Circuit Court for Howard County
Case No. C-13-CV-20-000801

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 940

September Term, 2021

JACQUES ETAME

v.

M&T BANK, INC.

Arthur,
Shaw,
Woodward, Patrick L.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: May 4, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Jacques Etame, appellant, appeals from an order issued by the Circuit Court for Howard County granting a motion for summary judgment filed by M&T Bank, Inc., appellee. On appeal, he claims that the court erred in granting the motion for summary judgment and in denying his motion to alter or amend the judgment. For the reasons that follow, we shall affirm.

Appellant and his wife, Mireille Ngole,[1] are the former owners of a residential property located at 12217 Bare Bush Path, Columbia, Maryland. Appellee was the servicer of their mortgage loan. In 2018, substitute trustees appointed by appellee filed an Order to Docket Foreclosure in the circuit court. The property was sold at a foreclosure auction in July 2018 to a third-party purchaser. Thereafter, appellant filed a "Motion to Set Aside Foreclosure Sale," which the court treated as exceptions to the sale. In that motion, appellant claimed that appellee had failed to properly credit partial payments that he had made towards the loan; had wrongfully rejected certain partial payments; had wrongfully placed some of the partial payments into escrow; and failed to explain why certain partial payments had been rejected. The court denied the exceptions following a hearing. Appellant filed a notice of appeal from the order denying his exceptions. However, that appeal was ultimately dismissed. The circuit court subsequently entered an order ratifying the sale and referred the case to an auditor.

[1] Ms. Ngole is not a party to this appeal. Appellee has filed a motion to dismiss claiming that she is a necessary party because she was a co-owner of the property and a plaintiff in the civil action against appellee. However, Maryland Rule 8-401(a) specifically provides that an appeal "may be filed with or without the assent or joinder of coplaintiffs, codefendants, or other parties." Therefore, we shall deny the motion to dismiss.

Appellant did not file a notice of appeal from the ratification order. Rather, he filed exceptions to the auditor's report raising essentially the same claims that he raised in his exceptions to the foreclosure sale. The court denied the exceptions and ratified the auditor's report. Appellant then filed a motion for reconsideration, wherein he requested the court to consider certain documents that he claimed supported his contention that appellee had not properly applied his mortgage payments. The court denied that motion, noting (1) that it had "serious doubts as to the authenticity" of one of appellant's exhibits, and (2) that appellant's "allegation of fraud was rejected at the hearing" on his exceptions to the foreclosure sale on November 15, 2018. Appellant did not file any further notices of appeal in the foreclosure case.

In October 2020 appellant and his wife[2] filed a complaint against appellee for breach of contract, breach of duty of good faith, and fraud. The underlying factual basis for all the claims set forth in the complaint was appellant's assertion that appellee had failed to properly credit his monthly mortgage payments, resulting in the wrongful foreclosure of his home. He also asserted that appellee had violated the Song-Beverly Credit Card Act of 1971 by erroneously reporting to "various business associate[ions] and credit reporting agencies" that his mortgage payments had been delinquent.

Appellee filed a motion for summary judgment, claiming that appellant's complaint was barred by the doctrine of res judicata and that it failed to state a claim upon which relief could be granted. With respect to res judicata, appellee noted that appellant had raised

[2] There were three other named plaintiffs. However, there is nothing in the complaint or the record indicating what connection they had to the loan or the property.

the exact same claims in the foreclosure action; that the parties in the foreclosure action were either the same or in privity to the parties in appellant's complaint; that the circuit court had entered a final judgment ratifying the foreclosure sale; and appellant had not appealed from the ratification order. Appellee also asserted that appellant had failed to state a claim upon which relief could be granted with respect to any violations of the Song-Beverly Credit Card Act of 1971 as that was a California statute that applied only to consumer credit cards issued to cardholders in the California. Appellant did not file an opposition.

On July 1, 2021, the court entered an order granting appellee's motion for summary judgment. Appellant filed a timely motion to alter or amend the judgment pursuant to Maryland Rule 2-534, which included a late-filed opposition to the motion for summary judgment. In that motion, appellant asserted that he had been unable to file a timely opposition due to an illness and asked the court to consider the late-filed opposition and vacate its order granting summary judgment. On July 13, 2021, the Clerk of Court sent a notice of deficiency to appellant pursuant to Maryland Rule 20-203(d) because the documents had not been submitted as separate PDFs and the motion was an "omnibus motion" that combined more than one motion into a single document. The notice of deficiency indicated that appellant must correct the deficiency and re-file his motion within 14 days or the motion would be stricken. On July 23, 2021, appellant filed another motion for reconsideration which was lengthier than the first motion, included a new "Declaration" by appellant, and contained several additional exhibits. That motion was filed by the Clerk, although it is unclear whether the Clerk intended to treat the motion as a new motion or a

corrected version of the first motion because the Clerk never struck the first motion from the docket. Nevertheless, the court entered an order on August 4, 2021 denying the July 23 motion for reconsideration. Appellant filed his notice of appeal on August 24, 2021.

On appeal, appellant claims that the court erred in granting appellee's motion for summary judgment and in denying his motion to alter or amend the judgment. Appellee contends that the July 23 motion was a new motion for reconsideration, rather than a corrected version of appellant's first motion for reconsideration and therefore, that it did not toll the time for appellant to appeal from the order granting summary judgment. Consequently, appellee asserts the only issue we can address on appeal is whether the court abused its discretion in denying appellant's July 23 motion for reconsideration because appellant's notice of appeal was only timely as to the court's order denying that motion. We need not resolve that issue, however, because even if we assume that appellant's appeal was timely as to the order granting appellee's motion for summary judgment, the court did not err in granting that motion.

Res judicata ("a thing adjudicated") is "an affirmative defense [that] bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been - but was not - raised in the first suit." *Anne Arundel County Bd. Of Educ. v. Norville*, 390 Md. 93, 106 (2005) (quotation marks and citation omitted). By preventing parties from relitigating matters that "have been decided or *could have been* decided fully and fairly," the doctrine of res judicata "'avoids the expense and vexation attending multiple lawsuits, conserves the judicial resources, and fosters reliance on judicial action by minimizing the possibilities of

inconsistent decisions.'" *Id*. at 107 (quoting *Murray Int'l Freight Corp. v. Graham,* 315 Md. 543, 547 (1989)). Under Maryland law, the elements of res judicata, or claim preclusion, are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and (3) that there has been a final judgment on the merits. *See Colandrea v. Wilde Lake Comm. Ass'n.*, 361 Md. 371, 392 (2000).

Based on our review of the record, we are persuaded that all three elements of res judicata were met in this case. First, appellant was a party to the foreclosure action and appellee was in privity with the substitute trustees as they were appointed to act on appellee's behalf. *See FWB Bank v. Richman*, 354 Md. 472, 498 (1999) ("Privity in the res judicata sense generally involves a person so identified in interest with another that he represents the same legal right.") (quotation marks and citation omitted); *see also Proctor v. Wells Fargo Bank, N.A.*, 289 F.Supp.3d 676, 683 (2018) (noting that when a substitute trustee prosecutes a foreclosure action on behalf of the lender, "the servicer, lender and substitute trustee share the same right to foreclose on the [subject] mortgage such that the privity component of claim preclusion is satisfied" (internal quotation marks and citation omitted)). Second, there is no question that appellant raised the same claims regarding appellee's application of his mortgage payments in the foreclosure action and that the court found those claims to lack merit. Third, because the foreclosure sale has been ratified, there has been a final judgment on the merits for res judicata purposes. *See Jones v. Rosenberg*, 178 Md. App. 54, 72, *cert. denied*, 405 Md. 64 (2008) (noting that final ratification of sale "is *res judicata* as to the validity of such sale, except in the case of fraud

or illegality" and therefore the regularity of a final ratification of sale, cannot be attacked in collateral proceedings).

Appellant cannot avoid the doctrine of res judicata by repackaging his claim in a civil action for damages. Because appellant's claim that appellee had failed to properly credit his mortgage payments was essentially a claim that there had been no foreclosure-triggering default, the foreclosure action was the proper forum to litigate that contention. Thus, the court's ratification of that sale was res judicata as to that issue. *See Fairfax Sav., F.S.B. v. Kris Jen Ltd. Partnership*, 338 Md. 1, 31 (1995) (holding that a final judgment in a deed of trust foreclosure was res judicata as to the borrowers' subsequent lender liability claims which were based on an allegation that there was no foreclosure-triggering default because such claims would have nullified an essential foundation for the foreclosure judgment and could have been raised in the foreclosure action); *Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 78 (2000) (holding that claim against the lender alleging that the lender had imposed illegal fees was barred by the doctrine of res judicata where it was raised in the foreclosure action in an attempt to dispute the amount owed on the mortgage; *see also Anyanwutaku v. Fleet Mortg. Group, Inc.*, 85 F.Supp.2d 566 (D. Md. 2000) (granting summary judgment to defendants on res judicata grounds as to plaintiff's claims of fraud, breach of contract, and negligence where plaintiff contended that the defendant mortgage companies had failed to properly credit loan payments to his account and those claims were raised in a previous foreclosure action).

In short, appellant's complaint was an attempt to relitigate the issue of whether appellee had properly applied his mortgage payments, an issue that was raised multiple

times in the foreclosure action and had been finally resolved by the ratification of the foreclosure sale. Thus, the complaint constituted an impermissible collateral attack on the foreclosure action that the doctrine of res judicata bars.

Finally, we note that appellant's claims that appellee violated the Song-Beverly Credit Card Act of 1971 also failed to state a claim upon which relief could be granted as that is a California statute that only applies to consumer credit cards issued to cardholders in California. Thus, it has no application to allegations raised in appellant's complaint. Accordingly, the circuit court did not err in granting appellee's motion for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.