STATE OF MICHIGAN

COURT OF APPEALS

DONALD GAYLES,

Plaintiff-Appellant,

v

DEUTSCHE BANK NATIONAL TRUST COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 21, 2010

No. 292988
Oakland Circuit Court
LC No. 2008-091273-CH

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. Because defendant did not engage in the unauthorized conduct of business in this matter and because res judicata barred plaintiff's action, we affirm.

In 2004, plaintiff executed a promissory note to Argent Mortgage and secured the note by granting Argent a mortgage on his residence in Southfield, Michigan. According to defendant, in 2004 a trust was created, with defendant being designated as the trustee of the trust, and the Argent mortgage was assigned to the trust the same year. No assignment of the mortgage was recorded, however, until March 20, 2007. Apparently, plaintiff began falling behind on his payments on the note in 2006. Defendant initiated statutory foreclosure proceedings on plaintiff's home in September 2006 and ultimately purchased the property at a sheriff's sale on March 27, 2007. When the statutory redemption period had expired, defendant initiated a termination proceeding in the 46th District Court. Defendant and plaintiff signed a consent judgment in that matter, whereupon they agreed that defendant had a right to possession of the home and that an order of eviction would issue on November 12, 2007.

In May 2008, plaintiff filed the instant matter, asserting that defendant, a foreign corporation, engaged in the unauthorized conduct of business in Michigan, that defendant failed to comply with the foreclosure statute, engaged in fraud by asserting that it was an assignee of the mortgagee at the time foreclosure proceedings were initiated, and was negligent in its maintenance of the property since obtaining possession of the same. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) claiming, among other things, that res judicata barred plaintiff's complaint and contradicting plaintiff's claims that defendant engaged in the unauthorized conduct of business, failed to comply with the foreclosure statute, or

engaged in fraud or negligence. The trial court entered summary disposition in defendant's favor.

This Court reviews de novo the trial court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). MCR 2.116(C)(7) permits summary disposition where the claim is barred because of, among other things, a prior judgment. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). In reviewing motions under MCR 2.116(C)(7), this Court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). If no factual development could justify the plaintiff's claim for relief, the motion must be granted. *Id*.

A court may grant summary disposition under MCR 2.116(C)(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Price v Kroger Co of Michigan*, 284 Mich App 496, 499-500; 773 NW2d 739 (2009). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

On appeal, plaintiff asserts that defendant was not authorized to conduct business in Michigan and thus could not utilize the statute governing foreclosure by advertisement. We disagree.

In support of his position, plaintiff directs this Court to MCL 450.3011. That statute provides:

> A foreign corporation shall not conduct affairs in this state until it has procured a certificate of authority so to do from the administrator. A foreign corporation may be authorized to conduct affairs in this state which may be conducted lawfully in this state by a domestic corporation, to the extent that it is authorized to conduct such affairs in the jurisdiction where it is organized, but no other affairs.

The above statute is part of the Nonprofit Corporation Act, thus applying only to nonprofit corporations. Defendant asserts that it is a for-profit corporation, and there is no allegation or evidence suggesting otherwise. The above statute is therefore inapplicable. Instead, we look to the Business Corporation Act, MCL 450.1101 *et seq.*, to determine whether defendant engaged in unauthorized business in this state.

MCL 450.2011 states:

> A foreign corporation shall not transact business in this state until it has procured a certificate of authority to transact business from the administrator. A foreign corporation may be authorized to transact business in this state that may

> be transacted lawfully in this state by a domestic corporation, to the extent that it is authorized to transact that business in the jurisdiction where it is organized, but no other business.

Pursuant to MCL 450.2012(1), a foreign corporation is not considered to be transacting business in this state, "for the purposes of this act, solely because it is carrying on in this state any 1 or more of the following activities:"

> (a) Maintaining, defending, or settling any proceeding.
>
> ***
>
> (g) Creating or acquiring indebtedness, mortgages, and security interests in real or personal property.
>
> (h) Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

Because defendant was undisputedly securing or collecting a debt, and enforcing a mortgage through foreclosure proceedings, defendant's actions cannot be deemed to be the conducting of business in Michigan. Summary disposition on plaintiff's claim based upon the unauthorized conduct of business was thus appropriate.

Plaintiff next asserts that res judicata is inapplicable and the trial court erred in relying upon the doctrine to dismiss plaintiff's complaint. We disagree.

This Court reviews the question whether the doctrine of res judicata bars a subsequent action de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). Res judicata bars a subsequent action 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." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Under Michigan's broad approach to res judicata, the doctrine "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair v State*, 470 Mich at 121.

Here, after defendant purchased the property at issue at the sheriff's sale and the redemption period had expired, it initiated a summary proceeding in the 46th District Court to remove plaintiff from the property. Defendant and plaintiff ultimately entered into a consent judgment in the district court case, wherein plaintiff agreed that defendant had a right to possession of the property. Because a consent judgment entered, the first action was decided on the merits. See, *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001)("Res judicata applies to consent judgments"). The first element of res judicata is thus met.

The plaintiff in the 46th District Court action was Deutsche Bank National Trust Company (defendant in the present action), and the defendant in the 46th District Court action was Donald Gayles, the plaintiff in the instant action. Thus, the third element of res judicata, that both actions involve the same parties or their privies, has been met.

Whether the second element of res judicata, that the matter contested in the second action was or could have been resolved in the first, has been met requires some analysis. Plaintiff suggests that this action is not barred by res judicata based upon the language contained in MCL 600.5750. That statute provides:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except that a judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial and that a judgment for possession after forfeiture of such an executory contract which results in the issuance of a writ of restitution shall also bar any claim for money payments which would have become due under the contract subsequent to the time of issuance of the writ. The plaintiff obtaining a judgment for possession of any premises under this chapter is entitled to a civil action against the defendant for damages from the time of forcible entry or detainer, or trespass, or of the notice of forfeiture, notice to quit or demand for possession, as the case may be.

However, our Supreme Court has stated that:

> [n]othing in [MCL 600.5750] or in *JAM Corp* [*v AARO Disposal, Inc*., 461 Mich 161; 600 NW2d 617 (1999)] stands for the proposition that, having litigated in the district court the issue who has the right to the premises, that question can be relitigated de novo in a subsequent suit. Such an approach would empty MCL 600.5701 *et seq.;* MSA 27A.5701 *et seq.* of all significance. After repossessing premises in accord with the statute and an order of the district court, a landlord would remain in jeopardy of further litigation on that same question.
> *Sewell v Clean Cut Mgmt, Inc.*, 463 Mich 569, 575; 621 NW2d 222 (2001).

Perhaps more to the point, a panel of this Court observed the following in *Manufacturers Hanover Mortg Corp v Snell*, 142 Mich App 548, 553-554; 370 NW2d 401 (1985):

> The Supreme Court has long held that the mortgagor may hold over after foreclosure by advertisement and test the validity of the sale in the summary proceeding. *Reid v Rylander*, 270 Mich 263, 267; 258 NW 630 (1935); *Gage v Sanborn*, 106 Mich 269, 279; 64 NW 32 (1895). . .The mortgagor may raise whatever defenses are available in a summary eviction proceeding. MCL 600.5714; MSA 27A.5714; *Federal National Mortgage Ass'n v Wingate*, 404 Mich 661, 676 fn. 5; 273 NW2d 456 (1979). The district court has jurisdiction to hear and determine equitable claims and defenses involving the mortgagor's interest in the property. MCL 600.8302(3); MSA 27A.8302(3). . .

Clearly, the validity of the foreclosure could have been raised in the action in the 46th District Court, but plaintiff did not raise this issue in the summary proceeding, nor did he raise any other defense. He instead consented that defendant was entitled to possession of the property. In

doing so, plaintiff implicitly agreed that the foreclosure was valid. The third element of res judicata has thus been met and summary disposition in defendant's favor was appropriate.

Because we find that res judicata barred plaintiff's action, we need not address his remaining issues on appeal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro