

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK MENDOLA AND LAURA
MENDOLA,

Plaintiff-Appellant,

v

AUDREY HARVEY,

Defendant-Appellee.

UNPUBLISHED
January 19, 2006

No. 255697
Macomb Circuit Court
LC No. 2003-5277-CH

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

This appeal arises from enforcement of a foreclosure judgment in favor of defendant, which caused plaintiff to file an action to quiet title. This case has been before this Court on two previous occasions. In the instant action plaintiffs filed a complaint alleging that defendant's right to the property is subordinate to theirs because she did not timely file her deed, which, plaintiffs argue, has the effect of nullifying the sale or at least extending the period in which they can redeem their interest. They appeal an opinion and order of the trial court dismissing their claim on res judicata and collateral estoppel grounds. We affirm, but for different reasons than those set forth by the trial court.

Plaintiffs filed a complaint on November 20, 2003, seeking to quiet title to the property at issue. In the complaint, plaintiffs alleged that in the course of redeeming the property, they discovered that defendant did not file a deed within twenty days of the foreclosure sale as required by MCL 600.6130(2). They claim that such inaction negated the sale, and further, that at the very least; MCL 600.6130(2) requires that the redemption period not begin to run until the filing of the deed. According to plaintiffs, their claim is superior to that of defendant because they redeemed sixty-three days after defendant filed her deed and their title to the property is superior to that of defendant. Defendant moved for summary disposition, arguing that the doctrines of res judicata and collateral estoppel barred the claims. Plaintiffs contended that neither doctrine applied because in their earlier litigation, the court was never asked to decide the factual questions of whether defendant filed the deed in conformance with statutory requirements and whether plaintiffs redeemed within six months of that date. On April 30, 2004, the trial court granted defendant's motion for summary disposition, finding that the doctrines of res judicata and collateral estoppel barred plaintiffs' claims.

We begin our decision with a discussion of the doctrines of res judicata and collateral estoppel. “[R]es judicata bars a subsequent suit between the same parties or their privies when the same cause of action is raised in a subsequent suit, and when the facts or evidence essential to the maintenance of both actions are identical. On the other hand, collateral estoppel will bar the relitigation of issues previously decided in the first action when the parties to the second action are the same; where the second suit is a different cause of action, the bar is conclusive only as to issues actually litigated in the first suit.” *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 60 Mich App 606, 610-611; 231 NW2d 479 (1975). The applicability of res judicata is a question of law which we review de novo. *Shuler v Michigan Physicians Mutual Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004). The applicability of collateral estoppel is also a question of law which we review de novo. *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000).

The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). For the doctrine to be applicable, the following factors must be met: (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003). In this case, only the third element is in dispute, namely that the matter contested could have been resolved in the prior proceeding.

Plaintiffs could not have litigated defendant's failure to comply with MCL 600.3130 and record her deed within twenty days of the foreclosure sale until that failure to record actually occurred. The foreclosure sale occurred on November 17, 2000, pursuant to a January 28, 2000, judgment of foreclosure. Defendant's failure to record within twenty days as required by MCL 600.3130 therefore did not occur until December 6, 2000. The timing was thus several months after the judgment of foreclosure ended the trial stage of the first action. In defending that action, plaintiffs could not have raised the defense of late recording and their theory of redemption period extension because that defense assumed facts which had not yet, and might not, occur: that they would lose and that defendant would fail to timely record.

The lengthy procedural history following the judgment of foreclosure did not provide plaintiffs meaningful opportunity to raise their new defense. That procedural history consisted of motions for reconsideration, an appeal to this Court, and an application for leave to appeal to our Supreme Court. Plaintiffs could not raise defendant's failure to record in any of these instances. On appeal it would have been improper for plaintiffs to raise their new defense because it was not argued and decided below. See *Booth Newspapers, Inc v University of Michigan Bd or Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (holding that issues first raised on appeal “are not ordinarily subject to review”); *Polktown Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005) (holding that an issue is generally not properly preserved for appeal if it is not raised before, addressed, or decided by the circuit court). It would also have required expansion of the record on appeal, which typically is improper. See *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998). In particular, plaintiffs would have had to allege defendant's failure to record, a failure which could not have occurred until after the judgment of foreclosure. They in fact raised it for the first time in a motion for reconsideration, which the

trial court decided not to consider. For these reasons, the doctrine of res judicata does not bar plaintiffs' instant claim against defendant for failure to timely record her deed after the foreclosure sale. This claim depends on factual developments and legal arguments that were not and could not have been raised in the earlier litigation. Res judicata is not applicable if the facts change or new facts develop. *Labor Council, Michigan Fraternal Order Police v Detroit*, 207 Mich App 606, 608, 525 NW2d 509 (1994). Defendant's failure to timely record is a new factual development.

This Court notes that plaintiffs' argument that they could not have possibly anticipated that defendant would record on April 2, 2003, confuses the issue. The relevant fact is not when defendant actually filed, but whether she filed within twenty days of the sale. In other words, when she actually filed is beside the point. What matters is when it was knowable that she let the deadline for filing pass, which was December 6, 2000. That fact was not readily ascertainable during the earlier litigation until it was too late to raise it.

The doctrine of collateral estoppel also does not bar this suit. Application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 667 NW2d 843 (2004).

This issue largely overlaps with the res judicata analysis. But there is one important difference. Collateral estoppel cannot be based on questions which might have been litigated but were not. *McCoy v Cooke*, 165 Mich App 662, 666; 419 NW2d 44 (1988). In light of the analysis above concluding that the issue of late filing could not have been raised, it logically follows that the issue was not decided.

Having found that neither doctrine applies, we turn our analysis to the principal issue in this appeal: whether defendant's late filing of the deed either voided the tax sale or extended the redemption period.

In order to answer this question, we must examine two statutory provisions: MCL 600.3130 and MCL 600.3140.

MCL 600.3130 concerns foreclosure sales and the recording of deeds:

(2) The deed of sale as soon as practicable and within 20 days after the sale shall be deposited with the register of deeds of the county in which the land therein described is situated

MCL 600.3140 sets out redemption rights that commence following a foreclosure sale:

The mortgagor, his heirs, executors, administrators, or any person lawfully claiming from or under him may redeem the entire premises sold by paying, within 6 months from the time of the sale, to the purchaser, his executors, administrators, or assigns, or to the register of deeds in whose office the deed of sale is deposited as provided in the court rules, for the benefits of the purchaser,

the sum which was bid with interest from the time of the sale at the rate percent borne by the mortgage.

By not filing her deed within twenty days of the foreclosure sale, defendant clearly failed to comply with MCL 600.3130. Plaintiffs contend that the proper remedy is nullification of the sale, or, alternatively, extension of their redemption period under MCL 600.6140. Neither argument is persuasive because defendant did not engage in the type of behavior which should result in the relief requested by plaintiffs.

An examination of case law interpreting earlier statutory redemption provisions indicates that the remedies sought by plaintiffs are only appropriate when the mortgagor suffers some harm due to the purchaser's failure to record. For example, in *Grover v Fox*, 36 Mich 461 (1877), our Supreme Court found that the mortgagor was prejudiced by the "irregular, insufficient and inequitable" foreclosure proceedings. *Id.* at 471. The purchaser filed a second deed dividing the property into parcels but never removed the first deed, which led to confusion with the register and prevented the mortgagor from redeeming his property. *Id.* at 464-465. No such action took place in this case.

Similarly, in *Lilly v Gibbs*, 39 Mich 394, 395 (1978), our Supreme Court termed the failure to file "an irregularity which was very apt to mislead and make trouble." A difference of a few days between the sale and the recording misled the register of deeds and brought on the controversy by precluding the mortgagor from redeeming the property during the narrow time frame between one year from the date of sale and the anniversary of the recording. *Id.* at 396-397. Again, we do not find any factual similarity between *Lilly* and the case presently before us.

Finally, in *Mills v Jirasek*, 267 Mich 609, 610; 255 NW 402 (1934), our Supreme Court considered the effect of a late filing that occurred in September after a May foreclosure sale. The Court noted that earlier decisions may have motivated an 1875 amendment to the statute setting twenty days as the reasonable time after sale that a deed may be filed. *Id.* at 613-614. It further noted that statutes regulating foreclosure sales and subsequent recordings "were intended to prevent surprise or unfairness, and they should be enforced in everything substantial." *Id.* at 614 (quotation, citation omitted). According to the Court:

But on the other hand those provisions cannot be enlarged or unreasonably construed so as to render mortgage sales unsafe, or to make bidding hazardous. The law was designed to encourage and not to destroy recourse to these simple and cheap remedies; and while no substantial right should be disregarded, substantial regularity is all that should be held imperative. [*Id.* (quotation, citation omitted).]

The Court held that the appellant was entitled to no relief because he showed no damage as a result of the failure to timely record. *Id.* at 615. According to the Court:

We see no reason to allow appellant the benefit of a new foreclosure merely because he insists upon a technical and strict construction of the statute. The equities are not with his position. It may be true that appellee, or some one acting for her, has acted inadvertently in the matter, but no harm has been done the parties or any one claiming through them. The situation appeals to the conscience

of the court. We hold that the provisions of the statute as to time of recording are directory, and, under the circumstances of the instant case, defendant is estopped to question the validity of plaintiff's deed. [*Id.*]

In accord with the decision in *Mills, supra*, plaintiffs' claim must fail because plaintiffs have not demonstrated that any harm resulted from defendant's untimely filing of her deed. Admittedly, she waited over two years after the sale to record her deed, which is considerably longer than in any of the cases cited above. However, the plaintiffs waited even longer to attempt to redeem the property. It was only in the course of attempting to redeem that they discovered the untimely filing. No act of consequence hinged on the date of the filing. Unlike in *Grover* and *Lilly, supra*, no irregularity, confusion, frustration of redemption, or other ill results flowed from the late filing. Plaintiffs were fully aware of the foreclosure and their right to redeem and were not misled by any of defendant's action or in this case, inaction. Thus, we are left with the firm conclusion that plaintiffs' argument is a final effort to undo the foreclosure sale. *Mills, supra*, did not allow a similarly positioned plaintiff to disrupt a settled foreclosure sale – nor will we. Under these circumstances, MCL 600.3130 and 3140 do not contemplate the remedies that plaintiffs seek.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis