STATE OF MICHIGAN

COURT OF APPEALS

WESLEY GANSON,

Plaintiff-Appellant,

and

WANDA GANSON,

Plaintiff,

v

WELLS FARGO BANK OF MINNESOTA,

Defendant-Appellee.

UNPUBLISHED
June 2, 2009

No. 284720
Wayne Circuit Court
LC No. 07-704805-CH

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the circuit court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff defaulted on his mortgage and the house was foreclosed. Plaintiff did not redeem within the redemption period, and defendant took title to the house. Defendant brought summary proceedings in the district court to evict plaintiff. Plaintiff responded that he did not have notice of the foreclosure and that he had attempted to redeem, but defendant prevented him from doing so. The district judge first noted that it lacked jurisdiction to address the latter issue, and then concluded that there was no question of fact regarding notice. The bank had provided as a witness the process server who had posted the property and testified regarding the procedures he followed when he posted the notice on the property, and plaintiff had no evidence to show that this had not actually happened.

[1] The order on appeal was entered against plaintiff Wesley Ganson only. Thus, the singular "plaintiff" refers to Wesley Ganson.

Plaintiff filed in the circuit court the suit underlying this appeal, alleging four counts: slander of title, intentional infliction of emotional distress, negligent infliction of emotional distress, and quiet title. Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff's entire claim was based on the allegation that he lacked notice of the foreclosure, but that because that issue was decided by the district court, all the counts had to fail. Plaintiff responded that he was always ready and able to redeem the property but defendant unreasonably refused to allow him to do so. Plaintiff attached documentation showing that he was approved for a loan of nearly $200,000 on December 4, 2006, but he did not receive the approval in time to redeem. Plaintiff's motion brief stated:

> The bottom line is this—Mr. Ganson had and has the financial means to redeem his property had he been given notice of the sale as required by law. In the few weeks remaining in the redemption period, he could not get a mortgage finalized in time, and Defendant, out of spite, has rejected every reasonable offer and refused to extend the deadline. In this economy, with the masses of foreclosed homes in Detroit, why would a mortgage company refuse the redemption price from Plaintiff? A question of fact exists which must be submitted to the trier of fact.

The circuit court held that res judicata barred the issue of notice and concluded that the other counts in the complaint lacked sufficient factual support.

In this Court, plaintiff argues that the circuit court erred in finding res judicata barred the notice issue because it was only briefly addressed in the district court, citing *JAM Corp v AARO Disposal*, 461 Mich 161, 169; 600 NW2d 617 (1999), and *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 576; 621 NW2d 222 (2001). Plaintiff also argues that he presented a question of fact regarding defendant's unreasonable refusal to cooperate when he tried to redeem the property.

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second 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. *Sewell*, *supra* at 575.

Regarding the res judicata issue, plaintiff's cited cases do not support his position. *Sewell* expressly stated:

> Our decision in *JAM Corp* recognized a statutory exception to this rule with respect to claims that "could have been" litigated in a prior [summary] proceeding. There, we recognized that the legislative intent for this exception was to remove the incentive for attorneys to "fasten all other pending claims to swiftly moving summary proceedings." Our decision in *JAM Corp* said nothing about the preclusive effect of claims actually litigated in the summary proceedings. Thus, the "other claims of relief," described in *JAM Corp* at 170, were those claims that "could have been" brought during the summary proceedings, but were not. This Court was not describing subsequent claims involving the issues actually litigated in the summary proceedings. [*Sewell*, *supra* at 576, internal citations omitted.]

The issue of notice was actually litigated in the district court. In fact, an entire hearing was devoted to the issue, and the district court decided the issue on its merits. Thus, it is barred by res judicata. This issue is also barred by collateral estoppel. Collateral estoppel, also known as "issue preclusion," applies when three elements have been met:

> (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel." [*Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988).]

The proper avenue of redress for plaintiff's dissatisfaction with that decision was the appeal to the circuit court, not a new lawsuit. Thus, the circuit court did not err in granting defendant's motion on the issue of notice.

Plaintiff's second issue, that defendant refused to allow redemption, was properly raised for the first time in the circuit court. This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff's evidence failed to show that defendant acted illegally in any way. He admits that he could not tender the redemption amount before the redemption period expired. Defendant was under no requirement to extend the redemption period, no matter how unreasonable that decision might appear. Defendant's documents show that it sent the redemption information to plaintiff. Although plaintiff may have had approval for a loan sufficient to redeem the property, plaintiff provides no evidence that he attempted to tender the required amount by that date, and in his brief he admits he missed the deadline. Plaintiff's entire argument hinges on defendant's refusal to extend the date. Even if this refusal was based on "spite," as plaintiff alleges, defendant had no legal obligation to make any concession to plaintiff by extending the date.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens