STATE OF MICHIGAN

COURT OF APPEALS

D. HAYWOOD & ASSOCIATES, P.C.,

Plaintiff-Appellant,

v

PATRICIA A. FOX,

Defendant,

and

RICHARD DELENE, NANCY DELENE, DAVID DELENE, SUSAN TOLLEFSON, and MFC FIRST NATIONAL BANK a/k/a WELLS FARGO BANK MICHIGAN, N.A.,

Defendants-Appellees.

UNPUBLISHED
October 21, 2004

No. 250574
Baraga Circuit Court
LC No. 00-004832-CH

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Plaintiff appeals by leave a trial court's order dismissing its action to quiet title to parcels of land located in Baraga County. We affirm.

Plaintiff argues that the trial court erred in interpreting an order of the Eaton Circuit Court to stay the sale of the subject property, in failing to apply the doctrines of collateral estoppel and res judicata to bar defendants' improper notice defense, and in finding that plaintiff failed to comply with the statutory requirements of MCL 600.6052.

Plaintiff argues that a consent judgment entered in Eaton County precluded defendants from arguing that plaintiff failed to comply with MCL 600.6052. The consent order was entered after a motion for an emergency hearing and request to stay the sheriff's sale was filed by Richard and Nancy Delene. The consent order states as follows:

> IT IS ORDERED that the sale upon execution of judgment of the property referenced in this matter is hereby stayed for 10 days. It is further ORDERED that the defendant waives all notice, publication, technical and other procedural

> objections to the sale which may occur in 10 days pending stipulation by the parties or further orders by this Court. [Eaton County order, 03/03/98].

The trial court found that the language in the order referred only to the raising of objections over the ten-day adjournment of the sale. We agree. The first sentence of the order states that the sale is going to be adjourned and stayed for ten days. The second sentence addresses the time frame for raising objections and contains the provision, "which may occur in ten days." We believe this second sentence clearly references the length of the stay, and thus ties the waiver of objections to that stay.

At the bench trial on the action to quiet title, when defendants argued lack of compliance with MCL 600.6052, plaintiff failed to argue that this defense was precluded by the doctrines of collateral estoppel or res judicata However, as plaintiff did argue in its motion for reconsideration that both doctrines precluded defendants from using non-compliance as a defense, we will review the issue. Whether res judicata or collateral estoppel bars a claim is reviewed de novo. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

Plaintiff argues that defendant's non-compliance defense is precluded because they failed to raise it when they sought to stay the order in the Eaton Circuit Court. Collateral estoppel will preclude an issue in a subsequent proceeding if a final judgment was entered in a prior proceeding between the same parties or their privy and the issue was actually litigated and necessarily determined. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). "A question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). Collateral estoppel does not apply to consent judgments because "nothing is adjudicated between . . . parties to a consent judgment." *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 103; 380 NW2d 60 (1985). In this case, the Eaton County order was a stipulated order between the parties and not decided by the court. Therefore, collateral estoppel would not apply.

We also reject plaintiff's assertion that the action is barred by res judicata. Res judicata seeks to bar multiple suits litigating the same cause of action. *Adair, supra* at 121. "The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* "To be accorded the conclusive effect of res judicata, 'the judgment must ordinarily be a firm and stable one, the "last word" of the rendering court.' " *Kosiel v Arrow Liquors Corp*, 446 Mich 374, 381; 521 NW2d 531 (1994), quoting 1 Restatement Judgments, 2d, § 13, comment a, p 132. Michigan courts have applied the doctrine of res judicata broadly, prohibiting "not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

In this case, the order plaintiff wishes to have preclusive effect was not a final judgment. Black's Law Dictionary defines a final judgment as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy." Black's Law Dictionary (6th ed). This comports with MCR 7.202(7)(i), which defines a final order in a civil case to be "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." The order itself states that it may be modified by stipulations by the parties or

further orders of the court. Additionally, the order does not settle the rights of the parties and it does not dispose of any issues, except stating that the sale is adjourned. The stay order is clearly not "the last word of the rendering court." *Kosiel, supra* at 381 (concluding that an order that included the phrase "until the further order of the Department" was not final for res judicata purposes). Therefore, because the Eaton County order was not a final judgment on the merits, the trial court did not err in finding that res judicata did not bar defendants from arguing non-compliance with MCL 600.6052.

Plaintiff finally claims that the trial court erred in determining plaintiff failed to comply with the requirements of MCL 600.6052. We disagree. Questions of statutory interpretation are questions of law, which are reviewed de novo. *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). If the language of a statute is clear and unambiguous, courts should refer to the plain meaning of the statute and enforce the statute as written. *Id.* at 63.

MCL 600.6052(1) requires notice to be posted in three public places in the city or township where the real estate is to be sold, and, if the real estate is located in a township or city other than where it is being sold, in three places in the township or city where the real estate is located. The sale of the real estate took place in L'Anse Township and the land was located in Baraga Township, yet plaintiff only had notice posted in three areas; one in Baraga Township, one in L'Anse Township, and one in Covington Township.

MCL 600.6052(2) also states that notice shall be published in a newspaper in the county where the land is located, if that county has a newspaper. The use of the word "shall" in this provision denotes a mandatory action. *Roberts, supra* at 65. Baraga County does have a newspaper, the *L'Anse Sentinel*. Therefore, the statute mandates that the notice of sale be published in that newspaper. However, plaintiff published the notice not in the *L'Anse Sentinel* but in *The Mining Journal*, which is published in Marquette County. Therefore, plaintiff also did not comply with this section of the statute.

Additionally, while plaintiff did publish notice of the adjournment of the sale in the same newspaper as the original notice, the original notice was not published in compliance with MCL 600.6052(2). Thus, plaintiff failed to comply with MCL 600.6052(3) as well. Finally, plaintiff argues that failure of an officer to post valid notice of the sale does not invalidate the sale of the property to a bona fide purchaser without notice of the omission. See MCR 600.6054(3). However, plaintiff did have notice of the omission by the sheriff when it received the affidavit of posting returned to it listing only three public places where the notice was posted, when the statute required six. Therefore, the trial court did not err when it dismissed plaintiff's action for non-compliance with MCL 600.6052.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey