

Circuit Court for Montgomery County
Case No. 44459-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1462

September Term, 2019

AKINBOBOLA AKINKOYE

v.

PATRICIA SWEENEY

Leahy,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Salmon, J.

Filed: December 23, 2020

*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.

The appellant in this case is Akinbobola Akinkoye (“Mr. Akinkoye”), a real estate investor. The appellee is Patricia Sweeney (“Ms. Sweeney”). Ms. Sweeney is the owner of Equity Trust Company.

On December 26, 2018, Mr. Akinkoye filed a Second Amended Complaint (“the Complaint”) in the Circuit Court for Montgomery County against Ms. Sweeney, individually and in her capacity as trustee of Equity Trust Company. The counts in the Complaint were captioned: Fraud/Intentional Misrepresentation (Count I); Breach of Contract (Count II); Violation of Maryland Mortgage Fraud Protection Act¹ (Count III); and Trespass (Count IV). The factual allegations concerning counts I, II and III, are outlined below.

In 2015, Mr. Akinkoye purchased a house located at 9208 Gladys Farm Way, Gaithersburg, Maryland (“the Gladys Way Property”). He financed that purchase by borrowing \$548,000 from Equity Trust Company. The loan was evidenced by two promissory notes. One note, in the amount of \$343,000, was payable to Equity Trust Company, Custodian FBO (For the Benefit of) David Shames, David Shames TTEE;² the second note was for \$205,000 and was payable to Equity Trust Company, Custodian FBO Patricia Sweeney, Patricia Sweeney TTEE. The notes were secured by a deed of trust

¹ The Maryland Mortgage Fraud Protection Act is codified at § 7-401 *et seq.* of the Real Property Article of the Maryland Code.

² David Shames was the fiancé of Ms. Sweeney. “TTEE” is a commonly used abbreviation for “Trustee.”

encumbering the Gladys Way Property that was filed in the land records of Montgomery County.

In May of 2017, Mr. Akinkoye met with Ms. Sweeney and told her that he wanted to refinance the notes secured by the deed of trust on the Gladys Way Property. At the time of the meeting, Mr. Akinkoye was in the process of selling another property that he owned which was located at 5419 7th Street, N.W, Washington, D.C. (“the D.C. Property”). Previously, Equity Trust Company had loaned Mr. Akinkoye monies secured by a deed of trust on the D.C. Property. According to the Complaint, Ms. Sweeney agreed to apply \$100,000 from proceeds realized from the sale of the D.C. Property “to pay down the mortgage on” the Gladys Way Property.

Ms. Sweeney received the \$100,000 payment from the sale of the D.C. Property in July of 2017. The next month, Mr. Akinkoye asked Ms. Sweeney for an accurate payoff statement on the loan that was secured by the deed of trust on the Gladys Way Property. Ms. Sweeney, however, refused to provide a payoff statement “that reflected the \$100,000 payment from the [sale] of the D.C. Property.” Her refusal was made despite the fact that Mr. Akinkoye needed “an accurate payoff statement” so that he could refinance the notes on the Gladys Way Property. Ms. Sweeney told Mr. Akinkoye that she would not provide him with an accurate payoff statement reflecting the \$100,000 payment received until Mr. Akinkoye “liquidated” property he owned at 5416 13th Street, N.W., Washington D.C. (“the 13th Street Property”).

According to the Complaint, as a direct result of the failure to provide an accurate payoff statement, Mr. Akinkoye could not obtain financing to restructure the loan secured

by the Gladys Way Property; which, in turn, led to the filing, in the Circuit Court for Montgomery County, of a foreclosure action against the Gladys Way Property.³ Only after the foreclosure action was filed did Ms. Sweeney give him the \$100,000 credit.

Ms. Sweeney, by counsel, filed a motion to dismiss the Complaint. In regard to the first three counts of the Complaint, she contended that Mr. Akinkoye’s causes of action were barred by the doctrine of collateral estoppel and/or *res judicata*. In support of that contention, Ms. Sweeney relied on documents filed in the foreclosure action that was instituted against the Gladys Way Property by trustees appointed by Equity Trust Company.

Ms. Sweeney asked the court to take judicial notice of all documents in the foreclosure proceeding but one of the documents that movant attached to her motion to dismiss was a “Motion to Dismiss or Stay the Foreclosure Sale” that Mr. Akinkoye filed in the prior action. In that motion, Mr. Akinkoye claimed that the foreclosure was barred by the doctrine of unclean hands because “Sweeney gave Akinkoye the payoff [for the Gladys Way Property] but did not give him the credit for the \$100,000 she received from the sale of the D.C. Property.” He characterized Ms. Sweeney’s actions in refusing to apply the proceeds from the sale of the D.C. Property and/or to provide him with an accurate and timely payoff figure reflecting the \$100,000 payment, as “fraudulent [and/or] inequitable conduct.”

³ The foreclosure action was filed on February 12, 2018.

Documents from the foreclosure action attached by Ms. Sweeney to her motion to dismiss show that the trustees opposed Mr. Akinkoye’s motion to dismiss/stay on several grounds. The trustees argued that one of the reasons that Mr. Akinkoye’s motion to dismiss/stay should be denied was because it was not timely filed. In support of this argument, the substitute trustees pointed out that the motion to dismiss/stay was filed pursuant to Maryland Rule 14-211, which contains a strict time requirement. To meet that deadline, for property that is not owner-occupied residential property, “a motion by a borrower or record owner to stay the sale and dismiss the action shall be filed within 15 days after service pursuant to Rule 14-209 of an order to docket or complaint to foreclose.” *See* Md. Rule 14-211(a)(2)(B). Maryland Rule 14-211(a)(2)(C) provides that, “[f]or good cause, the court may extend the time for filing the motion or excuse non-compliance.” The trustees pointed out that Mr. Akinkoye’s motion to dismiss/stay was filed on March 12, 2018, which was too late in view of the fact the order to docket was filed on February 12, 2018, and Mr. Akinkoye was served with that order on February 16, 2018. The trustees also asserted that Mr. Akinkoye had not set forth good cause for the late filing.

In their opposition to the motion to dismiss/stay, the trustees took issue with Mr. Akinkoye’s claim that he lived at the Gladys Way property. The trustees filed an affidavit from Ms. Sweeney that stated, based on land records, that Mr. Akinkoye lived at 409 Phelps Street, Gaithersburg. In their opposition, the trustees also said:

Adding to this evidence, Defendant executed a “Commercial Loan Affidavit” at the time of Ms. Sweeney’s purchase-money loan, swearing that he would “not be living in the real property known as 9208 Gladys Farm Way.” *See* Commercial Loan Affidavit 9208 Gladys attached hereto as Exhibit F. That sworn statement is not consistent with the Property being

purchased as “owner[-]occupied property.” In light of the above facts, including two prior affidavits from the Defendant, his current ambiguous claims of being an owner occupant at the Property are simply not credible.

The trustees in the foreclosure action, aside from the issue of untimeliness of Mr. Akinkoye’s motion to dismiss/stay, contended that under the circumstances of this case, Mr. Akinkoye had failed to set forth facts that would support an unclean hands defense to the foreclosure action.

In the foreclosure action, Mr. Akinkoye filed a reply to the trustees’ opposition to the motion to dismiss in which he said that the trustees’ “flagship argument” to support their opposition was based on the contention that the motion to dismiss/stay was untimely. He attempted to rebut that argument by claiming that he and his family lived at the Gladys Way Property and it was therefore owner-occupied. According to Mr. Akinkoye, he did not have to file his motion to dismiss/stay until the foreclosure mediation was concluded. According to Mr. Akinkoye, because the matter was never mediated, despite his request, his motion to dismiss/stay was timely. He also reiterated his assertion that due to the unclean hands doctrine, the foreclosure action should be dismissed.

Also in the foreclosure action, Mr. Akinkoye filed a motion for foreclosure mediation. On March 26, 2018, the trustees filed a motion to strike that request, which was followed one day later by an amended motion to strike. They contended that the Gladys Way Property was not owner-occupied. The argument in support of that contention was the same untimeliness argument that the trustees’ put forth in their opposition to Mr. Akinkoye’s motion to dismiss/stay.

Documents from the foreclosure action show that on April 27, 2018, the Honorable Karla N. Smith signed an order that provided as follows:

Upon consideration of Defendant’s Motion to Dismiss and Plaintiff’s opposition thereto, it is this 27th day of April, 2018,

ORDERED, that Defendant Akinbobola Akinkoye’s Motion to Dismiss is DENIED.

A second order, signed on the same date by Judge Smith, granted the trustees’ motion to strike the request for foreclosure mediation. Both orders were docketed on April 30, 2018.

Mr. Akinkoye then filed in the foreclosure action a “Motion to Alter or Amend the Order Granting Plaintiff’s Motion to Strike the Request for Mediation, and the Order Denying Defendant’s Motion to Stay and Dismiss.” He contended, once again, that his motion to dismiss/stay was timely filed because the Gladys Way Property, contrary to the allegations of the trustees, was owner-occupied because it was his primary residence. He relied on Maryland Rule 14-211(a)(2) which provides:

(2) Time for Filing. (A) Owner-Occupied Residential Property. In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:

(i) the date the final loss mitigation affidavit is filed;
(ii) the date a motion to strike postfile mediation is granted; or
(iii) if postfile mediation was requested and the request was not stricken, the first to occur of:

(a) the date the postfile mediation was held;
(b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or

(c) the expiration of 60 days after transmittal of the borrower’s request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

Mr. Akinkoye, in his motion to alter or amend, summarized his argument that the motion to dismiss/stay was timely as follows:

[B]ecause the Property is owner-occupied residential property, and mediation was requested, the deadline for filing a motion pursuant to Rule 14-211 never actually arose. Therefore, [d]efendant’s motion could not be untimely. Pursuant to Md. Rule 14-211, a Motion to Stay or Dismiss must be filed “no later than 15 days after . . . the date a motion to strike postfile mediation is granted . . . or the date the postfile mediation was held . . .” when the subject property is owner-occupied residential property. Md. Rule 14-211(a)(2)(iii)(a). Therefore, to the extent that the [c]ircuit [c]ourt relied on [p]laintiff[’]s argument concerning the timeliness in denying [d]efendant’s Motions to Stay and Dismiss, such reliance was unfounded and contrary to Maryland law. Therefore, the Court should vacate the April 30, 2018 Orders Denying Defendant’s Motions to Stay and Dismiss.

He also argued in his motion to alter or amend that the foreclosure action should not go forward because it was barred by the unclean hands doctrine inasmuch as incorrect information had been provided to him by Ms. Sweeney which prevented him from avoiding foreclosure by refinancing the Gladys Way Property.

On July 24, 2018, a hearing was held in the foreclosure action on Mr. Akinkoye’s motion to alter or amend. Judge Boynton denied the motion in an order that provided:

Upon consideration of the Defendant’s Motion to Alter or Amend the Order Granting Plaintiff’s Motion to Strike, and the Orders Denying Defendant’s Motions to Stay and Dismiss and the Opposition filed by the Plaintiff, good cause having been shown, it is this 24th day of July, 2018, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Defendant’s Motion is over-ruled and denied.

Judge Greenberg filed, on August 28, 2018, an order ratifying the sale, which constituted a final order in the foreclosure action.

In the case *sub judice*, Ms. Sweeney argued that the first three counts of Mr. Akinkoye’s Complaint should be dismissed because they were all barred by the collateral estoppel doctrine. She claimed that in the foreclosure action the same contentions that were raised in the first three counts of the Complaint, were raised and rejected by the circuit court.

Mr. Akinkoye filed an opposition to Ms. Sweeney’s motion to dismiss counts I, II and III of the Complaint. In that opposition he asserted, *inter alia*:

In the instant matter, the issues regarding the \$100,000 curtailment and Sweeney’s refusal to provide the [p]laintiff with an accurate payoff statement was not actually litigated in determining [p]laintiff’s Motion to Dismiss. Indeed, as is evident on the face of the Orders that the [d]efendant submitted with her Motion to Dismiss (Ex. B and D), the [c]ourt never made a determination regarding the accuracy of any statements; those issues were not mentioned by the [c]ourt in its rulings. The [d]efendant, with her motion to dismiss, did not include any evidence whatsoever indicating that the [c]ourt even considered the accuracy of the payoff statements that Sweeney had a duty to provide to the [p]laintiff[.]

In a similar vein, Mr. Akinkoye also argued that in the foreclosure action “the [c]ourt certainly did not determine whether the presentation of that inaccurate pay-off supported a claim for [f]raud, MMFPA [Maryland Mortgage Fraud Protection Act], or breach of contract.”

A hearing was held on Ms. Sweeney’s motion to dismiss on April 10, 2019. After hearing from counsel, the circuit court in an oral decision, dismissed, with prejudice, counts I, II and III of the Complaint on the grounds that the claims were barred by the collateral estoppel doctrine. Count IV, the trespass count, was dismissed with leave to amend within 15 days. Mr. Akinkoye did not file an amended complaint as to count IV and, accordingly,

on August 30, 2019, an order was entered dismissing that count with prejudice. Mr. Akinkoye filed a timely notice of appeal to this Court on September 27, 2019 in which he presents one question that we have rephrased: Did the circuit court err in dismissing counts I, II and III of the second amended complaint based on the collateral estoppel doctrine?⁴

I.

Standard of Review

Ms. Sweeney filed in the circuit court what she characterized as a motion to dismiss for failure to state a claim pursuant to Maryland Rule 2-322. But, if exhibits are attached to a motion to dismiss that are not excluded by the court, the motion to dismiss is treated as a motion for summary judgment filed pursuant to Md. Rule 2-501. *See* Md. Rule 2-322(c). *See also D'Aoust v. Diamond*, 424 Md. 549, 572-73 (2012). Because Ms. Sweeney's motion to dismiss was supported by the documents, orders and exhibits in the foreclosure action (along with other documents in the foreclosure file of which the circuit court was asked to take judicial notice), we shall treat the motion to dismiss filed in the circuit court as a motion for summary judgment. Although the name of the motion has been changed, neither party is prejudiced by treating the order signed in the circuit court as an order granting summary judgment. There are no issues of material fact that would

⁴ Appellant phrases the issue presented as: Whether the circuit court committed errors of law and/or abused its discretion in dismissing counts I-III of plaintiff's complaint, based on the doctrines of *res judicata*/collateral estoppel[.]

impact the issue of whether Ms. Sweeney was entitled to a judgment in her favor based on the collateral estoppel doctrine.⁵

In deciding whether a circuit court judge erred in granting a motion for summary judgment, we are required to consider all facts presented in the lower court, together with all inferences that can legitimately be drawn from those facts, in the light most favorable to the non-moving party – here, Mr. Akinkoye. *See* Md. Rule 2-501(a).

II.

Analysis

In *Electrical General Corp. v. Labonte*, 229 Md. App. 187 (2016), this Court wrote:

We must begin our analysis by recognizing the four-part test which must be satisfied in order for the doctrine of collateral estoppel to be applicable[:] . . .

- (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
- (2) Was there a final judgment on the merits?
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
- (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

229 Md. App. at 202-03 (quoting *Washington Suburban Sanitary Comm’n v. TKU Associates*, 281 Md. 1, 18-19 (1977) (citing *Pat Perusse Realty Co. v. Lingo*, 249 Md. 33, 45 (1968))).

⁵ At oral argument before this panel, neither party objected to our treating appellee’s motion to dismiss as a motion for summary judgment that the circuit court granted.

In this appeal, the crucial issue is whether, in the foreclosure action, the same issue was decided as the issue presented in the first three counts of Mr. Akinkoye’s Complaint. Relevant to this issue is what the Court of Appeals said in *Cosby v. Dep’t of Human Resources*, 425 Md. 629 (2012):

Collateral estoppel does not require that the prior and present proceedings have the same purpose, nor does it mandate that the statutes upon which the proceedings are based have the same goals. The relevant question is whether the fact or issue was actually litigated and decided in a prior proceeding, regardless of the cause of action or claim. If the answer to that question is yes, then, assuming that the remaining factors of the doctrine have been met, collateral estoppel bars re-litigation of the issue.

425 Md. at 642 (quoting *Montgomery Cty. Dep’t of Health and Human Servs. v. Tamara A.*, 178 Md. App. 686, 701 (2008), *rev’d on other grounds*, 407 Md. 180 (2009)) (emphasis added). *See also Welsh v. Gerber Products, Inc.*, 315 Md. 510, 518 (1989) (holding same).

Ms. Sweeney argues that the same issue that is the cornerstone of the claims set forth in Counts I, II and III of the Complaint were raised and decided in the foreclosure action. She phrases that argument as follows:

Akinkoye understood that the doctrine of “unclean hands” is available as a defense to a foreclosure action. By denying the Motion to Dismiss, the [c]ircuit [c]ourt must have made a determination that the payoff statement was accurate and that there was no fraud. Moreover, Judge Smith and Judge Boynton each had a complete record before them to make the findings and conclusions that they reached. Judge Boynton also held a hearing on the matter and both [o]rders from the [c]ircuit [c]ourt specifically state that the Motion to Dismiss and Motion to [Alter or] Amend are upon consideration of Akinkoye’s filings. *See Court Orders* (“Upon consideration of Defendant’s Motion to Dismiss ...” and “Upon consideration of Defendant’s Motion to Alter or Amend ...”)[.] The [c]ircuit [c]ourt does not need to specifically mention each and every issue raised in the motions for the issues to have been “actually litigated.” What matters is that the issue was

determined in the Foreclosure Action and that Akinkoye was given a fair opportunity to be heard.

(References to appendix omitted.)

We disagree with Ms. Sweeney’s argument that Judge Smith “must have made a determination that the payoff statement was accurate and that there was no fraud.” We know for sure that Judge Smith agreed with the trustees that Mr. Akinkoye’s motion to dismiss/stay was filed too late and must be dismissed for that reason. We say this because Judge Smith, contemporaneously with signing the order denying Mr. Akinkoye’s motion to dismiss/stay, signed an order granting the trustees’ motion to strike Mr. Akinkoye’s request for mediation. There was no possible reason to deny that request except for the one advanced by the trustees: that he was not entitled to mediation because the Gladys Way Property was not owner-occupied. And, of course, if the Gladys Way Property was not owner-occupied, the motion to dismiss/stay was filed too late – a fatal flaw. *Svrcek v. Rosenberg*, 203 Md. App. 705, 721 (2012).

It is true that, as a general rule, a motions judge is not required to say why he/she grants or denies a motion. But when, as here, two reasons are advanced as to why a motion should be granted or denied and only one of those reasons would support a collateral estoppel defense, the party who relies on collateral estoppel cannot prevail if the court does not specify which of the reasons it found persuasive.

CONCLUSION

We have assumed, purely for the sake of argument, that the facts set forth in counts I, II and III of the Complaint (that Ms. Sweeney caused harm by providing Mr. Akinkoye

with an inaccurate payoff statement that prevented him from obtaining refinancing) were, in all material respects, identical to the facts that Mr. Akinkoye relied upon in the foreclosure action to support his lack of “clean hands” defense. But in the case *sub judice*, Ms. Sweeney presented no evidence to the motions court to show that this issue was decided by the Honorable Karla Smith in the foreclosure action.

For the reasons stated above, we hold that the judge in the subject case erred in dismissing counts I - III on the grounds of collateral estoppel. Accordingly, we shall reverse the judgment of the Circuit Court for Montgomery County and remand the case for trial.

**JUDGMENT REVERSED; CASE
REMANDED TO THE CIRCUIT
COURT FOR MONTGOMERY
COUNTY; COSTS TO BE PAID BY
APPELLEE.**