



Jun 06, 2018

Categories:

[Blockchain and Digital](#)

[Assets](#)

[Blogs](#)

[Publications](#)

Joinder of Claims in Commercial Foreclosure Litigation is a Choice

A prior blog post analyzed *Green Tree Servicing v. Asterino-Starcher, et al.*, 2018–Ohio–977 (Franklin Cty. App., March 15, 2018), which advises, in part, “[a] foreclosure proceeding is a two-step process involving, first, the enforcement of a debt obligation, and, second, the creditor’s right to collect against the security given by the borrower for that debt. . . . There is reason to distinguish the action on the note from the ensuing action against the associated collateral. The first claim involves only the maker of the note and the person entitled to enforce it. The second joins all those with an interest in the mortgaged property.” This article discusses what happens if a secured lender believes that quote and tries to collect the mortgage debt through two separate lawsuits.

Consider a typical commercial mortgage loan where potential sources of recovery are the borrower, the collateral and guarantor(s). Usually, efforts to recover from all three sources are joined in one action that asserts both the claims described above: collection of the debt from obligated entities; and sale of the collateral. This is permitted by Ohio’s civil rules that permits a plaintiff to join certain claims in one lawsuit. Ohio Rules of Civ. P. 18(B) (“Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion [the debt claim], the two claims may be joined in a single action [the foreclosure claim]”) and 20(A) (“All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.”)

Planning collection litigation requires the usual considerations of venue^[1] and personal jurisdiction.^[2] Convenience for plaintiff’s counsel and a court’s reputation for expertise and speed are also relevant. So, sometimes, litigation on the debt is separated from litigation against the collateral.^[3] This scenario arose in the litigation

concerning a \$8,600,000 dispute between: (i) MultiBank 2009-1CML-ADC Venture LLC ("Lender"); and (ii) South Bass Island Resort and several guarantors ("Defendants"). In that battle Lender brought two "companion" cases: (a) a case in Erie County on the promissory note and guarantees; and (b) a foreclosure case in Ottawa County where the collateral is located.

Lender's debt litigation in Erie County was slow and painful. Lender obtained summary judgment on the debt obligation, but at least one guarantor, a doctor, made fraud counterclaims and appealed the trial court's decision against him. *MultiBank 2009-1CML-ADC Venture LLC v. South Bass Island Resort Limited*, 2017-Ohio-344, 77 N.E.3d 565 (Erie Cty. App. Jan. 27, 2017).[\[4\]](#)

During the Erie County slog, Lender decided to proceed with the collateral litigation in Ottawa County. Lender asserted that the Erie County court had determined that the debt obligations had been breached and so the mortgage could be foreclosed. In response, Defendants asserted that:

- the Erie County debt related decision was not a final order that could be used in the collateral litigation because the guarantors' liability was undecided[\[5\]](#); and
- issues related to the debt were already joined in Erie County and could not be asserted in the Ottawa County litigation. It could be argued that the "jurisdictional priority rule" prevented the Ottawa County court from considering issues related to debt defaults. See, *State ex. rel. Consortium for Economic and Community Development for Hough Ward 7 v. McMonagle*, 2016-Ohio-4704, 68 N.E.3d 125 (Cuyahoga Cty. App. 2016) (quoting the Ohio Supreme Court "the principles of the jurisdictional priority rule are also well established. This rule provides that 'as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'"

Defendants eventually lost in the trial court. The Ottawa County trial court found defaults in the debt obligations and granted summary

judgment to Lender. Defendants then appealed again.

In their third trip to the Sixth Appellate District, Defendants asserted that the Ottawa County court could not issue a decision that the debt obligations had been breached (thus permitting foreclosure of the mortgage). Defendants asserted “[Lender]’s claims for breach of the loan agreement and breach of the mortgage agreement arose out of the same transaction, and *[defendants] note that, in the foreclosure action, [Lender] was not seeking foreclosure based upon a judgment lien from another county, but rather upon breach of the loan agreement. Thus, [Defendants] contend that because [Lender] elected to litigate its claims separately, in two different courts, [Lender] . . . is prevented from seeking additional relief or recovery in a second action based upon the same transaction involving the same parties.*” (italics added)[6]

Defendants lost again. The *MultiBank 2009-1CML-ADC Venture LLC v. South Bass Island Resort*, 2018-Ohio-128 (Ottawa Cty. App. Jan. 12, 2018) appellate decision agreed with the reasoning of the *Green Tree Servicing* case, quoted above. Rejecting Defendants’ argument, the court said: “[a] foreclosure action is a separate and distinct action from a complaint on a note, res judicata and/or collateral estoppel does not apply, and a plaintiff need not include both in a single complaint in order to preserve all issues.”

In sum, it seems that noteholder/mortgagees have the needed procedural protections to safely file two separate cases to collect a single commercial debt (i) from the borrower and guarantors; and (ii) through sale of the collateral.

[1] Venue of the mortgage foreclosure claim is in the county where some or all the property is located. 69 O. Jur.3d. Mortgages section 334 citing Ohio R. Civ. P. 3(B)(5). The same is true when lien property is sold to foreclose a judgment lien.

[2] Subject matter jurisdiction is always appropriate in Ohio’s courts of general jurisdiction (a Court of Common Pleas) and in federal court if you have either federal question or diversity between the Plaintiff(s) and Defendants.

[3] This may occur when no single venue has personal jurisdiction over all obligated entities. This particular problem can

nearly always be avoided by proper loan document drafting since an obligated entity can consent to personal jurisdiction in the county where the collateral is located. This issue is always considered by Frost Brown Todd's commercial lawyers when they draft loan documents.

[4] Erie County and Ottawa County are both in Ohio's Sixth Appellate District.

[5] This position was initially successful. See, *Multibank 2009-1 CML-ADC Venture, LLC v. South Bass Island Resort, Ltd.*, 2014-Ohio-4513 (Ottawa Cty. App. Oct. 10, 2014).

[6] The appellate court's phrase that I have italicized shows that any victory by Defendants using this argument could have been temporary. Once it was final, Lender could have transferred the Erie County judgment to Ottawa County and then foreclosed the resulting judgment lien on the mortgaged collateral without the need for an Ottawa County determination that Defendants breached their debt obligations making the mortgage subject to foreclosure.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.