

STATE OF MICHIGAN
COURT OF APPEALS

JERRY WATHA, FATTIN WATHA,
MUNTISAR WATHA, THAIRA A. WATHA, and
ONE MANAGEMENT, INC.,

UNPUBLISHED
March 21, 2013

Plaintiffs-Appellees,

v

No. 308236
Oakland County Circuit Court
LC No. 2011-122246-CH

TALMER BANK AND TRUST, f/k/a FIRST
MICHIGAN BANK, a/k/a FIRST MICHIGAN
BANCORP, f/k/a PEOPLES STATE BANK,

Defendant-Appellant,

and

MICHAEL J. BOUCHARD,

Defendant.

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

In this action, plaintiffs challenge defendant's attempt to foreclose a mortgage by advertisement and also challenge the validity of the mortgage at issue. The trial court granted summary disposition in favor of plaintiffs, upon apparently finding that the foreclosure was barred by a prior action and that the mortgage had been discharged. Because we conclude that the summary disposition order was erroneous, we reverse and remand for further proceedings.

The parties agree that there are no material facts in dispute. The documents in the record indicate that in February 2008, plaintiff One Management, Inc. executed a \$225,000 promissory note in favor of defendant's predecessor, Peoples Bank (referred to herein as the Oakland Note). The security for the note was a mortgage on the Oakland County residence of plaintiffs Jerry and Fattin Watha. Mr. and Mrs. Watha executed an accompanying mortgage in favor of Peoples Bank (the Oakland Mortgage).

In the years surrounding the execution of the Oakland Note and the Oakland Mortgage, One Management also executed at least three other notes in favor of Peoples Bank. These three

notes were secured by three mortgages on properties in Wayne County. The three notes secured by Wayne County mortgages, plus the note secured by the Oakland Mortgage, constitute the indebtedness at issue between One Management and Talmer Bank, as successor to Peoples Bank. The combined principle of the four notes exceeded 1.3 million dollars.

One Management defaulted on the notes and the mortgages, and Jerry and Fattin Watha defaulted on the Oakland Mortgage. Defendant, as successor to Peoples Bank, pursued a lawsuit in Wayne County against One Management. The lawsuit had three counts: enforcement of all four promissory notes; judicial foreclosure on the Wayne County mortgaged properties; and appointment of a receiver over the “properties subject to the Mortgages.” The trial court appointed a receiver. Talmer Bank and One Management later entered into a consent judgment of foreclosure.

The Wayne County consent judgment, as amended, specifically ordered that defendant had priority mortgage interests on the Wayne County mortgaged properties. The amended judgment expressly listed the Wayne County properties and defined the properties collectively as “the Property.” The amended judgment also ordered that “‘the Property’ may be sold at foreclosure sale.” The amended judgment did not reference the Oakland County mortgaged property or the Oakland Mortgage. However, the amended judgment indicated that One Management’s total debt to Talmer Bank arose from the four promissory notes and specifically identified each note, including the Oakland Note. The consent judgment declared that One Management’s debt was on “the subject notes” and was secured by “the subject mortgages,” but the judgment did not expressly define “subject notes” or “subject mortgages.” One Management and Talmer Bank subsequently stipulated to dismiss the Wayne County action with prejudice, except that the receivership could continue.¹

Defendant then sought to foreclose on the Oakland property by advertisement. Plaintiffs filed the present action to enjoin the foreclosure and to request a discharge of the Oakland Mortgage. According to plaintiffs, the dismissal of the Wayne County action operated to extinguish the Oakland Note, which in turn required a discharge of the Oakland Mortgage. Plaintiffs sought summary disposition under MCR 2.116(C)(7) (relief because of release, prior judgment, or other disposition of the claim before commencement of the action) and MCR 2.116(C)(10) (no material factual issues and judgment is appropriate as a matter of law).

The trial court granted summary disposition in favor of plaintiffs, but did not specify whether the grounds for the summary disposition rested on the Wayne County consent judgment, the Wayne County dismissal, or on other legal conclusions. Rather, the court stated:

The parties’ briefing recites the facts and then goes to town on the law; i.e., *res judicata*, collateral estoppel, doctrine of election of remedies. However, out of the facts comes the law. If it was clear; in other words, not merely implicit

¹ We note that the amended consent judgment was entered after the date of the stipulated dismissal of the Wayne County Action. Neither party challenges the validity of the amended consent judgment.

or common sense, that the Wayne County case did or did not include the Oakland County property or security, then the applicability or the inapplicability of the various doctrines would be a no-brainer. It is only because of the lack of the expressed exclusion or inclusion of the Oakland County property that causes one to evaluate the applicability of the various doctrines.

The Court finds that from a survey of all the facts and circumstances that the Court is persuaded by the—that the—the reasons from the plaintiff[s], and the Court grants the plaintiff’s [sic] motion.

The trial court’s decision is founded on an incorrect legal premise, i.e., that a consent foreclosure judgment necessarily encompasses every mortgage that secures the indebtedness described in the consent judgment. This Court construes consent judgments in accordance with the plain and ordinary meaning of the terms of the judgment. *Laffin v Laffin*, 280 Mich App 513, 517; 760 NW2d 738 (2008). In this case, the amended consent foreclosure judgment specifically identified the mortgaged properties and defined those properties collectively as “the Property.” The amended consent judgment went on to order that “‘*the Property*’ may be sold at foreclosure sale” (emphasis added). The Oakland property was not listed as part of “the Property” subject to foreclosure. The consent judgment contains no reference to the Oakland property or to the Oakland Mortgage. Rather, the consent judgment identifies only the Oakland Note and orders that the principal and interest due on that note is part of the total debt due from One Management to Talmer Bank. In sum, nothing in the plain language of the Amended Consent Judgment affects the enforceability, or lack of enforceability, of the Oakland Mortgage.²

We also conclude that Talmer Bank’s foreclosure by advertisement on the Oakland property is not necessarily precluded by the so-called “one-action rule” or election of remedies doctrine in MCL 600.3204(1)(b). The statutory subsection allows a creditor to foreclose by advertisement if, among other things:

[a]n action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part. [MCL 600.324(1)(b).

Plaintiffs maintain that Talmer Bank elected to pursue a remedy at law in the Wayne County action, and that the one-action rule now precludes the bank from foreclosing by advertisement. We disagree. As Talmer Bank points out, the Wayne County action is no longer pending, and the consent judgment in that action does not authorize a judicial foreclosure on the Oakland

² We recognize that our Supreme Court recently reiterated, “Under the settled law of this State, the mortgage and the note are to be construed together.” *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 910; 805 NW2d 183 (2011), quoting *Guardian Depositors Corp v Wagner*, 287 Mich 202, 208; 283 NW 29 (1939). Construing the mortgage and the note together does not require that the mortgage be extinguished in this case.

property. The judgment identifies the amount due on the Oakland Note and leaves Talmer Bank to its remedies on the Oakland Mortgage. If Talmer Bank continues to pursue the option of foreclosure by advertisement, that remedy would not result in a double recovery against plaintiffs. Presumably, if Talmer Bank foreclosed on the Oakland Property, any amount recovered would be setoff against the total debt due on the promissory notes.

Similarly, we cannot conclude that the Wayne County action necessarily triggers the claim and issue preclusion doctrines (*res judicata* and collateral estoppel). Claim preclusion bars a subsequent action between the same parties, if the facts or evidence essential to the action are identical to those essential in the prior action. *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010). Issue preclusion bars relitigation of an issue in a subsequent cause of action between the same parties when the issue was necessarily and finally decided in the prior proceeding. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Neither the Oakland Mortgage nor the Oakland property was referenced in the Wayne County action. Accordingly, the judgment and dismissal of that action cannot operate to preclude a subsequent action on the Oakland Mortgage.

Given that the trial court presented no other clear rationale for its summary disposition decision, we reverse the court's entry of summary disposition in favor of plaintiffs and remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering