STATE OF MICHIGAN

COURT OF APPEALS

AMANDA LAVOY, Plaintiff-Appellant,	UNPUBLISHED February 25, 2014
v	No. 310322 Monroe Circuit Court
ALTERNATIVE LOAN TRUST 2007-4CB, Defendant-Appellee.	LC No. 12-032164-CH

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

In this mortgage foreclosure case, plaintiff Amanda LaVoy appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10) in favor of defendant, Alternative Loan Trust 2007-4CB. Because we conclude that summary disposition was properly granted, we affirm.

This case involves real property located at 2049 Baldwin Road, Monroe, Michigan. Plaintiff purchased the property with a loan from Countrywide Home Loans, and entered into a mortgage agreement with Mortgage Electronic Registration Systems, Inc. (MERS), the mortgagee under the agreement acting as a nominee for Countrywide, the lender. The mortgage is dated February 28, 2006, and was recorded on March 6, 2006. On January 1, 2007, plaintiff signed a loan modification; the loan modification agreement was recorded on May 18, 2007. The mortgage was assigned to defendant, The Bank of New York,[1] as trustee for the benefit of Alternative Loan Trust 2007-4CB Mortgage Pass-Through Certificates, Series 2007-4CB, on November 26, 2008, and the assignment was recorded on December 3, 2008.

Eventually, plaintiff defaulted on the mortgage, triggering its power of sale clause. Notice of a sheriff's sale was published and posted on the property, and the sale was held on July 9, 2009. Defendant was the highest bidder at the sale. The redemption period for the property was one year, MCL 600.3240(13), and accordingly expired after July 9, 2010. There is nothing

[1] Defendant states that it was misidentified in the lower courts, and that it is properly identified as The Bank of New York as Trustee for the Benefit of Alternative Loan Trust 2007-4CB Mortgage Pass-Through Certificates, Series 2007-4CB.

in the record to indicate that the property was redeemed or that plaintiff took any action to challenge the foreclosure proceedings within the redemption period.

After the redemption period expired, plaintiff continued to live in the home located on the property at issue. On September 13, 2010, defendant filed a complaint for termination of tenancy in the district court to evict plaintiff from the property for "unlawfully holding over after expiration of redemption period following sheriff's sale." The hearing date was set for October 1, 2010. On September 28, 2010, plaintiff's attorney sent a letter to defendant's attorney offering to settle the case. The letter stated that plaintiff would vacate the property on or before October 31, 2010, and if she did not vacate on time, defendant would be entitled to an immediate order of eviction. Defendant accepted this offer, and prepared a consent judgment which stated plaintiff would have until October 31, 2010 to vacate the property. Plaintiff signed the judgment and it was entered by the district court on October 1, 2010. The judgment also provided that plaintiff had until October 11, 2010, to file a motion for a new trial, motion to set aside a default judgment, or an appeal. Plaintiff did not seek any relief from the consent judgment within the time frame provided by the order. However, plaintiff continued to occupy the property. Despite its right to evict plaintiff, defendant imposed a "holiday moratorium" on its eviction proceedings and plaintiff remained on the property.

In March 2011, defendant moved for entry of judgment and an order of eviction. The motion stated that an order of eviction was to issue on November 1, 2010, that the judgment had expired, and that pursuant to MCR 4.201(L),[2] more than 56 days had passed since entry of the judgment and a hearing must be held and an order granted before the order of eviction could be executed. Defendant requested immediate entry of a judgment and immediate entry of an order of eviction. On April 6, 2011, the district court granted defendant's requests and entered an order granting the judgment an additional 56 days and also entered an order of eviction. Plaintiff was not present at the hearing.

On April 7, 2011, plaintiff, acting in propria persona, sent a letter stating that she was not notified about the April 6, 2011, hearing and that she had "no idea who this lender is," in regard to Bank of New York. Then, plaintiff, still acting in propria persona, filed a motion to set aside "default" on April 15, 2011.[3] The district court denied plaintiff's motion to set aside the "default"; however, on the same day it entered a judgment ordering that plaintiff had a right to possession of the property until July 18, 2011, after which date an order of eviction would enter. The order further provided that plaintiff had until July 18, 2011 to appeal the order.

On July 15, 2011, plaintiff filed an in propria persona "notice of appeal" in the circuit court wherein she alleged that she first learned of the tax sale that week. She further alleged that

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[2] MCR 4.201 governs summary proceedings to recover possession of premises, and subsection (L) specifically covers orders of eviction.

[3] We note that plaintiff was not actually defaulted, and that the order entered by the district court was not a default judgment but rather a continuation of the previous consent judgment and order of eviction.

defendant had violated several "federal laws," committed fraud, and demanded to see her "original note to show who currently has true position [sic]." Moreover, she alleged that she was the owner of the property and that "MERS never owned the property and never had legal right to transfer or assign any mortgages." Finally, plaintiff stated that she was submitting a motion to "quiet title." On July 25, 2011, plaintiff filed an "ex parte motion to stay proceedings" in the circuit court alleging that defendant obtained the property "through fraudulent tax sale foreclosure."

The circuit court granted plaintiff's motion to stay proceedings and scheduled an expedited hearing on July 27, 2011. The circuit court noted in its order that plaintiff apparently was seeking to appeal the district court orders and was also seeking to maintain a separate quiet title action. The circuit court cited MCR 2.612(C)(1)(c), noting that it could provide relief from a judgment based "on a motion and on just terms." It stated that it was granting a stay of proceedings, but that if plaintiff was "unsuccessful in her motion" following the expedited hearing, "the eviction notice shall be automatically reinstated."

The scheduled expedited hearing was adjourned to allow plaintiff to retain counsel and rescheduled for August 31, 2011. On August 29, 2011, plaintiff, still acting in propria persona, filed several additional pleadings, including a "motion for quiet title," "motion for discovery," and a "motion for injunctive relief." On August 31, 2011, the circuit court issued an order denying plaintiff's request for injunctive relief and affirming the district court's decision regarding plaintiff's eviction. The order stated that in addition to her appeal of the district court's eviction order, plaintiff filed a motion to quiet title. The order stated that the motion for quiet title "may proceed and the plaintiff will need to process the case by serving the opposing party." The circuit court order further observed that plaintiff's "notice of appeal" appeared to "raise similar arguments" as the arguments raised by the quiet title motion; however, it stated that the court "would leave the parties to any proper recourse available to them." Plaintiff thereafter filed an in propria persona "motion to vacate judgment," which the circuit court denied.

On November 22, 2011, defendant filed a motion to renew the order of eviction in the district court. At this point, plaintiff retained counsel, who filed an answer to defendant's motion on December 20, 2011. On January 11, 2012, the district court granted defendant's motion to renew the eviction order; however, defendant apparently never took any action in regard to the eviction order in light of the proceedings that were commenced after plaintiff filed another complaint.

Plaintiff's second complaint, filed through her attorney on January 4, 2012, is the complaint relevant to the instant case on appeal. The complaint has two counts alleging "quiet title" and "abuse of process and fraud." The quiet title count alleges that the mortgage "is a nullity and is unenforceable against the property at issue" because Countrywide allegedly "split the ownership of the promissory note executed by plaintiff from the mortgage recorded as security in this matter." Thus, plaintiff maintained that the transfer of the mortgage to defendant was a transfer without the underlying obligation and accordingly, was a "mere nullity and does not create the standing to commence enforcement of the mortgage." The abuse of process and fraud count alleges that defendant improperly used the foreclosure by advertisement process

because defendant lacked standing to bid on the property and because plaintiff never received "proof that the holder of the promissory note was paid the purchase price."

Defendant answered plaintiff's complaint and raised several affirmative defenses. Shortly thereafter, defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Defendant argued that summary disposition was proper under MCR 2.116(C)(7) because res judicata applied to plaintiff's complaint in light of the fact that plaintiff previously entered into a consent judgment regarding the foreclosure, could have raised any defenses available to her regarding the foreclosure during the summary proceedings in the district court but failed to, and both parties were involved in the district court proceedings. Further, defendant argued that summary disposition was appropriate under MCR 2.116(C)(8) and (C)(10) because plaintiff lacked standing to challenge the foreclosure. Defendants maintained that plaintiff lacked standing because she had until July 9, 2010 to redeem the property and her failure to redeem the property within the redemption period vested all rights, title, and interest in the property in the purchaser with the sheriff's deed. Thus, because plaintiff did not avail herself of her right of redemption during the foreclosure proceedings, her right to challenge those proceedings was extinguished upon the expiration of the statutory redemption period. Moreover, plaintiff failed to allege fraud or significant irregularities so as to fall into the exception to this rule.

Plaintiff answered defendant's motion, and argued that res judicata was not applicable because the consent judgment was entered into in the context of a summary proceeding and plaintiff could not have addressed the validity of the underlying foreclosure by advertisement. Plaintiff also argued that defendant lacked an ownership interest in the promissory note, and because of this alleged fact, defendant did not meet the requirements of the foreclosure by advertisement statute and could not legally purchase the property at the sheriff's bid.

On April 27, 2012, the circuit court held a hearing regarding defendant's motion for summary disposition. Both parties presented arguments at the hearing, following which the trial court issued its opinion from the bench. The trial court held:

> First, as to the res judicata argument, res judicata bars subsequent action between the same parties when the evidence or essential facts are identical. The second action is barred when the first action was decided on the merits. In this case it was based upon the consent judgment. The matter contested in the second action was or could have been resolved in the first . . . the foreclosure could have been contested or challenged, the validity of it, in the . . . district court proceedings. In both actions there involved the same parties or their privies . . . that element is also established here because certainly they were their privies, and so I do believe this action is barred by res judicata.

The trial court also addressed defendant's standing argument, holding:

> Plaintiff lacks standing to challenge the foreclosure because her . . . rights to challenge it were extinguished upon expiration of the redemption period. Also, plaintiff was not a party to the assignment and therefore lacked standing to challenge that as well, and so . . . there was no fraud or challenge about . . .

> irregularity in the foreclosure proceedings. So for all these reasons the motion for summary disposition is granted under (C)(7), and arguably (8) and (10), but primarily (C)(7).

An order granting defendant's motion for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) was entered on May 8, 2012, "for the reasons stated on the record." Plaintiff now appeals as of right the trial court's order granting summary disposition to defendant.

On appeal, plaintiff argues that summary disposition in favor of defendant was not proper.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We comment upon a much too common problem with some of the briefing received by this Court. Specifically, in her brief on appeal plaintiff relies in part on an outdated and overruled summary disposition (actually summary judgment under the 1963 court rules) standard, arguing that under MCR 2.116(C)(10) the trial court must deny a motion if "a record might be developed that will leave open an issue upon which reasonable minds could differ," citing *Betrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995). Yet it has been *almost 15 years* since the Supreme Court (1) explicitly recognized that that standard was inapplicable under the Michigan Court Rules established in 1985, and (2) reversed the cases citing to that standard. Indeed, in *Smith v Globe Life Ins Co.*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), the Supreme Court was very specific in holding that the old standard, requiring denial of a motion if "a record might be developed" that could create a question of material fact, was no longer viable:

> We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition brought under MCR 2.116(C)(10), erroneously applied standards derived from *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). These decisions have variously stated that a court must determine whether a record "might be developed" that will leave open an issue upon which reasonable minds may differ, see, e.g., *Farm Bureau Mutual Ins. Co. of Michigan v Stark*, 437 Mich 175, 184; 468 NW2d 498 (1991); *First Security Savings Bank v Aitken*, 226 Mich App 291, 304; 573 NW2d 307 (1997); *Osman v Summer Green Lawn Care, Inc.*, 209 Mich App 703, 706; 532 NW2d 186 (1995), and that summary disposition under MCR 2.116(C)(10) is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome." *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997); *Horton v Verhelle*, 231 Mich App 667, 672; 588 NW2d 144 (1998).
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> These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10). See *McCart, supra* at 115, n. 4. Under MCR 2.116, it is no longer sufficient for plaintiffs to *promise to offer* factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary

> proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4).
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> Consequently, those prior decisions of this Court and the Court of Appeals that approve of *Rizzo*-based standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so.

We recognized this point a decade ago in *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004), yet still today we frequently receive briefs that contain this outdated, overruled, and obviously inapplicable standard.[4] Appellate counsel need to either update their brief banks or their legal research methods to avoid citing to these summary judgment standards that were long ago set aside by the 1985 Court Rules that established a more intricate and different summary disposition standard. It is a disservice to clients and the profession to continue citing standards that have no application today.

Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred by a prior judgment, i.e., res judicata. *RDM Holdings, LTD v Continental Plastics Co*, 281 Mich App 678, 687; 762 NW2d 529 (2008); *Beyer v Verizon North Inc*, 270 Mich App 424, 435; 715 NW2d 328 (2006). A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence. *Id.* "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

Summary disposition pursuant to MCR 2.116(C)(8) is proper if the nonmoving party failed to state a claim on which relief can be granted. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Claims must be "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation and citation omitted). In reviewing a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(8), this Court reviews the pleadings alone, accepting all factual allegations in the complaint as true and construing them in a light most favorable to the nonmoving party. *Id.*

Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Coblentz*, 475 Mich at 567. The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine

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[4] See, for example, *Overweg v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued May 9, 2013 (Docket No 308785); *Gass v Catts Realty Co*., unpublished opinion per curiam of the Court of Appeals, issued March 13, 2012 (Docket No. 302217), and *Bush v Peninsular Realty Inc*, unpublished opinion per curiam of the Court of Appeals, decided December 13, 2011 (Dockket No 298617).

issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden*, 461 Mich at 120.

We first consider whether the doctrine of res judicata barred plaintiff's claims, entitling defendant to summary disposition under MCR 2.116(C)(7).

As explained by this Court in *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010):

> The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation. Accordingly, res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. It is applicable when the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies. For the doctrine to apply, the judgment in the first case must have been final. [Citations, quotation marks, and alterations omitted.]

MCL 600.5750 addresses the application of the doctrine of res judicata in the context of a summary proceeding for eviction. MCL 600.5750 states in pertinent part:

> The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except [with regard to certain exceptions that are not pertinent in this case.]

In *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170; 600 NW2d 617 (1999), our Supreme Court held that in light of the language in MCL 600.5750, a judgment in summary proceedings does not bar other claims for relief. However, in *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575-577; 621 NW2d 222 (2001), our Supreme Court clarified that res judicata will bar relitigation of issues actually litigated in summary proceedings. Specifically, the Court explained that:

> Our decision in *JAM Corp* recognized a statutory exception to this rule with respect to claims that "could have been" litigated in a prior proceeding. See *id.* at 168, 600 NW2d 617, citing MCL. § 600.5750; . . . . There, we recognized that the legislative intent for this exception was to remove the incentive for attorneys to "fasten all other pending claims to swiftly moving summary proceedings." *Id.* at 169, 600 NW2d 617. Our decision in *JAM Corp* said nothing about the preclusive effect of claims actually litigated in the summary proceedings. Thus, the "other claims of relief," described in *JAM Corp* at 170, 600 N.W.2d 617, were those claims that "could have been" brought during the summary proceedings, but were not. This Court was not describing subsequent claims involving the issues actually litigated in the summary proceedings. [*Id.* at 576.]

Thus, the "limited statutory exception to Michigan's res judicata rule," set forth by MCL 600.5750, does not apply to issues actually litigated in summary proceedings. *Id.* at 577.

In this case, the first requirement for application of res judicata, that the prior action was decided on the merits, *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999), is satisfied because this Court has clearly held that res judicata applies to consent judgments. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001) (rejecting the plaintiff's claim that the doctrine of res judicata was inapplicable because the case was settled and clearly holding that "[r]es judicata applies to consent judgments."). Similarly, the third requirement of res judicata, that both actions involved the same parties or their privies, is satisfied in this case because no one contests the fact that both plaintiff and defendant were the parties that entered into the consent judgment in the district court. *Dart*, 460 Mich at 586. Accordingly, the only issue is whether the second requirement for the application of res judicata, that the matter contested in the second action was resolved in the first, is satisfied. *Id.*

Plaintiff's complaint in this case contains two counts—a "quiet title" count and an "abuse of process and fraud" count. Both counts assert that the foreclosure by advertisement sale was invalid. The quiet title count alleges the foreclosure by advertisement sale was invalid because the mortgage was a "nullity" due to the alleged transfer of the mortgage without its underlying obligation. Accordingly, plaintiff alleged that defendant did not properly possess any interest in the property and title must be quieted in plaintiff. The abuse of process and fraud count alleged that defendant used the foreclosure by advertisement process to improperly take plaintiff's property because defendant lacked the legal authority to make a credit bid at the sale. Plaintiff further alleged that the records regarding the promissory note and certificate were deficient, and as a result, the foreclosure by advertisement process was fraudulent and abusive and the sale of the property to defendant was invalid. Thus, both counts of the complaint assert that the sheriff's sale was invalid and defendant has no legal right to ownership and possession of the property.

However, the validity of the sheriff's sale and defendant's legal right to ownership and possession was conceded by plaintiff when she agreed to the entry of a consent judgment in the district court stating that if she did not move out, an order evicting her would be issued on November 1, 2010.[5] By consenting to that judgment, plaintiff acknowledged defendant's right to possession and the validity of the sheriff's sale because a valid foreclosure procedure and sheriff's sale resulting in defendant's possession of the property is a prerequisite to defendant's entitlement to an eviction order. Accordingly, we conclude that the consent judgment was conclusive in regard to defendant's right of possession and res judicata bars relitigation of the validity of the foreclosure proceedings and the sheriff's sale on which defendant's right of possession was premised. Thus, summary disposition under MCR 2.116(C)(7) was appropriate. See also *Simpson v JP Morgan Chase Bank, NA*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2010 (Docket No. 292955) (upholding the application of res

[5] We note that instead of consenting to the entry of a judgment, plaintiff could have challenged the validity of the sheriff's sale. *Mfr Hanover Mtg Corp v Snell*, 142 Mich App 548, 553-554; 370 NW2d 401 (1985) ("The mortgagor may raise whatever defenses are available in a summary eviction proceeding. The district court has jurisdiction to hear and determine equitable claims and defenses involving the mortgagor's interest in the property.") (Citation omitted). See also *Federal Nat'l Mtg Ass'n v Wingate*, 404 Mich 661, 676 n 5; 273 NW2d 456 (1979).

judicata to bar the plaintiff's action to set aside a sheriff's sale after a district court judgment had previously affirmed the defendants' right of possession).[6]

Because we conclude that summary disposition was appropriately granted under MCR 2.116(C)(7), we need not consider whether summary disposition was also appropriate under MCR 2.116(C)(8) and (C)(10). Nevertheless, we note that summary disposition was also appropriate under those subsections because it is undisputed that plaintiff did not challenge the validity of the foreclosure proceedings until after the expiration of the redemption period; thus, her rights to the property were completely extinguished and she had no legal basis on which to challenge the proceedings. MCL 600.3236; *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942). Moreover, plaintiff failed to demonstrate fraud or an irregularity entitling her to an equitable extension of the redemption period. *Schulthies v Barron*, 16 Mich App 246, 247-248; 167 NW2d 784 (1969).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[6] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). However, unpublished opinions can be instructive or persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).