

STATE OF MICHIGAN
COURT OF APPEALS

RUTH E. CROUCH and JUDY L. WOLLET,

Plaintiffs-Appellants,

v

DAVID L. WOLF, D.O., P.C.,

Defendant-Appellee.

UNPUBLISHED

March 3, 2009

No. 280388

Jackson Circuit Court

LC No. 07-001360-CH

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

Plaintiffs Ruth Crouch and Judy Wollet appeal as of right from the circuit court's order dismissing their case. We decide this appeal has been decided without oral argument pursuant to MCR 7.214(E), and we affirm.

I. Basic Facts And Procedural History

Crouch and Wollet signed a note and mortgage in 1997 related to real property in Jackson County. The terms of the note and mortgage included a loan for \$192,000, to be paid back with 16 percent interest for five years and then culminating in a balloon payment due in 2002. On the same day the note and mortgage were signed, the lender assigned the note and mortgage to defendant David Wolf.

In 2005, Wolf foreclosed on the property and obtained sheriff's deeds for two of the four parcels of real estate covered by the mortgage. Wolf later brought a summary proceedings complaint for eviction in the district court. Crouch and Wollet filed counterclaims for an equitable accounting and injunctive relief, arguing that the sheriff's deeds were improper, that the mortgage instrument violated the usury statute, and that Wolf's conduct violated the consumer protection act.

The district court voided the sheriff's deeds at issue because the sheriff's sale was not conducted properly. The district court then turned to the issues raised in the counterclaims. The district court found that Wolf had properly foreclosed on the property despite improperly conducting the sheriff's sale, that Wolf had title to the property, and that Crouch and Wollet did not have authority to quiet title. The district court also determined that there was no usury violation and that the consumer protection act did not apply. Accordingly, the district court denied Crouch and Wollet's requested relief.

In 2007, Wolf published and posted a notice for a sheriff's sale concerning one of the four mortgaged parcels of the foreclosed property. The notice of sale specified the amount claimed due on the mortgage, for principal and interest, as "the sum of One Hundred Thirty Five Thousand and Zero Cents (\$226,827.04) [sic]." Shortly after that notice was published, Crouch and Wollet filed the instant complaint in the circuit court, seeking to enjoin the foreclosure by advertisement and have the interest rate declared usurious. Crouch and Wollet claimed that the circuit court should enjoin foreclosure because the 2007 notice of sale contained an inconsistency in the amount claimed due: the amount, as spelled out, was only \$135,000.00, but the parenthetical stated the amount as "\$226,827.04." Crouch and Wollet also claimed that the legal description did not meet the statutory requirements for notice because it described only one parcel, whereas the mortgage itself contained the legal description of four parcels.

The circuit court dismissed the case, finding that there was no improper parceling and there was no harm caused by the inconsistency in the amount claimed due. The circuit court also found that, because of the district court's earlier decision, res judicata barred all other claims.

II. Res Judicata

A. Standard Of Review

The applicability of res judicata is a question of law that we review de novo.¹ We also review a lower court's conclusions of law de novo.²

B. Legal Standards

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical."³ The subsequent action is barred when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies."⁴ Michigan's broad rule of res judicata "bars not only claims actually litigated in the prior actions, but every claim arising out of the same transaction that the parties, exercising reasonable diligence, could have raised but did not."⁵

However, when summary proceedings are involved there is a limited statutory exception to that broad rule.⁶ "The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory."⁷ Under that exception, parties

¹ *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

² *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 496; 739 NW2d 656 (2007).

³ *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001).

⁴ *Id.*

⁵ *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 167; 600 NW2d 617 (1999).

⁶ MCL 600.5750; *Sewell*, *supra* at 576.

⁷ MCL 600.5750.

are not required to bring all other claims of relief in a summary proceeding.⁸ Therefore, claims that could have been brought in a summary proceeding but were not brought will not be barred by res judicata.⁹ But that limited exception only applies to claims that could have been brought. The doctrine of res judicata still applies when claims are actually litigated in the summary proceedings.¹⁰

C. Applying The Standards

The parties in this case were first involved in the district court case involving summary proceedings for eviction. As noted above, in response to the complaint for eviction, Crouch and Wollet filed an answer and a counterclaim. The district court recognized that it had jurisdiction to decide of all the issues before it, and addressed all of them in its opinion and order. The district court ruled on both Wolf's request for eviction and on the counterclaims. The district court voided the sheriff's deeds at issue and determined that the mortgage was properly foreclosed, that the interests of Crouch and Wollet were extinguished, and that Wolf had title. The district court also determined that the mortgage did not violate the usury statute.

Because the parties raised these issues in either the initial summary proceedings or in the accompanying counterclaim and the district court made a determination on them, we find that such issues were actually litigated. Accordingly, res judicata applies to these issues.

D. Other Issues

But there were two issues that the district court did not address and that, therefore, res judicata did not bar. Those issues dealt with alleged defects in the 2007 Notice of Sale, which was published and posted after the district court voided the first sheriff's deeds.

Every notice of foreclosure by advertisement shall include, among other things, "[t]he amount claimed to be due on the mortgage on the date of the notice" and "[a] description of the mortgaged premises that substantially conforms with the description contained in the mortgage."¹¹ Moreover, Michigan law requires that parcels be sold separately if they are not occupied as one parcel.

If the mortgaged premises consist of distinct farms, tracts, or lots not occupied as 1 parcel, they shall be sold separately, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due on such mortgage at the date of the notice of sale, with interest and the cost and expenses allowed by law

⁸ *Sewell, supra* at 576.

⁹ *Id.*

¹⁰ *Id.* at 577.

¹¹ MCL 600.3212(c) and (d).

but if distinct lots be occupied as 1 parcel, they may in such case be sold together.^[12]

A defect in notice renders a foreclosure sale voidable rather than void.¹³ To determine if the defect should actually void the sale, there should be an examination of whether the defect caused any harm.¹⁴ There is no harm when the mortgagor “would have been in no better position had notice been fully proper and the mortgagor lost no potential opportunity to preserve some or any portion of his interest in the property. . . .”¹⁵

Here, neither claimed defect in the notice harmed Crouch and Wollet. The inconsistency in the amount Wolf claimed was owed did not prevent them from trying to preserve their interest in the property.

Concerning the parceling issue, the claim that Crouch and Wollet brought was not substantively about the parceling. Rather it was about the notice not complying with the statutory requirement that the notice contain “[a] description of the mortgaged premises that substantially conforms with the description contained in the mortgage.”¹⁶ Crouch and Wollet argue that listing only one of the four parcel’s descriptions did not substantially conform to the description contained in the mortgage.

But the alleged defect in legal description did not cause any harm to Crouch and Wollet because Wolf was required to sell the fewest parcels possible to cover the amount due, only the one parcel described was going to be sold, the parcel’s description conformed to the same parcel’s description in the mortgage, and Crouch and Wollet lost no potential opportunity to preserve any portion of their interest in the parcel.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O’Connell

/s/ Donald S. Owens

¹² MCL 600.3224.

¹³ *Jackson Investment Corp v Pittsfield Products, Inc*, 162 Mich App 750, 755-756; 413 NW2d 99 (1987).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ MCL 600.3212(d).