STATE OF MICHIGAN

COURT OF APPEALS

ANNETTE RENEE WYLER and STACEY A. WYLER, Plaintiffs-Appellants, v BANK OF NEW YORK MELON, formerly known as BANK OF NEW YORK, as trustee for CERTIFICATEHOLDERS CWALT, INC. ALTERNATIVE LOAN TRUST 2006-6CB, MORTGAGE PASSTHROUGH CERTIFICATES, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and BANK OF AMERICA, N. A., Defendants-Appellees.	UNPUBLISHED November 17, 2016 No. 329153 Leelanau Circuit Court LC No. 2014-009394-CH

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Plaintiffs Annette Renee Wyler (Annette) and Stacey A. Wyler (Stacey) appeal as of right the trial court order granting summary disposition in favor of defendants Bank of New York Mellon as trustee for Certificateholders CWALT, Inc., Alternative Loan Trust 2006-6CB, Mortgage Passthrough Certificates (BONYM Trustee), Mortgage Electronic Registration Systems, Inc. (MERS), and Bank of America, N. A. (BOANA) pursuant to MCR 2.116(C)(7) (claim barred by prior judgment) and (C)(8) (failure to state a claim). We affirm.

This case centers around a mortgage loan transaction that Stacey and Beatrice Wyler (Stacey's mother, an unmarried person who is not a party to the appeal) entered into on November 9, 2005, with Wyler Mortgage Group, LLC (WMG) for a residential house located at 781 E. Shetland Trail, Cedar, Michigan (the property). Plaintiffs claimed that assignments of the mortgage were invalid and therefore brought this action, asserting that foreclosure and a sheriff's sale of the property were illegal and invalid.

Plaintiffs first argue that the trial court should have recused itself due to a conflict of interest because the Michigan Judges' Retirement System is invested in BOANA stockholdings and it would therefore be in the trial judge's own best interest for BOANA to prevail. Plaintiffs

failed to preserve this issue because they presented it for the first time in a motion for reconsideration. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). "This Court may review an unpreserved issue if it is an issue of law for which all the relevant facts are available." *Id*.

For purposes of the facts of this case, disqualification of a judge is warranted when (1) the judge is biased for a party, MCR 2.003(C)(1)(a), (2) the judge, based on objective and reasonable perception, has a serious risk of actual bias impacting the due process rights of a party, MCR 2.003(C)(1)(b)(*i*), or (3) the judge knows that he or she has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding, MCR 2.003(C)(1)(f). We conclude that plaintiffs in this case failed to overcome the heavy presumption of judicial impartiality. See *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The market value of assets in the Michigan Judges' Retirement System was $252.8 million as of September 30, 2013.[1] On that date, the market value of BOANA stock owned by the Retirement System was $1,084,905, or .43% of the Retirement System's assets (Michigan Judges' Retirement System Investment Section, Largest Stock Holdings by Market Value as of September 30, 2013).[2] On these facts, we conclude that plaintiffs are unable to overcome the presumption of judicial impartiality, *Cain*, 451 Mich at 497, because the Retirement System's investment in BOANA stocks is minimal, MCR 2.003(C)(1)(a); indeed, plaintiffs present no proofs that the trial court judge was even aware of the Retirement System's investments when ruling on defendants' motions for summary disposition. MCR 2.003(C)(1)(b)(*i*); MCR 2.003(C)(1)(f).

Next, we agree with the trial court's conclusion that plaintiffs' claims are barred by the doctrine of res judicata. The applicability of res judicata is a question of law subject to de novo review on appeal. *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). This Court also reviews de novo a trial court's grant or denial of summary disposition. *Id*. A trial court may grant summary disposition under MCR 2.116(C)(7) when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . prior judgment . . . ." MCR

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[1] RVK, Inc., *September 2014 Asset/Liability Study, Michigan Judges' Retirement System* https://www.michigan.gov/documents/treasury/AssetLiabilityStudy_Judges_368376_7.pdf (accessed September 1, 2016). Although this information was not introduced in the trial court, judicial notice of facts may be taken at any stage of the proceeding, including at the appellate level, MRE 201(e), as long as the judicially noticed fact is not subject to reasonable dispute in that it is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). *People v Burt*, 89 Mich App 293, 297; 279 NW2d 299 (1979).

[2] Plaintiffs submitted a document with their appeal, which sets forth the Retirement System's largest stock holdings by market value as of September 30, 2013, and indicates that it held BOANA stock holdings worth $1,244,135. Even assuming the overall value remained the same in 2014 as September 2013, the BOANA stock holdings would be less than 1% of the Retirement System's assets, which is a *de minimis* economic interest.

2.116(C)(7). "In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v Dearborn*, 302 Mich App 68, 72-73; 836 NW2d 916 (2013).

In 2011, Stacey challenged foreclosure proceedings on the property when he filed a complaint in the United Stated District Court for the Western District of Michigan against BOANA (formerly known as Bank of America), asserting claims of negligence and promissory estoppel, and violations of various federal acts. The federal court ultimately granted summary disposition in favor of BOANA and dismissed all plaintiffs' claims with prejudice. In 2014, plaintiffs filed this action, again seeking to halt foreclosure proceedings and asserting claims of quiet title, illegal and invalid foreclosure and sheriff's sale, and fraudulent mortgage assignments.

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 Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). We apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment. *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999).

Under federal law, res judicata precludes a subsequent lawsuit " 'if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.' " *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 193 F3d 415, 422 (CA 6, 1999), quoting *Bittinger v Tecumseh Products Co*, 123 F3d 877, 880 (CA 6, 1997) (emphasis omitted in *Becherer*).

First, the federal action was decided on the merits. *Becherer*, 193 F3d at 422. The federal district court decided the federal action on the merits when it granted summary disposition under F R Civ P 12(b)(6) and dismissed all plaintiffs' claims with prejudice. For purposes of res judicata, dismissal for failure to state a claim under F R Civ P 12(b)(6) generally constitutes a final decision on the merits. *Rogers v Stratton Indus, Inc*, 798 F 2d 913, 917 (CA 6, 1986).

The second requirement is also met because both actions involve the same parties and their privies. Under federal law, privity is divided into three groups: "First, those who are successors in interest to a party will be bound by a judgment against that party. Second, a nonparty who controlled the original suit will be bound by the resulting judgment. Third, a nonparty who is adequately represented by a party will also be precluded from relitigating the same issues." *Becherer*, 193 F3d at 422. With regard to plaintiffs, Stacey was a named party in the prior federal action. Annette was not a named party but as Stacey's wife and a signatory to the mortgage, she was in privity with him because he adequately represented her interests. See *Sanders Confectionery Prod, Inc v Heller Fin, Inc*, 973 F2d 474, 481 (CA 6, 1992) (explaining that with regard to res judicata, "[p]rivity in this sense means a successor in interest to the party, one who controlled the earlier action, or one whose interests were adequately represented"); *Stolmayer v McCarthy*, 171 F Supp 3d 690, 695 (ND Ohio, 2016) (relying on *Sanders*

Confectionery Prod, Inc, and concluding that for purposes of res judicata analysis, the plaintiff husband, while not a named party in the prior administrative proceeding, was in privity with his wife, who was a named party in the prior proceeding, and his interests were adequately represented). With regard to BOANA, it was a named party in the federal action because it was the mortgage service provider of the mortgage at the time (and the provider who began foreclosure proceedings) and is a defendant in this action. The BONYM Trustee and MERS, while not named parties in the federal action, are in privity with BOANA. Plaintiffs gave MERS a mortgage on the property in 2005, which was recorded with the Leelanau Register of Deeds on November 16, 2005. MERS assigned its interest in the mortgage to the Bank of New York Trustee, which was recorded on February 9, 2009, and a second assignment of the mortgage by MERS to the BONYM Trustee, to record that BONYM was formerly known as Bank of New York, was made on May 27, 2011, and recorded on June 7, 2011. Mortgage service providers (like BOANA) are in privity with mortgagees (here, MERS and its assignees) for purposes of res judicata. See *Duke v Nationstar Mtg, LLC*, 893 F Supp2d 1238, 1247-1248 (ND Ala, 2012) (citing cases that indicate on balance federal district courts have generally found privity to exist between a mortgage service provider and the owner [and its assignee] of the mortgage under differing factual scenarios and state law definitions of privity); *Kimball v Orlans Assoc, PC*, 651 Fed Appx 477, 481 (CA 6, 2016) (stating that "[m]yriad district courts agree that a mortgage's loan servicer acts as agent for the mortgagee, thereby satisfying res judicata's privity requirement for suits involving the mortgage"). Thus, although not parties to the federal action, MERS and the Bank of New York Trustee and the BONYM Trustee (mortgagee and its assignees, respectively) were in privity with BOANA for purposes of res judicata.

Finally, requirements three and four also exist because the issues raised in this action should have been litigated in the prior action and there is an identity of the causes of action. With regard to the third element, what is important is not whether a particular claim is compulsory, but whether the claim should have been considered during the prior action. *Winget v JP Morgan Chase Bank, N A*, 537 F3d 565, 580 (CA 6, 2008) (quotation marks and citation omitted). Plaintiffs' claims in this action are based on MERS making, assigning and servicing the mortgage. Other than commencement of foreclosure proceedings in 2014 that prompted the current action, the circumstances supporting their claims in the present complaint had already occurred at the time of the federal lawsuit; the assignments were a matter of public record, and should have been raised in the federal action. See *J Z G Resources, Inc v Shelby Ins Co*, 84 F3d 211, 215 (CA 6, 1996) (citation and quotation marks omitted) (explaining that res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose). There is also an identity in the facts of the causes of action. "Identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Sanders Confectionery Prod, Inc*, 973 F2d at 484 (quotation marks and citation omitted). The federal court considered Stacey's claims related to Bank of America's (now BOANA) alleged refusal to modify the terms of the mortgage and initiation of foreclosure proceedings. Plaintiffs' current claims relate to the validity of the assignments and mortgage and any resulting impact on foreclosure proceedings. Both actions share an identity of facts because they each revolve around the origination and handling of the mortgage once transferred to MERS and in turn its assignment of those mortgages.

We also conclude that plaintiffs are judicially estopped from asserting the claims raised in this action. The trial court appears to have granted defendants' motion related to these arguments under MCR 2.116(C)(8).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

We review de novo a trial court's application of the doctrine of judicial estoppel. *Szyszlo v Akowitz*, 296 Mich App 40, 46; 818 NW2d 424 (2012).

"Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) (quotation marks and citations omitted). "Judicial estoppel is utilized in order "to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship." *Browning v Levy*, 283 F3d 761, 776 (CA 6, 2002) (quotation marks and citation omitted).

Section 521(1) of the Bankruptcy Code, 11 USC 521(1), requires a debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." A cause of action is an asset that must be scheduled and disclosed under § 521(1). *Eubanks v CBSK Fin Group, Inc*, 385 F3d 894, 897 (CA 6, 2004). "[T]he disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *In re Colvin*, 288 BR 477, 481 (Bankr, ED Mich, 2003).

In the context of bankruptcy proceedings, the federal courts have indicated that

> to support a finding of judicial estoppel, [a reviewing court] must find that: (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. In determining whether [the plaintiff's] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff's] "attempts" to advise the bankruptcy court of [the plaintiff's] omitted claim. [*Spohn*, 296 Mich App at 480-481,

quoting *White v Wyndham Vacation Ownership, Inc*, 617 F3d 472, 478 (CA 6, 2010).]

Applying the first requirement, it is clear in this case that plaintiffs assumed a position that was contrary to the one that they asserted under oath in the bankruptcy proceeding. Specifically, it is undisputed that plaintiffs did not include their potential claims regarding the validity of the mortgage on their bankruptcy petition nor did they seek to amend or reopen the petition to do so. "This failure to disclose the potential lawsuit was contrary to the bankruptcy code, [11 USC §101, *et seq*.], which requires a debtor to file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs [11 USC §521(a)(1)(B)]. It is routinely recognized that a potential cause of action constitutes an asset that must be included under 11 USC §521(a)(1)(B)(i)." *Spohn*, 296 Mich App at 481. "The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete." *Spohn*, 296 Mich App at 482 (quotation marks and citations omitted).

Applying the second requirement, it is also clear that the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition. Specifically, the bankruptcy court discharged plaintiffs' debts, so the second requirement of adoption for judicial estoppel was established.

Applying the third requirement—that the plaintiffs' omission was not result of mistake or inadvertence—"courts first consider whether the plaintiff lacked knowledge of the factual basis of the undisclosed claims[.]" *Id*. at 483 (quotation marks and citation omitted). In the bankruptcy proceeding, plaintiffs averred that they had no claims against the validity of the mortgage. While there is no evidence that plaintiffs lacked or did not lack knowledge of the factual basis of the undisclosed claims raised in this action during the bankruptcy proceedings in 2007 and 2008, it cannot be disputed that they had a motive to conceal the undisclosed claims in that they sought to avoid foreclosure of the mortgage not once, but twice. Moreover, plaintiffs argue that the mortgage and promissory notes were never transferred out of the name of WMG and that MERS (and in turn by assignment the BONYM Trustee) therefore did not have an interest in the mortgage such that foreclosure by advertisement was proper. The factual basis for that claim was available during the bankruptcy proceeding but plaintiffs chose not to disclose it, yet rely on those same facts in asserting the current claims.

Next, plaintiffs argue that the trial court erred by concluding that they lacked standing to challenge the mortgage assignments. We disagree. The trial court apparently granted summary disposition of plaintiffs' illegal foreclosure and fraudulent assignments of mortgage claims for lack of standing under MCR 2.116(C)(8). The underlying basis of plaintiffs' illegal foreclosure, fraudulent assignment of mortgages, and quiet title claims is that the assignments of the mortgages in 2009 and 2011 were invalid because the trust's pooling and servicing agreement (PSA) allegedly states that "the cutoff date for assigning any mortgage into the trust was March 1, 2006[,]" which date passed before the assignments were made. Plaintiffs argue that on this

basis, the BONYM Trustee is not a proper foreclosing party. This argument is without merit because plaintiffs lack standing to challenge the assignments.

The rule in Michigan is that a person who is not a party to an assignment lacks standing to challenge it. *Bowles v Oakman*, 246 Mich 674, 677-678; 225 NW 613 (1929). In *Livonia Props Holdings, LLC v 12840-12976 Farmington Rd Holdings, LLC*, 399 F Appx 97, 102-103 (CA 6, 2010), the United States Court of Appeals for the Sixth Circuit addressed the same assignment issue. Therein, the Sixth Circuit held that the plaintiff mortgagor lacked standing to challenge an underlying assignment of the mortgage even if there was a flaw in the assignment. *Id*. at 102. Here, plaintiffs claim that Annette has standing to challenge the assignments because WMG was the original lender and the assignments were invalid. First, WMG is not a party to this lawsuit, is not a party to any assignment, and is not a party to a PSA and, thus, plaintiffs do not have standing to make that argument. Further, plaintiffs have presented no evidence or suggested that MERS objected to its assignment of the mortgage interest to Bank of New York Trustee in 2009 or to the BONYM Trustee in 2011.

We also find no merit in plaintiffs' assertion that they were denied due process by the foreclosure by advertisement. Whether a party has been afforded due process is a question of law that this Court reviews de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Preserved constitutional error is reviewed for error that is harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). No person may be deprived of life, liberty or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. However, the proscriptions of the due process clauses apply only to actions of the state. *Dearborn v Freeman-Darling*, *Inc*, 119 Mich App 439, 442; 326 NW2d 831 (1982). As we noted in *Cheff v Edwards*, 203 Mich App 557, 560; 513 NW2d 439 (1994), "[t]he constitutionality of foreclosure by advertisement has been reviewed and held valid previously by" Michigan and federal courts. Moreover, "foreclosure by advertisement is not a judicial action and does not involve state action for purposes of the Due Process Clause, but rather is based on contract between the mortgagor and the mortgagee." *Id*.

Given our conclusion that plaintiffs' claims are barred by both the doctrines of res judicata and judicial estoppel, as well as our conclusion that plaintiffs lack standing to bring their current claims, we decline to address their remaining issues.

Affirmed.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola