

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
TRIAL DIVISION-CIVIL

DOCKETED

MAR 29 2016

R. POSTELL  
COMMERCE PROGRAM

TRACY HUA and CHI-HUNG MU, : April Term 2015  
Plaintiffs, :  
v. : No. 2704  
LEHMAN XS TRUST MORTGAGE PASS :  
CERTIFICATES, SERIES 2007-7N, US BANK : COMMERCE PROGRAM  
NATIONAL ASSOCIATIONS AS TRUSTEE, :  
Defendant. : Control Number 15112262  
:

**ORDER**

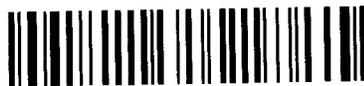
**AND NOW**, this 29th day March 2016, upon consideration of Defendant's Preliminary Objections to Plaintiffs' Complaint in opposition, no response in opposition and in accord with the attached Memorandum Opinion, it hereby is **ORDERED** that the Preliminary Objections are **Sustained** and the Complaint is dismissed with prejudice.

**BY THE COURT:**



**RAMY I. DJERASSI, J.**

Hua Etal Vs U S Bank Na-ORDRF



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	:	

**OPINION**

**DJERASSI, J.**

**March 29, 2016**

Presently before the court are defendant’s Lehman XS Trust Mortgage Pass Certificates, Series 2007-7N, US Bank National Associations as Trustee (“Defendant”) preliminary objections to plaintiffs’ complaint. For the reasons discussed below, the preliminary objections are sustained and the complaint is dismissed with prejudice.

Plaintiffs Tracy Hua and Chi-Hung Mu (“Plaintiffs”) are the record owners of a property identified as 550 Van Kirk Street (“property”) in Philadelphia, Pa.<sup>1</sup> Defendant is a national bank acting as trustee for a securitization trust.<sup>2</sup> On March 19, 2007, plaintiffs executed a promissory note with County Wide Bank, FSB. On the same date, plaintiffs executed a mortgage securing the repayment of the note.<sup>3</sup> On February 2, 2011, plaintiffs defaulted on mortgage payments securing the property. On June 20, 2011, while the mortgage payments were in default MERS executed a mortgage assignment on behalf of Country Wide Bank, FSB to US Bank NA as

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<sup>1</sup> Complaint ¶ 1.

<sup>2</sup> Complaint ¶2.

<sup>3</sup> Complaint ¶¶ 3-4.

trustee.<sup>4</sup> On February 29, 2012, plaintiff received a document entitled “Notice of Intention to Foreclose Mortgage.” The notice indicated that \$6,365.01 was due and owing and if payment was not made in 30 days defendant indicated it intended to exercise its rights to accelerate the mortgage payments. Plaintiffs allege that the notice provided was not a demand to immediately pay the unpaid principal balance plus interest. Plaintiffs interpreted this notice as a demand to pay the default balance.<sup>5</sup>

On April 24, 2012, defendant filed a judicial foreclosure action requesting that an *in-rem* judgment be entered against plaintiffs for all sums secured by the security agreement plus expenses and cost. On July 2, 2014, a judgment was entered against plaintiffs after a bench trial in the amount of \$134,815.70.<sup>6</sup> On January 6, 2015, plaintiffs filed a motion to strike the pleadings. Plaintiffs argued that defendant never provided plaintiffs with notice that the note and mortgage was accelerated and full payment plus interest was required to cure. On February 3, 2015, the motion were denied.

In April, 2015, plaintiffs instituted this action against defendant alleging breach of promissory note and mortgage based on defendant’s failure to provide plaintiffs with notice that the note and mortgage were accelerated and payment in full was required. Plaintiffs now request the court to void the judgment entered on July 2, 2014 and restore the status quo. Presently before the court are defendant’s preliminary objections to plaintiffs’ complaint for failing to conform to law or rule of court since plaintiffs’ claims have been fully addressed in the previous

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<sup>4</sup> Complaint ¶¶ 5, 7.

<sup>5</sup> Complaint ¶¶ 8-10.

<sup>6</sup> Complaint ¶¶ 11-12.

foreclosure matter between the same parties in this action and is barred by *res judicata* and legal insufficiency. No response was filed by plaintiffs.

