

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

**THE BANK OF NEW YORK AS TRUSTEE
FOR POPULAR FINANCIAL SERVICES
MORTGAGE/PASS THROUGH
CERTIFICATE SERIES #2006-D,**

Plaintiff/Appellant,

vs.

No. 34,426

No. D-117-CV-2008-00139

**JOSEPH A. ROMERO AND MARY
ROMERO A/K/A MARY O. ROMERO
A/K/A MARIA ROMERO,**

Defendants/Appellees.

Appeal from the First Judicial District Court, Rio Arriba County
Honorable Sarah M. Singleton, District Court Judge

APPELLANT'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

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RESPONSE TO THE ROMEROS' STATEMENT OF THE CASE

The Romeros' "key" facts regarding the proceedings leading up to and including the New Mexico Supreme Court's decision in *Bank of N.Y. v. Romero*, 2014-NMSC-007, 320 P.3d 1 ("*Romero*") are incomplete. During the February 2009 trial, the district court admitted: (1) oral testimony of BONY as Trustee's witnesses, *Id.*, ¶ 9; (2) evidence that BONY as Trustee had physical possession of the Note and Mortgage at the time the complaint was filed, *Id.*, ¶ 8; and (3) evidence that the Note had been transferred to BONY as Trustee, who was the holder of the Note. *Id.*, ¶¶ 11, 30. The district court then ruled in favor of BONY as Trustee holding that the Romeros were in default and that BONY as Trustee had standing. *Id.*, ¶ 11; [2 RP 321, 323, 325-327].

The Supreme Court, only after excluding the evidence admitted by the trial court, ruled that "the Bank's standing to foreclose the Romeros' mortgage was not supported by substantial evidence." *Romero*, ¶ 38. The Court never stated definitively that BONY as Trustee lacked standing or that it could under no factual circumstances prove standing. Throughout their Answer Brief, the Romeros repeatedly refer to the Supreme Court's "final determination" and "adjudication" of the lack of standing. *See* Answer Brief, pp. 10, 11, 18, 21, 22, 24, 25 and 33. The Romeros' key facts do not, however, identify where the Supreme Court made

such a “final determination,” because there was no such final determination. The ruling made by the Supreme Court was simply that the trial court’s finding and conclusion that there was standing to foreclose was not supported by sufficient admissible evidence.

ARGUMENT

The issues before this Court are whether the district court’s dismissal “with prejudice” and the additional statement in its order that BONY as Trustee “is precluded from raising in the future the issue that it is entitled to enforce the Romeros’ note and foreclose on the Romeros’ mortgage” were in error. [4 RP 930-932]. BONY as Trustee does not disagree with the Romeros regarding what is typically intended to be conveyed by the phrases “with prejudice” and “without prejudice.”

The district court, however, had no authority to dismiss the foreclosure with prejudice. After ruling that much of the evidence that was admitted by the district court and relied upon during trial was inadmissible, the Supreme Court concluded that the remaining evidence was insufficient to establish that BONY as Trustee had standing to pursue the foreclosure action. With the Supreme Court’s ruling regarding standing, the district court lost jurisdiction over the merits of the matter and was effectively stripped of the power to do anything other than vacate the foreclosure judgment and dismiss the case without prejudice. The subsequent

mandate directed the district court to simply dismiss the case. By dismissing the case (1) with prejudice and (2) specifically prohibiting BONY as Trustee from pursuing another action, the district court took the mandate two steps further than intended because no such final determination had been made by the Supreme Court, either in its opinion or its mandate.

Here, no affirmative finding has ever been made by a finder of fact utilizing the proper evidentiary standard to justify a dismissal with prejudice. A dismissal for lack of standing, when the defect is curable, is not an adjudication on the merits sufficient to invoke the doctrine of either res judicata or collateral estoppel and any dismissal should have been without prejudice.

Moreover, the preclusive effect of a judgment is not determined by the court in the first case. The first court cannot dictate to another court the preclusive consequences of its judgment. Res judicata and collateral estoppel would apply to bar BONY as Trustee's claims in a second action only if the Romeros plead and carry their burden of proving all elements of the defense in a second action.

The change in the law articulated by the Supreme Court in 2014, but applied to the trial that occurred in 2009, precludes the application of collateral estoppel to BONY as Trustee's foreclosure action. BONY as Trustee presented and the district court admitted evidence at the 2009 trial that met the standard that was then

applicable. BONY as Trustee has never had the opportunity to present evidence to meet the standard articulated by the Supreme Court in *Romero*.

The language used in the *Romero* opinion and in the mandate to the district court shows that the Supreme Court recognized there might be additional evidence at trial that was not admitted in the trial below that could establish BONY as Trustee's standing to foreclose, and that further action by BONY as Trustee was, indeed, contemplated by the Supreme Court. The district court's December 10, 2014, Order Granting Motion to Dismiss and Dismissing Foreclosure with Prejudice should, therefore, be set aside.

I. THE DISTRICT COURT LACKED JURISDICTION TO RULE ON THE MERITS OF THE CASE AND ITS DISMISSAL WITH PREJUDICE WAS IN ERROR.

The Romeros failed to address the argument that the lack of jurisdiction over this matter precluded a court from ruling on the merits of BONY as Trustee's claims. Standing is a jurisdictional prerequisite. *Romero*, ¶ 17. Therefore, a party's standing to bring a claim is distinct from the merits of the case and should be considered separately. *St. Martin's Episcopal Church v. Prudential-Bache Secs., Inc.*, 613 So.2d 108, 110 n. 4 (Fla. 4th DCA 1993).

Once the Supreme Court concluded that BONY as Trustee did not present sufficient admissible evidence to meet the standard for proving it had standing to foreclose, no court had jurisdiction to rule on the merits of the case, to dismiss the

case with prejudice or to proclaim that BONY as Trustee was barred from filing a second lawsuit. *City of Las Vegas v. Oman*, 1990-NMCA-069, ¶ 33, 796 P.2d 1191 (when a judgment is one of dismissal for “lack of jurisdiction, improper venue, or for nonjoinder or misjoinder of parties,” a second action by the plaintiff against the defendant is not barred) (citations omitted). *See also, Hope v. Comty. Ditch Ass’n v. New Mexico State Engineer*, 2005-NMCA-002, ¶ 10, 105 P.3d 314 (a dismissal for lack of standing is not a decision on the merits and dismissal with prejudice was incorrect); *Perez v. Brubaker*, 1983-NMCA-029, ¶ 11, 660 P.2d 619 (same); *Henry v. Daniel*, 2004-NMCA-016, ¶ 13, 87 P.3d 541 (setting aside the court’s dismissal with prejudice, because the court lacked personal jurisdiction over the party).

The Supreme Court’s decision in *Romero* regarding BONY as Trustee’s standing resulted from the exclusion of evidence admitted at trial and was not an ultimate determination that BONY as Trustee did not have standing. This is consistent with the fact that the Supreme Court acts as a court of review, “not [as] a forum for the trial of causes in the first instance.” *Thurman v. Grimes*, 1931-NMSC-035, ¶ 9, 1 P. 972. *See also, Phoenix Funding v. Aurora*, No. 33,211, 2015 WL 5020997, *6 (N.M. Ct. App. Aug. 24, 2015) (“We are not deciding whether Aurora was the holder of [the note] when it initiated foreclosure proceedings against Hood. The issue before us is whether Aurora presented evidence sufficient

to establish that it was the holder of the note at the time the complaint for foreclosure was filed [...].”); *Padilla v. Frito-Lay*, 1981-NMCA-154, ¶ 12, 639 P.2d 1208 (a reviewing court is not a trier of fact); *Clayton v. Trotter*, 1990-NMCA-078, ¶ 4, 796 P.2d 262 (reviewing courts “see if legal error that would change the result occurred,” but cannot “retry the case”); *Scott v. Jordan*, 1983-NMCA-022, ¶ 19, 661 P.2d 59 (an appellate court cannot make findings of its own). Because neither the merits of the jurisdictional standing issue, nor the merits of BONY as Trustee’s foreclosure claim have been decided by any court acting as trier of fact applying the proper evidentiary standard, the district court’s dismissal with prejudice was erroneous and should be set aside.

II. A DISMISSAL BASED ON LACK OF STANDING, WHERE THE DEFECT IS CURABLE, SHOULD BE WITHOUT PREJUDICE.

The Romeros contend that dismissals for lack of standing should be dismissals with prejudice. Answer Brief, p. 30. While a prior dismissal on the grounds that the party permanently lacks standing can, under some circumstances, preclude that party from relitigating the standing issue, it does not preclude a second action on the same claim if the standing problem can be overcome. *Fed. Treasury Enter. Sojuzplodoimportv. Spirits Int’l B.V.*, 41 F.Supp.3d 395, 405-06 (S.D.N.Y. 2014) (“because lack of standing is ‘curable,’ FTE may re-assert its claims because it has alleged new facts to cure its standing defect”); *Cheron*

Holdings LLC v. Fernandes, No. A-2957-12T3, 2014 WL 1464556, at *6 (N.J. Super. Ct. App. Div. Apr. 16, 2014) (a plaintiff that lacked standing because it did not possess the note before filing may, after a dismissal without prejudice, re-file once it obtains possession); *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332 (Fed.Cir.2009) (dismissal for lack of standing should be without prejudice, particularly when the defect in standing is curable).

The cases cited by the Romeros are consistent with the “incurable defect” line of cases. For example, in *THI of New Mexico at Las Cruces, LLC v. New Mexico Human Services Department*, No. 31,588, 2013 WL 6640490 (N.M. Ct. App. Nov. 25, 2013), the plaintiff attempted to assert a claim on behalf one of its patients, who was deceased. The claim was rejected on the grounds the plaintiff was not the proper party to represent the patient’s interests. The standing defect was incurable, due to the patient’s death, and the case was dismissed with prejudice. *Id.*, at *2.

In *San Juan Agric. Water Users Assn. v. KNME TV*, 2010-NMCA-012, 227 P.3d 612, it was determined the plaintiff could not cure a standing defect, because an undisclosed principal did not and could not meet the statutory requirements under the statute to bring an actionable claim under the Inspection of Public Records Act. Similarly, in *Kimbrell v. Kimbrell*, a parent attempted to sue the guardian ad litem for his child on behalf of his child. The court determined that

upon the appointment of the guardian ad litem, a judicial determination had already been made that the parent was incapable of acting in the best interests of the child, such that he was absolutely precluded from bringing a lawsuit on the child's behalf. 2014-NMSC-027, ¶ 18, 331 P.3d 915

The holding in *Trujillo v. Acequia de Chamisal*, 1968-NMCA-015, 439 P.2d 557, is also consistent with the view that an incurable defect in standing can, in fact, bar a second suit. There, this Court recognized that a dismissal for lack of standing is not a decision on the merits. The facts in the first case “were put in issue but not actually adjudicated either expressly or impliedly [and] [t]he effect of that dismissal was for want of capacity to sue.” *Id.*, ¶ 12. The plaintiff in the first suit asserted trespass claims mistakenly believing he owned the land. During the earlier litigation, it was determined conclusively that the deed upon which he based his claim was defective and could never support a claim of ownership. Therefore, the dismissal was with prejudice as against the original plaintiff for lack of standing. The dismissal would not, however, bar the true owners of the land from pursuing another lawsuit against the same defendants. *Id.* Although not specifically articulated in the opinion, this conclusion was likely based on the fact that the first plaintiff indisputably could never prove standing, because he did not own the property at the time of the alleged trespass. In other words, his inability to cure the standing defect, which was obvious, would prevent him from filing a

second cause of action based on the same claim, but would not bar the true owners of the property.

In *Cutler v. Hayes*, the court ruled that the principles of collateral estoppel “may” apply to standing determinations. 818 F.2d 879, 888-890 (U.S. App. D.C. 1987). In that case, it had been “conclusively resolved” in a prior proceeding that the plaintiffs had standing to pursue the claims. *Id.*, at 887. Unlike the affirmative determination of standing found in *Cutler* in the first suit, there was no conclusive negative determination that BONY as Trustee could never establish standing to pursue foreclosure.

Gupta v. Thai Airways Intern., Ltd., 487 F.3d 759 (9th Cir. 2007), is distinguishable for the same reason. In that case, a state court had already conclusively determined that Thai Airways was immune from suit under the Foreign Sovereign Immunities Act. When the plaintiff attempted to refile the case in federal court, the court determined that the prior dismissal was barred by res judicata. Again, that case involved a conclusive determination of an issue (sovereignty) and is distinguishable from the proceedings in this case.

The Romeros also rely on *Bank of Am., N.A. v. Kuchta*, 21 N.E.3d 1040 (Ohio 2014), which does not stand for the proposition for which it is cited, *i.e.*, that a dismissal for lack of standing has preclusive effect on a second action. In *Kuchta*, Bank of America obtained a foreclosure judgment against the

borrowers. The borrowers did not timely appeal the judgment, but later attempted to obtain relief from the judgment under Rule 60 on the grounds the judgment was void because the bank lacked standing. Res judicata applied in that case because the issue of standing had been decided by the lower court and the borrowers failed to timely appeal it.

The Supreme Court opinion in *Romero* acknowledged that had the district court not applied the wrong evidentiary standard, there might have been other evidence that BONY as Trustee could have tendered at trial to demonstrate standing, such as the Pooling and Servicing Agreement and other business records indicating transfer of the note, *Romero*, ¶ 3, or evidence clarifying the indorsements, *Id.*, at ¶ 26. The Romeros accuse BONY as Trustee of making fallacious and specious arguments regarding the factual hypotheticals presented in the Brief-in-Chief. However, BONY as Trustee is not affirmatively stating that all the possible hypotheticals did in fact occur in this case. Rather, BONY as Trustee is merely using them as examples to support its argument that if any of the proposed hypotheticals did in fact occur, the standing defect would be curable, thereby distinguishing this case from incurable jurisdictional defect cases discussed above. While it would be proper to dismiss some cases with prejudice for incurable defects in the interest of judicial economy and finality, it was improper and premature for the district court to dismiss BONY as Trustee from ever filing a

second action to enforce the note and mortgage when BONY as Trustee has not yet had a full and fair opportunity to present evidence to support its standing.

III. THE DISTRICT COURT EXCEEDED ITS AUTHORITY BY ATTEMPTING TO DICTATE THE PRECLUSIVE EFFECTS OF THE DISMISSAL TO A SUBSEQUENT COURT.

In the Order dismissing the foreclosure action, the district court added that the “dismissal for lack of standing bars another suit by the entity that was found to have no standing.” [4 RP 930]. Whether or not res judicata or collateral estoppel would apply under the circumstances presented in this case should be left to the district court judge to whom the second case is assigned. *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2375 (2011) (“A court usually does not get to dictate the preclusion consequences of its own judgment.”); *Medellin v. Texas*, 128 S.Ct. 1346, 1361 n.9 (2008); *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 210, n.5 (C.A.3d 2003) (whether a court’s findings have a preclusive effect only becomes ripe for determination if and when the findings and conclusions are used in a later proceeding); *Covanta Onondaga Ltd. v. Onondaga Cty. Resource Recovery Agency*, 318 F.3d 392, 396-398 (C.A.2d 2003) (issue preclusion ordinarily is enforced by awaiting a determination in the second action; the court that entered the first judgment cannot dictate preclusion consequences to another court). Not only did the district court improperly dismiss the case “with prejudice,” but it exceeded its authority in ruling that BONY as Trustee “is

precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage." [4 RP 930-932].

IV. NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL APPLIES TO BAR BONY AS TRUSTEE FROM FILING A SECOND FORECLOSURE ACTION AGAINST THE ROMEROS.

Res judicata (claim preclusion) is inapplicable, because the rule requires, among other things, that there be an adverse final decision on the merits in the first suit. *First State Bank v. Muzio*, 1983-NMSC-057, ¶ 7, 666 P.2d 777. As discussed above, neither the merits of the jurisdiction question regarding BONY as Trustee's standing nor the merits of the foreclosure complaint were decided by the Supreme Court. Therefore, the merits of the case have not been decided with finality, and the district court's dismissal with prejudice and statement that BONY as Trustee is precluded from bringing another foreclosure action was improper.

The Romeros acknowledge that for res judicata to apply, the plaintiff must have had a full and fair opportunity to litigate the issue. Answer Brief, p. 23. *See also, Kirby v. Guardian Life Insurance Company of America*, 2010-NMSC-014, ¶ 61, 231 P.3d 87. BONY as Trustee did not have a full and fair opportunity to litigate the standing issue. If Judge Hall had sustained the Romeros' objections to evidence at the time of trial, BONY as Trustee would have had an opportunity at that time to cure any evidentiary deficiencies. The district court, instead, admitted

the evidence and found it sufficient to establish standing. BONY as Trustee was not on notice that additional evidence was required.

When a trial court errs by admitting evidence, as here, and the ultimate decision was based on improperly admitted evidence, the case must be retried. *Ortega v. Cach, LLC*, 396 S.W.3d 622, 633 (Tex Ct. App. 2013). After an appeal, a case must be returned to the point where the error occurred. *State ex rel. Bujac v. Dist. Court of Second Judicial Dist. for Bernalillo County*, 1922-NMSC-023, ¶ 51, 205 P. 716. Since the Supreme Court ordered the foreclosure action to be dismissed for errors that were made during trial, BONY as Trustee's due process rights can only be preserved if it is given an opportunity to produce evidence to comply with the standing requirements articulated by the Supreme Court in *Romero*. When a judgment is reversed on the grounds that the findings of fact on which such judgment is based were not justified by the evidence, a new trial must inevitably follow. *Id.*, ¶ 39, quoting *Kellogg v. King*, 46 P. 166 (Cal. 1896).

Collateral estoppel (issue preclusion) would similarly not bar a new claim by BONY as Trustee, because it requires that the precluded issue to have been "actually litigated" and "necessarily determined" in the first suit. *International Paper Co. v. Farrar*, 1985-NMSC-046, ¶ 10, 700 P.2d 642. As stated, the Supreme Court did not conduct a trial or act as the fact finder in this matter and,

instead, excluded evidence admitted at trial. There was no conclusive or ultimate determination that BONY as trustee did not in fact have standing.

Collateral estoppel should not apply when there are facts or events “which may alter the legal rights or relations of the litigants.” *Bellet v. Grynberg*, 1992-NMSC-063, ¶14, 845 P.2d 784; *See also, State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, ¶ 5, 637 P.2d 684. This reasoning applies when there has been a change in the law. *Wolford v. Lasater*, 1999-NMCA-024, ¶ 13, 973 P.2d 866 (“change in law can affect issue preclusive effect of judgment”); *Town of Atrisco v. Monohan*, 1952-NMSC-011, ¶ 21, 240 P.2d 216 (same). The Supreme Court’s ruling in *Romero* substantially changed the evidence a party needs to marshal in order to prove standing. *See Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, 356 P.3d 1102 (recognizing the “recent” decision of the Supreme Court in *Romero* that “where a plaintiff has not established the right to enforce the note, it cannot foreclose the mortgage, even if evidence shows that the mortgage was assigned to the plaintiff.”). This Court recognized that *Romero* put lenders “on notice that it must be able to show, through properly indorsed and dated documentation, that it is the owner of both the note and the mortgage on the date of filing a foreclosure action.” *Deutsche Bank Nat. Trust Co. v. Beneficial New Mexico, Inc.*, 2014-NMSC-090, 335 P.3d 217, *cert. granted sub nom. Deutsche Bank v. Johnston*, 2014-NMCERT-008, 334 P.3d 425.

There has been an upheaval in the area of foreclosure law since the *Romero* decision. The standard articulated by the Supreme Court has prompted considerable additional litigation in foreclosure cases at both the trial and appellate court level. Subsequent to *Romero*, lenders are on notice of the proof that must be submitted to establish standing, beyond merely showing possession of the note, or an assignment of mortgage, and then shifting the burden to the borrower defendant to come forward with evidence to counter the lender's assertion of standing. BONY as Trustee was not on notice in 2009 that it was required to submit evidence different than it did at trial, which evidence was admitted and accepted by the trial court at that time. It should not be denied the opportunity to do so in a subsequent lawsuit.

V. THE SUPREME COURT CONTEMPLATED FURTHER ACTION BY BONY AS TRUSTEE AND THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE, THEREFORE, WAS NOT IN ACCORDANCE WITH THE SUPREME COURT'S MANDATE.

The Romeros argue that the Supreme Court "clearly" contemplated the case would be dismissed with prejudice. Answer Brief, p. 19. The Supreme Court, however, remanded the case to the district court with instructions only "to vacate its foreclosure judgment and to dismiss the Bank of New York's foreclosure action for lack of standing." *Romero*, ¶ 1. The Court could have easily included the phrase "with prejudice" had that been what it "clearly" intended. The Supreme

Court specifically contemplated there would be future attempts at foreclosure against the Romeros as reflected in its reference to “whichever institution may be able to establish standing to foreclose the Romero home.” [4 RP 65]; *Romero*, ¶ 39. Had the Supreme Court intended to exclude BONY as Trustee from the potential institutions that may pursue a future foreclosure action, it could have stated “any institution, other than BONY as Trustee,” but it did not. The lack of limiting language from the Supreme Court is telling and convincing.

The Romeros further argue that the Supreme Court “definitively decided that the Bank of New York as Trustee would not be allowed to relitigate [the standing] issue,” relying on the Supreme Court’s statement that the “issue of HLPA violation is now moot in this case.” Answer Brief, p. 20. However, the HLPA violation was moot because the Romeros did not appeal the dismissal of their HLPA counterclaim and no alleged HLPA claim could be the basis of any recovery by the Romeros.

To support the Romeros’ interpretation, the Supreme Court’s statement would need to be rewritten. Instead of declaring that the “issue of HLPA violation is now moot *in this case*,” the Supreme Court would need to drop the “in this case” language for it to have broader, future application. Likewise, if the Supreme Court meant there to be a factual determination in the Opinion, it could have easily said so, such as, “we *find* that BONY did not have standing.” Instead, the opinion


throughout never says the Supreme Court was making findings but that the Supreme Court was *holding* that there was insufficient evidence of standing presented. The Supreme Court analyzed the HLPA issues as a defense precisely because those factual determinations would be relevant in “future attempts [...] to foreclose on the Romeros’ home.” *Romero*, ¶ 39.

CONCLUSION

The parties agree that the statute of limitation issue need not be decided at this time. As such, the only issues for this court to determine are if the district court erred in dismissing the case with prejudice and proclaiming that BONY as Trustee was precluded from pursuing a second foreclosure action against the Romeros. For the foregoing reasons, BONY as Trustee respectfully requests the district court’s decision be reversed.

Respectfully submitted,

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on this 3rd day of December, 2015.


Thomas L. Johnson