Judge Michael J. Sullivan, who provided for virtual proceedings through CourtCall, LLC ("CourtCall"). (I encouraged or otherwise inspired the program, in that I had been using such tools in the United States Bankruptcy Court for years in Chicago, Milwaukee, and elsewhere.) CourtCall is an independent conference servicing company, which judicial circuits in Illinois were allowed to use since 2010 or so. In the pilot program, allowances were made for audio and video participation. Various other allowances were also made at the chief's request, for things like fee waivers for participation by the indigent.

Into 2015 or so, the program went well, as various parties (or typically, attorneys for parties) were able to participate in proceedings without the need to travel to Woodstock, Illinois. I hosted a courtroom in the program, and often quipped that it was not that we did not want people to visit us in the scenic northwest suburbs of Chicago; instead, I explained it did seem to make much sense to have someone travel a half hour (from within McHenry County), let alone an hour-and-a-half or more (from the big city or elsewhere), for a status hearing which might last a couple of minutes.

By 2016 or so, each of the five courtrooms in our civil division was

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simply filing a foreclosure would suffice, so what is the purpose of this "Illinois two-step?" If proceeding in this fashion thwarts efficiency and judicial economy, there must be another reason for it being considered. While it is true that seeking a judicial declaration on the validity of a document is a proper use of the declaratory judgment procedure, the more likely reason the Illinois two-step is considered is to avoid the possibility of having to pay a defendant's attorneys' fees if the mortgagee does not prevail.

Section 1510 of the Illinois Mortgage Foreclosure Law[1] contains a provision that allows for a defendant that "prevails in a motion, an affirmative defense or counterclaim, or in the foreclosure action" to be awarded reasonable attorneys' fees; the statute on declaratory judgments[2] contains no such fee-shifting language. It would be adding insult to injury to mortgagees that hold mortgages that have some issues (e.g. possible fraud in the granting of the mortgage) to have to pay their attorney to foreclose, have it determined that the mortgage is invalid, and also having to pay for the defendant's attorneys' fees when the defendant prevails in the foreclosure case. A thought is to try to avoid this problem using the Illinois two-step, because if the mortgage is held invalid during step one – the declaratory judgment action – then they do not have to pay for the defendant's attorneys' fees because they never filed step two - a mortgage foreclosure action. The Illinois two-step may seem a safer and arguably more economic approach for the mortgagee since they obtain a judicial determination of the validity or invalidity of the mortgage at issue without the sword of the fee-shifting language of the Illinois Mortgage Foreclosure Law hanging over their heads.

Problem with the dance. While the idea of utilizing the Illinois two-step may sound intriguing to mortgagees, it does not appear to be authorized by the Declaratory Judgment Act. Part of subsection (a) of the Declaratory Judgment Act states, "[t]he court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." In fact, it has been held "[i]t is well settled that a declaratory judgment should not be granted if to do so would entail a piecemeal litigation of the matters in controversy, not unless that can by such judgment dispose of the controversy between the parties."[3] In *Harris*, the court dismissed the declaratory judgment action filed by the plaintiff after its analysis demonstrated that the declaratory judgment would not dispose of the entire dispute of the parties.

The thought behind the Illinois two-step is using it so that mortgagees can file one suit to determine the validity of a mortgage, and then file a second suit to foreclose if the mortgage is deemed valid. This is precisely the type of conduct that is *verboten* by the black-letter language of the declaratory judgment statute since the purpose of the declaration of the mortgage's validity is solely for the purpose of engaging in piecemeal litigation with the filing of a second suit in foreclosure based upon the validity of the mortgage. "It is not the intent of the declaratory judgment statute to confer jurisdiction on the courts to be legal advisors."[4]

Panic! at the dance.[5] The Illinois two-step would force defendants to defend two cases filed by the mortgagee. The first case relates to the validity of the mortgage, and the second case is between the same parties relating to the same operative facts and the same mortgage. The doctrine of *res judicata* now has reared its ugly head.

Res judicata "… provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action."[6] *Res judicata* bars not only the case that was brought, "… but also whatever could have been decided."[7]

Three elements must be satisfied in order for *res judicata* to apply: 1) a final

Bench & Bar

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judgment on the merits has been rendered by a court of competent jurisdiction; 2) an identity of cause of action exists; and 3) the parties or their privies are identical in both actions.[8] In looking at the Illinois two-step, *res judicata* appears to bar the second step – the foreclosure action – which is the ultimate goal of the dance.

Let's look at what would happen in a typical Illinois two-step case: A mortgage goes into default due to lack of payments, and the mortgagee sends a demand letter to the purported mortgagor. The mortgagor responds by stating that she never gave the mortgagee a mortgage and that her signature was forged. The mortgagee believes that forgery claim is bogus, so it files a declaratory judgment action against the mortgagor to declare that the mortgage is valid and enforceable. The declaratory judgment results in a declaration that the mortgage is valid, so the mortgagee takes the next step and files a second suit to foreclose on the judicially-approved mortgage.

Applying the principles of *res judicata*, the foreclosure case noted in the example above could conceivably be dismissed. A final declaratory judgment was entered, the judgment pertained to the mortgage subject to the foreclosure and the same facts were needed for both cases, and the parties were the same. Simply put, the mortgagee could have and should have litigated the validity of the subject mortgage in the foreclosure case, so there was no need to file the declaratory judgment action. Because the declaratory judgment action was filed, and the mortgagee obtained a final judgment on the merits of that action, the second action for foreclosure is now ripe for a motion to dismiss based on *res judicata*. Now, the mortgagee has not only lost the foreclosure case, but it will likely have to defend against a fee-petition for the other party's fees because the defending party prevailed on a motion in the foreclosure case.

Judicial scrutiny. Courts will likely scrutinize any declaratory judgment action regarding mortgages because such declarations are simply not proper under the law if they do not terminate the dispute between the parties. As *Harris* teaches, a declaratory judgment action is subject to dismissal for failure to state a cause of action if the suit will not terminate the dispute between the parties. After all, "[i]t is not the intent of the declaratory judgment statute to confer jurisdiction on the courts to be legal advisors." [9]

Conclusion. The Illinois two-step may appear to be a safe way to seek foreclosure of questionable mortgages because the declaratory judgment statute does not allow for fee-shifting. The notion of avoiding paying a defendant's fee is appealing despite the fact that declaratory judgments are not meant to be utilized so that litigants can proceed with cases in piecemeal fashion. The piecemeal litigation that the two-step utilizes is not only prohibited by statute, it runs against the spirit of the Illinois Mortgage Foreclosure law, and violates the principles of *res judicata*.

Lawyers tempted to dance the Illinois two-step should consider the repercussions of the strategy of filing two suits. It is possible that they could win the battle with the declaratory judgment, but lose the war by having the foreclosure case dismissed under *res judicata* principles. The better option appears to be avoiding the dance altogether by litigating any issues with the mortgage in the foreclosure case itself. Courts can encourage the filing of only one suit, and also support judicial economy, by ensuring that declaratory judgment actions are only allowed to move forward if they completely resolve the dispute between the parties. The statutory fee-shifting language in the Illinois Mortgage Foreclosure Law is discretionary, not mandatory, so if a fear of paying a defendant's fees is the impetus for the declaratory judgment action first, it might be better to focus on the legitimacy of the dispute in the foreclosure case in order to persuade the court to exercise its discretion to not award fees (or award only a limited amount). Courts have discretion on awarding fees, and they can and should exercise that discretion when dealing with a legitimate dispute over the validity of a mortgage in a foreclosure case.

On to the next dance.■

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1. 735 ILCS 5/15-1101, *et seq*.
2. 735 ILCS 5/2-701.
3. *Farmers Ins. Group v. Harris*, 4 Ill. App. 3d 372, 376 (3d Dist. 1972).
4. *Id*.
5. Not to be confused with the pop rock band Panic! At The Disco®.
6. *Hudson v. City of Chicago*, 228 Ill.2d 462, 467 (2008).
7. *Id*.
8. *Id*.
9. *Harris*, *supra* note 3 at 376.

Virtual Courtrooms Since 2014

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outfitted with CourtCall, and each of our civil division judges were regularly operating in virtual settings. Our virtual hearings have been interspersed with regular, in-person hearings. Daily manifests have tipped us when courtroom appearances were going to remote, as some judges prefer to call cases with those appearances first. Others simply call their cases in the order in which they appear on the docket, and those who appear through CourtCall step up to the virtual bench without the court losing a beat and with seamless efficiency.

Typically, we utilize audio for these virtual operations, and most hearings are short and summary in fashion. Many, however, involve contests. As with any arguments, one party goes at a time, and professionalism and civility are required. If testimony is being offered, a video appearance is generally required, so the finder of fact—the judge—can work to gauge credibility. Our electronic recording system seems to pick up these court proceedings well, to facilitate the making of a record. To facilitate the entry of orders following virtual proceedings, an email address (*proposedorders@22ndcircuit.illinoiscourts.gov*) was also established to receive proposed (draft) orders within twenty-four hours of a virtual court appearance.

Through the inspiration of our proposed order system, and with the advent of e-filing, we were also able to expand our virtual operations to include the receipt of proposed orders for newly filed guardianship cases for alleged disabled adults (where receipt of a proposed order prompts the court into setting a hearing without the need for a courtroom appearance), newly filed probate cases to establish a decedent's estate (where receipt similarly prompts the court to review initial filings without the need for a courtroom proceeding), and agreements (as with agreed judgments, dismissals, and other items which appear from the e-filings to warrant action, again without the need for a courtroom appearance).

As our legal system adjusts or otherwise retreats to virtual operations, the disruption prompted by the pandemic has more so inspired virtual operations, which should continue to be encouraged, providing the needs of proceedings—due process, integrity, etc.—can be accommodated. And while we continue to welcome participants from near and far to join us when you can, we continue to look for ways to further use the technology with which we have been blessed, to arrive at even greater efficiencies and better access to justice.■

Circuit Judge Michael Chmiel serves as the presiding judge of the Civil Division of the 22nd judicial circuit. He is a past chair of the Bench and Bar Section Council of the ISBA, and currently serves as chair of its Continuing Legal Education Committee.

Recent Appointments and Retirements

1. Pursuant to its constitutional authority, the supreme court has appointed the following to be circuit judge:

- Hon. Reginald C. Mathews, 19th Circuit, 1st Subcircuit, March 2, 2020

2. The circuit judges have appointed the following to be associate judges:

- Reginald N. Campbell, 16th Circuit, March 2, 2020
- Angelo J. Kappas, 18th Circuit, March 2, 2020

3. The following judge has retired:

- Hon. Jeffrey B. Ford, 6th Circuit, March 25, 2020

There were no changes in the judiciary in April 2020.■