### DISCUSSION

In general, *res judicata* is an affirmative defense which must be plead as new matter.<sup>7</sup> The plea of *res judicata*, however, may be raised by preliminary objection if the circumstances necessary to sustain it appears on the face of the complaint.<sup>8</sup> Here, *res judicata* may be raised by preliminary objection and considered by this court. Plaintiffs' complaint paragraphs 11 and 12 specifically allege that defendant filed a judicial foreclosure action requesting in an *in rem* judgement entered against plaintiffs and that a judgment was entered against plaintiffs after a bench trial. As such, the claim of *res judicata* is properly before the court for consideration.

Under Pennsylvania law, the doctrine of *res judicata* provides that a final valid judgment on the merits by a court of competent jurisdiction precludes any future action between the parties and their privies on the same cause of action.<sup>9</sup> A judgment is deemed final for purposes of *res judicata* or collateral estoppel unless or until it is reversed on appeal.<sup>10</sup> For *res judicata* to apply, the prior and present cases must share four "identities": (1) identity of the thing sued upon or for; (2) identity of the cause of action; (3) identity of the parties; and (4) identity of the capacity of

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<sup>7</sup> See Pa. R. Civ. P. 1030.

<sup>8</sup> *Bell v. Twp. of Spring Brook*, 30 A.3d 554, 558 (Pa. Comwlth. 2011) citing *Callery v. Municipal Authority of Blythe Township*, 432 Pa. 307, 243 A.2d 385 (1968); *Logan v. Patton*, 70 Pa.Cmwlth. 399, 453 A.2d 369 (1982).

<sup>9</sup> *Dempsey v. Cessna Aircraft Co.*, 439 Pa. Super. 172, 653 A.2d 679 (1995), *appeal denied*, 541 Pa. 631, 663 A.2d 684 (1995); *Malone v. West Marlborough Township Board of Supervisors*, 145 Pa.Cmwlth. 466, 603 A.2d 708 (1992).

<sup>10</sup> *Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872 (1996); *Philadelphia Electric Co. v. Pennsylvania Public Utility Commission*, 61 Pa.Cmwlth. 325, 433 A.2d 620 (1981).

the parties to sue or be sued.<sup>11</sup> Further, *res judicata* bars subsequent litigation not only of issues litigated in the first proceeding but also issues which should have been previously litigated, if they were part of the same cause of action.<sup>12</sup>

Here, all four identities for *res judicata* to apply are satisfied. There exists identity in the thing being sued upon. The subject of both actions, the promissory note and mortgage for the 550 Van Kirk Street property, the subsequent default and the propriety of the proceeding to foreclosure on the property, is the same. There is identity of the causes of action. The causes of action raised in the foreclosure action and the causes of action raised here in the present action are so inextricably intertwined that a different judgment in this action would operate to nullify or substantially impair rights or interests established by the judgment in the foreclosure action.<sup>13</sup> There is identity of the parties. The parties to both proceedings are identical. Lastly, there is identity of the quality or capacity of the parties suing or being sued in the foreclosure action and in this action; plaintiffs are the borrowers and defendant is the lender.

Based on the foregoing, the doctrine of *res judicata* applies. Plaintiffs had an opportunity to litigate the adequacy of notice in the foreclosure action. Despite the result, plaintiffs may not re-litigate the issue with the hope of receiving a different result. *Res judicata* applies and this action is dismissed.

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<sup>11</sup> *Mason v. Workmen's Compensation Appeal Board (Hilti Fastening Systems Corp.)*, 657 A.2d 1020 (Pa.Cmwlt.1995), *appeal denied*, 542 Pa. 679, 668 A.2d 1140 (1995).

<sup>12</sup> *Com ex rel. Bloomsburg State College v. Porter*, 148 Pa.Cmwlt. 188, 610 A.2d 516, 520 (1992), *appeal denied*, 534 Pa. 650, 627 A.2d 181 (1993).

<sup>13</sup> *See, Del Turco v. Peoples Home Savings Ass'n*, 478 A.2d 456, 463 (Pa. Super. 1984).

**CONCLUSION**

For the foregoing reasons, defendant's preliminary objections are sustained and the complaint is dismissed with prejudice.

**BY THE COURT:**

A handwritten signature in black ink, appearing to read 'Ramy I. Djerasi, J.', written in a cursive style.

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**RAMY I. DJERASSI, J.**