NO. COA12-1490
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

MARY GOOD and JIM GOOD,
Plaintiffs,

v. Watauga County
No. 11 CVS 862

OMEGA V, LLC, OMEGA IV, LLC,
and CAROLYN W. GRANT,
Defendants.

Appeal by Defendants from an order entered 8 October 2012 by Judge Gary M. Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 10 April 2013.

Deal, Moseley, & Smith LLP, by Bryan P. Martin, for plaintiffs-appellees.

Turner Law Office, P.A., by Victoria H. Tobin, for defendants-appellants.

HUNTER, JR., ROBERT N., Judge.

Omega V, LLC, and Omega IV, LLC, ("Defendants")[1] appeal from an order of the Watauga County Superior Court denying

[1] While Carolyn W. Grant is labeled as a defendant in the caption of this case, the order applies only to Omega V, LLC and Omega IV, LLC, as they were the only parties to move for summary judgment.

Defendants' motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. We affirm.

I. Factual and Procedural History

In 2010 in Wake County, Mary and Jim Good ("the Goods") filed suit to collect monetary damages on five promissory notes against Carolyn Grant and Omega Property Group, LLC (the "first lawsuit"). Defendants in the present case were not parties in the first lawsuit. One of the five promissory notes ("the September 2005 note") was for $250,000 and was executed 1 September 2005 by "Omega 5, LLC" by its "Partner," Grant, and by Grant individually as "Personal Guarantee."

Contemporaneously signed with the September 2005 note, a deed of trust on two tracts of land in Watagua County was executed by Omega IV, LLC by Grant as "Member-Manager", as grantor, to Jeffery J. Walker, Trustee to secure the payment of the note payable to the Goods. The Deed of Trust was recorded on 20 September 2005 in Book 1119 Page 573 of the Watauga County Registry. The recitals on this deed of trust, which is a standard form deed of trust prepared by the NC Bar Association Real Estate Section, read as follows:

> That witness the Grantor is indebted to the Beneficiary in the principal sum of Two hundred fifty thousand and no/100 dollars ($250,000.00) as evidenced by a

> Promissory Note of even date herewith, the terms of which are incorporated herein by reference.

Subsequently, the two tracts securing the indebtedness were transferred from Omega IV, LLC to Omega V, LLC on 28 December 2007. The deed transferring the land was a general warranty deed which recites that it was "PREPARED WITHOUT BENEFIT OF TITLE EXAMINATION." Although the deed is signed and recorded in December, the instrument indicates it was dated 1 April 2007. No mention of the prior deed of trust of record is made in the deed.

On 25 October 2010, Omega Property Group, LLC and Grant entered into a consent judgment (the "Consent Judgment") with the Goods. The Consent Judgment awarded the Goods $1,192,274.00, which included principal, accrued interest, and attorney's fees. The Consent Judgment included judgment on the September 2005 note but no provision was made in that judgment to foreclose on the property.

On 21 December 2011, the Goods filed a verified complaint against Defendants and Carolyn W. Grant in Watauga County Superior Court seeking reformation of the deed of trust, judicial foreclosure and damages in the amount of $316,365.00. Different relief is sought against different parties on varying claims. In their complaint, the Goods allege that Omega IV, LLC

and Omega V, LLC are closely held entities and have been making payments on the notes pursuant to a modification agreement. The Goods also imply in their brief to this Court that a scrivener's error occurred in the making of the note. The September 2005 note was supposed to have read "Omega V" instead of "Omega 5" and the deed of trust was supposed to have referenced not an obligation of Omega IV, LLC but an obligation of Omega V, LLC in referencing the note which secured the property. In the Goods' first cause of action, they sought to collect from Omega V, LLC and Grant sums due on the note. The Goods' second cause of action against Defendants and Grant sought reformation of the deed of trust and after reformation sought, in addition to monetary relief, to obtain judicial foreclosure on the property.

Defendants in their answer assert ten defenses including that the Goods' claims are barred by virtue of the Consent Judgment. Defendants moved for summary judgment on grounds of judicial estoppel, election of remedies, *res judicata*, and collateral estoppel. In support of their motion for summary judgment, the Defendants proffered to the court the Consent Judgment, stipulations in the first lawsuit, and an affidavit from Carolyn W. Grant containing an email from Jim Good.

On 8 October 2012, Superior Court Judge Gary M. Gavenus entered an order denying Defendants' motion for summary judgment. Defendants then filed a timely notice of appeal on 2 November 2012.

II. Jurisdiction and Standard of Review

The denial of a motion for summary judgment is interlocutory in nature, and generally interlocutory orders are not reviewable as a matter of course. *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 230-31 (2001). If, however, the interlocutory order deprives a party of a substantial right that would be lost absent a review, then it may be reviewed under N.C. Gen. Stat. §§ 1-277 and 7A-27. *Id.* Our courts have determined that "the denial of a motion for summary judgment based on the defense of *res judicata* (or claim preclusion) is immediately appealable." *Id.* at 51 (citing to *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)). The denial of a motion for summary judgment based on *res judicata* may affect a substantial right because it could require a successful defendant to relitigate a claim that has already been decided. *Id.*

Like *res judicata*, collateral estoppel is designed to prevent relitigation of issues that have already been decided.

Id. Forcing a party to further defend against issues that have already been fully litigated affects a substantial right. *Id.* Therefore, like *res judicata*, the denial of a motion for summary judgment based upon a defense of collateral estoppel is immediately reviewable.

As Defendants appeal from an interlocutory judgment of a superior court that affects a substantial right, an appeal lies to this Court pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(d) (2011).

The granting of a motion for summary judgment is only appropriate when "there is no genuine issue as to any material fact and [a] party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2011). On a motion for summary judgment, the trial court is not permitted to resolve issues of material fact, and if such issues of material fact exist, the trial court must deny the motion. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). The standard of review for a denial of summary judgment is *de novo*. *Town of Oriental v. Henry*, 197 N.C. App. 673, 678, 678 S.E.2d 703, 707 (2009). On appeal, the court must view the denial of a motion for summary judgment in the light most favorable to the

nonmoving party. *Bockweg*, 333 N.C. at 489-90, 428 S.E.2d at 160.

III. Analysis

Defendants appeal from a denial of summary judgment based on the asserted defenses of *res judicata*, collateral estoppel, election of remedies, and judicial estoppel. As discussed *ante*, the Goods seek two remedies not obtained in the first lawsuit: (1) monetary damages against Omega V, LLC; and (2) reformation of the deed of trust to be followed by judicial foreclosure. Because we hold that Defendants have not shown the absence of issues of material fact, we affirm the denial of their motion for summary judgment.

A. *Res Judicata*

Defendants appeal from the trial court's order denying their motion for summary judgment based upon the affirmative defense of *res judicata*. The doctrine of *res judicata* is an affirmative defense designed to prevent parties from relitigating previously decided matters. *State ex. rel. Pilard v. Berninger*, 154 N.C. App. 45, 54, 571 S.E.2d 836, 842 (2002).

Res judicata bars the relitigation of all matters that were previously decided. *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994). The doctrine also

bars the relitigation of any material and relevant matters that are within the scope of the pleadings regardless of whether they were plead, as long as they could reasonably have been plead. *Id.* When a plaintiff prevails in a prior suit, the cause of action merges with the judgment and all matters of fact or law that were or should have been adjudicated are deemed concluded. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. *Green v. Dixon*, 137 N.C. App. 305, 307, 528 S.E.2d 51, 53 (2000), *aff'd*, 352 N.C. 666, 535 S.E.2d 356 (2000).

Omega Property Group, LLC and Carolyn W. Grant entered into the Consent Judgment, which included judgment on the September 2005 note, with the Goods on 25 October 2010. Defendants were not parties to the Consent Judgment. A consent judgment is considered a final judgment under the doctrine of *res judicata*. *Turner v. Hammocks Beach Corp.*, 192 N.C. App. 50, 56, 664 S.E.2d 634, 639 (2008), *rev'd on other grounds*, 363 N.C. 555, 681 S.E.2d 770 (2009).

Defendants' argument for the protection of *res judicata* fails the requirement that there be the same parties or their privies in the prior and current suit. For the purposes of *res judicata*, the term privies or privity "'involves a person so identified in interest with another that he represents the same legal right' previously represented at trial." *State v. Summers*, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (quotation marks and citation omitted). However, privity does not exist simply if parties are interested in the same set of facts or if the question being litigated might affect another party's liability. *Masters v. Dunstan*, 256 N.C. 520, 525, 124 S.E.2d 574, 577 (1962).

Defendants unsuccessfully contend that they are in privity with Grant, who was party to the Consent Judgment. The evidence they tender to the Court is ambiguous on this point. Carolyn Grant's role in this transaction is not at all clear. Grant was sued as an individual in the first lawsuit. Grant signed the September 2005 note as "Personal Guarantee." Grant represented only her own legal rights in the first lawsuit, which are not the same legal rights as Defendants. Privity was not formed between Defendants and Grant merely because they have some relationship to each other. *See Queen City Coach Co. v.*

Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955) (holding that merely being parties on the same side of an action does not create a privity relationship); *see Bullock v. Crouch*, 243 N.C. 40, 89 S.E.2d 749 (1955) (holding that a business is not necessarily privy with its employee). Defendants' legal rights were not represented in the first lawsuit. Because there are material questions of fact as to whether or not the parties in the first lawsuit were in privity with Defendants, Defendants are not entitled to summary judgment on the basis of *res judicata*.

B. Collateral Estoppel

Defendants argue on appeal that the Goods' suit is barred by collateral estoppel. We disagree.

Collateral estoppel is a companion doctrine of *res judicata* and serves to promote judicial efficiency and to protect litigants from having to relitigate issues that were previously decided. *Bockweg*, 333 at 491, 428 S.E.2d at 161. The primary difference between collateral estoppel and *res judicata* is that collateral estoppel precludes further litigation based upon specific issues, while *res judicata* focuses on specific claims. *Foreman v. Foreman*, 144 N.C. App. 582, 587, 550 S.E.2d 792, 796, *cert. denied*, 354 N.C. 68, 553 S.E.2d 38 (2001).

Collateral estoppel applies only "when the following

requirements are met: (1) the issues to be concluded are the same as those involved in the prior action; (2) the issues in the prior action were raised and actually litigated; (3) the issues were material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action was necessary and essential to the resulting judgment." *Nicholson v. Jackson Cnty. Sch. Bd.*, 170 N.C. App. 650, 655, 614 S.E.2d 319, 322 (2005). Mutuality of parties is not necessary for invoking offensive or defensive collateral estoppel. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 269, 488 S.E.2d 838, 840 (1997).

The Consent Judgment indicates that the issue in the first lawsuit was whether Omega Property Group, LLC and Grant were liable for monetary damages under the September 2005 note. The distinguishable issue in the present case is whether defendant Omega V, LLC is liable for damages and whether the land securing the note may be foreclosed upon. The first lawsuit did not include Defendants and therefore it could not determine their rights or liabilities. Accordingly, we affirm the trial court's decision regarding Defendants' claim under collateral estoppel.

C. Election of Remedies

Defendants argue that they were protected by the doctrine of election of remedies, and therefore the trial court erred in denying the defendant's motion for summary judgment. We disagree.

The purpose of the election of remedies doctrine is to prevent a plaintiff from double recovery for a single wrong. *Swain v. Leahy*, 111 N.C. App. 884, 886, 433 S.E.2d 460, 461 (1993). The doctrine of election of remedies can be "invoked to estop the plaintiff from suing a second defendant only if [plaintiff] has sought and obtained final judgment against a first defendant ***and*** the remedy granted in the first judgment is repugnant or inconsistent with the remedy sought in the second action." *Id*. (alteration in original). Our Supreme Court has held that "[i]f the remedies are not inconsistent there is no ground for election." *Irvin et al. v. Harris et al.*, 182 N.C. 647, 653, 109 S.E. 867, 870 (1921).

We find that monetary damages granted against other defendants in the first lawsuit is not inconsistent with the equitable remedies being sought in the present action or the damages being sought against Omega V, LLC. Had Grant been a party to this appeal, she might have been able to assert this doctrine, but these parties may not.

It is well established that when a promissory note is in default and is also secured by a deed of trust, the holder of the note "may bring an action *in personam* or an action *in rem*, or he may pursue both remedies in one action." *Federal Land Bank v. Whitehurst*, 203 N.C. 302, 308, 165 S.E. 793, 795 (1932). The Goods were not granted relief on reformation of the deed and judicial foreclosure in the first lawsuit, and pursuing a deed of trust is a separate and distinct action from pursuing a note (although both actions can be brought together). Therefore, the Goods' second cause of action, for reformation of the deed of trust and judicial foreclosure, is not inconsistent with the remedy granted in the first lawsuit. Accordingly, we affirm the trial court's denial of summary judgment based upon the doctrine of election of remedies.

D. Judicial Estoppel

Finally, Defendants argue that the trial court erred in not granting their motion for summary judgment based upon judicial estoppel. We decline to address this argument.

Judicial estoppel is recognized as a common law defense in North Carolina. *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 22, 591 S.E.2d 870, 884 (2004). The purpose of judicial estoppel is to "protect the integrity of the judicial process by

prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 28, 591 S.E.2d at 888 (quotation marks and citations omitted). Judicial estoppel is to be flexibly applied, with the court considering the following three factors: (1) a party's subsequent position is clearly inconsistent with a party's previous position; (2) whether the party was successful in convincing the court to accept the prior position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 29, 591 S.E.2d at 888-89. The first factor is an essential element in the court's analysis, while the other two are factors to be considered. *Id.* at 29 n.7, 591 S.E.2d at 888 n.7. Further, judicial estoppel is limited to inconsistent factual assertions, not inconsistent legal theories.

When a court undertakes a judicial estoppel analysis, "[t]he dispositive issue is whether plaintiffs' position, based upon the factual allegations in the instant case, was clearly inconsistent with their position as asserted in the earlier *complaint*. In order to make this determination, a detailed analysis of the factual allegations of the *complaints* is required." *Estate of Means v. Scott Elec. Co.*, 207 N.C. App.

713, 719, 701 S.E.2d 294, 299 (2010) (emphasis added). We are unable to carry out this factual analysis in this case since the complaint from the first lawsuit is not included in the record. "[A]n appellant has the duty to ensure the record and complete transcript are properly prepared and transmitted to [the] Court." *Hill v. Hill*, 173 N.C. App. 309, 322, 622 S.E.2d 503, 512 (2005). It was the appellants' duty to submit all documents necessary for review, which would include the complaint from the first lawsuit. For this reason, we will not address this argument.

IV. Conclusion

For the foregoing reasons, we affirm the trial court's order for denial of Defendants' Motion for Summary Judgment. Our opinion is limited to the arguments made by Defendants under *res judicata*, collateral estoppel, election of remedies, and judicial estoppel in their motion for summary judgment.

AFFIRMED.

Judges BRYANT and MCCULLOUGH concur.

Report per Rule 30(e).