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IN THE
COURT OF APPEALS OF INDIANA

CHASE HOME FINANCE, LLC,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 37A03-1104-MF-134
	)	
NICHOLAS GEORGE BOBIS,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE JASPER CIRCUIT COURT
The Honorable John D. Potter, Judge
Cause No. 37C01-1001-MF-48

October 20, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Plaintiff-Appellant, Chase Home Finance, LLC (Chase), appeals the trial court's dismissal of their complaint with prejudice in accordance with Indiana Trial Rule 41(E).

We affirm.

ISSUE

Chase raises one issue for our review, which we restate as the following: Whether the trial court abused its discretion when it dismissed Chase's complaint with prejudice.

FACTS AND PROCEDURAL HISTORY

On October 14, 2008, Nicholas George Bobis (Bobis) executed and delivered to Chase a mortgage note mortgaging real property located in Wheatfield, Indiana for the original principal balance of $190,921.00 with interest payable at the rate of 7.25% per annum. On April 1, 2009, Bobis defaulted on the payment of monthly installments of principal and interest. The unpaid principal balance was $190,319.83.

On January 13, 2010, Chase filed a complaint on the note and request to foreclose the mortgage. On January 19, 2010, Bobis sent interrogatories and a request for production on Chase. On January 28, 2010, Bobis demanded a settlement conference pursuant to Ind. Code § 32-30-10.5-10; the trial court granted the motion, and the settlement conference took place on March 1, 2010. On June 23, 2010, Chase responded to Bobis' discovery request. On January 26, 2011 Bobis filed a motion to dismiss for failure to prosecute, to which Chase responded on January 31, 2011. On January 26, 2011, the trial court entered an order for

cause as to why Chase had failed to prosecute, and a hearing was set for March 4, 2011. At the March 4, 2011 hearing on the trial court's order for cause, both parties consented to a dismissal without prejudice. However, on that same day, after taking the matter under advisement, the trial court dismissed the complaint with prejudice.

Chase now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

The relevant portion of Ind. Trial Rule 41(E) states:

> [W]hen no action has been taken in a civil case for a period of sixty (60) days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

See T.R. 41(E). In an appeal from the dismissal of a complaint for failure to prosecute pursuant to Trial Rule 41(E), the trial court may only be reversed if it abused its discretion. *Olson v. Alick's Drugs, Inc.*, 863 N.E.2d 314, 319 (Ind. Ct. App. 2007), *trans. denied*. An abuse of discretion occurs if the decision of the trial court is against the logic and effect of the facts and circumstances before it, and, therefore, we will affirm the trial court will if there is any evidence to support's the trial court's decision. *Id*.

This appeal is somewhat different. Chase concedes the decision to dismiss its complaint was correct because, by its admission, it failed to prosecute the claim for over a year. However, this appeal only concerns the trial court's decision to dismiss the case with prejudice. Therefore, we will not address the appropriateness of the trial court's decision to

dismiss the case; instead, we will only review the trial court's decision as it relates to the dismissal being one with or without prejudice.

Ind. Trial Rule 41(b) states, "unless the court in its order for dismissal otherwise specifies, a dismissal under . . . subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits." Therefore, a trial court's 'default' dismissal is one with prejudice. *Brimhall v. Brewster*, 835 N.E.2d 593, 597 (Ind. Ct. App. 2005), *trans. denied*. Because an appeal of a trial court's decision to dismiss pursuant to T.R. 41(E) is reviewed for an abuse of discretion, and such dismissal is with prejudice unless otherwise clearly stated, we conclude that we review a decision to dismiss with or without prejudice under the same abuse of discretion standard.

II. *Dismissal with Prejudice*

Chase makes two arguments in its attempt to show the trial court abused its discretion by dismissing its case with prejudice. First, Chase contends the dismissal with prejudice was contrary to law. Second, Chase contends the dismissal was inequitable because it, in effect, granted Bobis a windfall.

A. *Contrary to Law*

In support of its first argument, Chase claims its internal policy of placing all of its files on hold in September, 2010, was sufficient cause for its failure to prosecute. Also, Chase claims that because both parties stated they would be amenable to a dismissal without prejudice, the trial court abused its discretion by doing the opposite. We disagree.

Chase contends its failure to prosecute was based on claims of "robo-signing" that "shook the foreclosure world" in September 2010. (Appellant's Br. p. 3). A "robo-signed" mortgage would not allow Chase to qualify as a "holder" of that mortgage pursuant to I.C. § 26-1-1-201(20), and as a result, Chase would not be able to foreclose on real property pursuant to I.C. § 26-1-3.1-301. Therefore, despite having no reason to believe that Chase had engaged in "robo-signing," it placed all of its files on hold after September 2010 to review the legality of its foreclosure files. (Appellant's Br. p. 3).

While we recognize, as the trial court did, that placing the files on hold made it difficult for Chase's counsel to persistently pursue prosecution of its ongoing foreclosures, this argument seems misplaced. There was no binding legal reason requiring Chase to place its files on hold. Chase's decision to place its files on hold was entirely its own internal decision. Chase admits it is not seeking a review of the appropriateness of a dismissal in general; instead, it is only seeking a review of whether the trial court abused its discretion by ordering a dismissal with prejudice. For that reason, the "robo-signing" defense is not really a defense at all; it is simply a factor the trial court can use to determine how to dismiss the case.

Chase further claims that because both parties assented to a dismissal without prejudice, the trial court abused its discretion by dismissing the case with prejudice. While that certainly was a factor in the trial court's decision, we do not reweigh evidence when reviewing a trial court's decision under the abuse of discretion standard. *Mogg v. State*, 918

N.E.2d 750, 755 (Ind. Ct. App. 2009). Instead, we will affirm if there is evidence to support the trial court's decision. *See Olson*, 863 N.E.2d at 319.

Based on our review of the record, we conclude that there is evidence to support the trial court's decision in this case. T.R. 41(E) provides that 60 days of inaction is sufficient to qualify for a dismissal. Chase did not take action for 221 days between June 2010 and January 2011. This inaction was, admittedly, due to an internal policy that forbade prosecution of the foreclosures Chase was handling at the time, and at the hearing, Chase stated that it did not know when it would potentially resume prosecution of the case if it were dismissed without prejudice. The objective of T.R. 41(E) is "to ensure that plaintiffs will diligently pursue their claims," and to provide "an enforcement mechanism whereby a defendant, or the court, can force a recalcitrant plaintiff to push his case to resolution." *Benton v. Moore*, 622 N.E.2d 1002, 1006 (Ind. Ct. App. 1993), *reh'g denied*. Therefore, the trial court could reasonably have concluded that, pursuant to the objectives of T.R. 41(E), Chase's past inaction and its reluctance to commit to future prosecution were grounds for a default T.R. 41(E) dismissal with prejudice.

B. Equity

Chase also contends that the trial court abused its discretion by ignoring the tenets of equity by effectively granting Bobis a windfall. We disagree. The injury claimed by Chase was caused completely by its own actions. Chase freely admits that it did not prosecute this case because of an internal policy requiring all of its files to be placed on hold for document review, even though there was no legally binding reason to do so.

Bobis' file was on hold for seven months prior to the trial court's dismissal of the case. However, just because Chase froze an individual file did not mean Chase could not have taken action with the trial court to prosecute the case moving forward pursuant to T.R. 41. T.R. 41 allows a party sixty days to take even a minimal amount of action on the case. From the moment it responded to a discovery request on June 23, 2010 to the moment it filed a response to Bobis' motion on failure to prosecute pursuant to T.R. 41 on January 31, 2011, Chase had taken no action of any kind on this case for 221 days. Further, Chase freely admitted it had no inclination of when it would be able to resume prosecution of the case. A trial court's equity jurisdiction is evoked by "conscience, constant good faith, and reasonable diligence" to aid the party which has not "slept on its rights." *Gatlin Plumbing & Heating, Inc. v. Estate of Yeager*, 921 N.E.2d 18, 25 (Ind. Ct. App. 2010), *trans. denied* (citing *Engel v. Mathley*, 48 N.E.2d 463, 466 (Ind. Ct. App. 1943)). The idea of a party using its own failure to act as the basis for an equitable claim is the antithesis of what this court has recognized as a trial court's equity jurisdiction. Therefore, based on Chase's past voluntary inactivity and its lack of knowledge as to when it would resume its prosecution in the future, the trial court could reasonably have concluded that equity favored Bobis. As a result, we conclude that the trial court could reasonably have decided to dismiss the case with prejudice.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it dismissed this case with prejudice.

AFFIRMED.

MAY, J. concurs

NAJAM, J. concurs in part and concurs in result with separate opinion

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Appellee-Defendant	)	

NAJAM, Judge, concurring in part and concurring in result.

I concur with the majority's resolution of the issues but write separately on another issue raised by Chase but not addressed in the majority's discussion of the alleged windfall to Bobis, namely, Chase's contention that a dismissal with prejudice is inequitable because it "would allow [Bobis] to have the real property free and clear and would negate [Chase's] mortgage lien on the property." Appellant's Br. at 5. Chase's argument continues, "[b]y dismissing this matter with prejudice, the trial court gave [Bobis] a windfall of nearly two hundred thousand dollars by essentially erasing [Chase's] mortgage lien." Id. at 5-6. And in its reply brief, Chase reiterates that argument: "By dismissing the case with prejudice, [Chase] loses its mortgage on the property and has no way to recover the money Bobis

borrowed to buy the property." Reply Br. at 2. In essence, Chase argues that the court's dismissal with prejudice allows Bobis to repudiate the balance owed on his note, which is secured by the mortgage. I cannot agree.

The issue here is the preclusive effect of res judicata on these facts. We recently addressed a similar question in Afolabi v. Atlantic Mortgage & Investment Corp., 849 N.E.2d 1170 (2006). There, the mortgagor failed to make timely payments on his note. The mortgagee brought a foreclosure action based on that default and attempted to accelerate payment under the note. The trial court dismissed the mortgagee's action with prejudice for failure to prosecute. The mortgagee subsequently assigned the mortgage to another party, and the successor mortgagee brought a new foreclosure action based on the mortgagor's nonpayment after the first action was dismissed. The successor mortgagee also sought to accelerate payment. The mortgagor contended that the successor mortgagee's action was precluded by res judicata.

On appeal, we held that the successive action was not precluded. Specifically, we reasoned as follows:

> The doctrine of res judicata prevents the repetitious litigation of disputes that are essentially the same. The principle of res judicata is divided into two branches: claim preclusion and issue preclusion, also referred to as collateral estoppel. . . .
>
> Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. In order for a claim to be precluded under the doctrine of res judicata, the following four requirements must be satisfied: (1) the former judgment must have been rendered by a court

> of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. . . .
>
> * * *
>
> [A] comparison of the two foreclosure actions reveal[s] that the facts necessary to establish a default in the first foreclosure action are different from the facts necessary to establish a default in the second foreclosure action. The designated evidence establishes that the facts at issue in each foreclosure action differed because the possible dates of default differed. In the first foreclosure, the trial court had to determine whether there were sufficient facts to establish a default prior to November 30, 1995. Whereas, in the second foreclosure action, the trial court had to determine whether there was a default between September 19, 1998 and November 14, 2005, a question which was not at issue in the first foreclosure action.
>
> Accordingly, . . . we conclude that the claim preclusion part of the doctrine of res judicata does not bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim. Here, the subsequent and separate alleged defaults under the note created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action. . . .
>
> Issue preclusion, or collateral estoppel, bars the subsequent litigation of a fact or issue that was necessarily adjudicated in a former lawsuit if the same fact or issue is presented in the subsequent lawsuit. . . . However, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. . . .
>
> We find collateral estoppel to be inapplicable in the case at bar. Because the [first foreclosure] action was dismissed with prejudice pursuant to T.R. 41(E) for failure to prosecute the claim, no issue was actually litigated.

Id. at 1173, 1175-76 (emphases added; citations omitted).

Applying our holding in Afolabi here means that the trial court's dismissal with

prejudice will prevent Chase from seeking another foreclosure based on the facts alleged as grounds for default and foreclosure in this action. Under the doctrine of res judicata, Chase is precluded from relitigating a default and foreclosure based on those facts. See id.; see also Singleton v. Greymar Assocs., 882 So.2d 1004, 1007 (Fla. 2004).

That does not mean, however, that the balance Bobis owes on his note or that his mortgage to Chase has been eliminated. Going forward, Bobis has a continuing obligation and remains liable for his monthly payments and other obligations under the note and mortgage. If Bobis should fail to make future payments or otherwise to perform as agreed, that would constitute a subsequent and different default and, as such, would create a new and independent cause of action on the debt and to foreclose the mortgage. See Afolabi, 849 N.E.2d at 1175-76. The claim that was dismissed was a claim that, at that time, Bobis was in default and that Chase was entitled to accelerated payment of the balance owed and to foreclose on the mortgage. The Trial Rule 41(E) dismissal for failure to prosecute did not reach or litigate the unpaid principal balance remaining on Bobis' note or the Chase mortgage lien.

Thus, Chase's argument is incorrect. There is no windfall. Neither the debt nor the mortgage has been eliminated. Chase may not relitigate the alleged default and accelerate payment of future installments based on the same facts alleged in the dismissed complaint, but the note and mortgage remain in effect and the dismissal with prejudice here does not bar another action for a subsequent and different default. See Singleton, 882 So. 2d at 1007.

For these reasons, I concur in part and concur in result.