

STATE OF MICHIGAN
COURT OF APPEALS

GLENN A BRYAN,

Plaintiff-Appellant,

v

JP MORGAN CHASE BANK,

Defendant-Appellee.

FOR PUBLICATION

April 10, 2014

9:05 a.m.

No. 313279

Oakland Circuit Court

LC No. 2012-124595-CH

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff, Glenna Bryan, appeals as of right an order granting summary disposition in favor of defendant, JP Morgan Chase Bank, in this quiet title action. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

The trial court's order granting summary disposition for defendant set forth the background facts of this case, none of which are in dispute:

This lawsuit arises from the foreclosure of a house located in Bloomfield Hills. Plaintiff defaulted on her mortgage payments and Defendant foreclosed by advertisement. On January 26, 2010, the property was sold at a Sheriff's Sale. Defendant was the purchaser and the Sheriff's Deed was recorded on February 2, 2010. The redemption period expired on June 26, 2010. A Judgment of Possession was entered by the District Court on August 11, 2010. On August 31, 2010, Plaintiff filed a Claim of Appeal and a Chapter 7 Bankruptcy Petition. The Bankruptcy case was dismissed on November 29, 2010. On April 11, 2011, Plaintiff filed a second Chapter 7 Bankruptcy Petition. On August 23, 2011, the Bankruptcy Court entered an Order discharging Plaintiff. The Appeal case was reopened on February 7, 2012 and this Court granted the motion to allow immediate execution of the Order of Eviction. The District Court denied Plaintiff's motion to set aside the Judgment of Possession on February 14, 2012. A Delayed Application for Leave to Appeal was filed and dismissed by this Court on March 8, 2012. Plaintiff filed this lawsuit on January 31, 2012, seeking to quiet title and alleging unjust enrichment, deceptive/unfair practice and wrongful foreclosure.

Plaintiff's complaint alleged, *inter alia*, that defendant was not the owner of the indebtedness secured by the mortgage nor the servicing agent of the mortgage as required in MCL 600.3204. Specifically, plaintiff alleged that defendant acquired its interest in the property from the Federal Deposit Insurance Corporation (FDIC) as receiver when the original mortgagee, Washington Mutual Bank, was closed. However, defendant failed to record its interest in the property prior to sheriff's sale. Plaintiff alleged that the sheriff's sale was, therefore, void *ab initio*.

The parties filed competing motions for summary disposition. Plaintiff admitted that the redemption period had expired, but argued that she still had standing to sue because of "fraud or irregularity" in the foreclosure process, specifically defendant's failure to record its mortgage interest before the sale, as required by MCL 600.3204(3) and *Kim v JP Morgan Chase Bank*, 295 Mich App 200; 813 NW2d 778 (2012)¹. Plaintiff did not believe that her claim was barred by res judicata or collateral estoppel because, although the district court had determined that defendant was entitled to possession, that decision was being appealed. Additionally, *Kim* was not decided until January 2012 and, therefore, the issue of whether the foreclosure was void *ab initio* was never fully addressed or resolved.

Defendant argued that plaintiff's claim was barred by the doctrines of res judicata and collateral estoppel. Defendant further argued that, even if res judicata and collateral estoppel did not apply, plaintiff had no standing to challenge the foreclosure where the redemptive period had expired and plaintiff failed to redeem the property.

The trial court issued a written order granting defendant's motion for summary disposition and denying plaintiff's motion for summary disposition:

The Court finds that Defendant is entitled to summary disposition. *Res Judicata* and collateral estoppel bar Plaintiff from challenging the foreclosure proceedings. There is no legal support for Plaintiff's argument that *Kim v JP Morgan Chase*, 295 Mich App 200 (2012) has retroactive effect that exempts Plaintiff from *res judicata* and collateral estoppel. Because the redemption period has expired, Plaintiff does not have standing to assert any interest in the subject property. The Court finds that Plaintiff has failed to state any claims upon which relief can be granted.

Plaintiff's motion for reconsideration was denied on October 19, 2012. She now appeals as of right.

II. ANALYSIS

The trial court granted defendant summary disposition pursuant to MCR 2.116(C)(8). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

¹ As discussed *infra*, *Kim* was subsequently reversed in part.

MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiffs' claim for relief. MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. [*Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).]

“The applicability of res judicata is a question of law that is reviewed de novo on appeal.” *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003).

Defendant argues that plaintiffs lacked standing to bring this action because the statutory redemptive period had expired and plaintiff made no effort to redeem the property. We agree.

Pursuant to MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the applicable prescribed time limit, which here was six months. “Unless the premises described in such deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter” MCL 600.3236. If a mortgagor fails to avail himself of the right of redemption “all plaintiffs' rights in and to the property [are] extinguished.” *Piotrowski v State Land Office Bd*, 302 Mich 179, 187; 4 NW2d 514 (1942).

We have reached this conclusion in a number of unpublished cases and, while unpublished cases are not precedentially binding, we find the analysis and reasoning in each of the following cases to be compelling. MCR 7.215(C)(1). Accordingly, we adopt their reasoning as our own. See *Overton v MERS*, unpublished opinion of the Court of Appeals, issued May 28, 2009 (Docket No. 284950) (“The law in Michigan does not allow an equitable extension of the period to redeem from a statutory foreclosure sale in connection with a mortgage foreclosed by advertisement and posting of notice in the absence of a clear showing of fraud or irregularity Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished.”); *Hardwick v HSBC Bank USA*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 2013 (Docket No. 310191) (“Plaintiffs lost all interest in the subject property when the redemption period expired. . . . Moreover, it does not matter that plaintiffs actually filed this action one week before the redemption period ended. The filing of this action was insufficient to toll the redemption period. . . . Once the redemption period expired, all plaintiffs' rights in the subject property were extinguished.”); *BAC Home Loans Servicing, LP v Lundin*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2013 (Docket No. 309048) (“[O]nce the redemption period expired, [plaintiff's] rights in and to the property were extinguished. . . . Because [plaintiff] had no interest in the subject matter of the controversy [by virtue of MCL 600.3236], he lacked standing to assert his claims challenging the foreclosure sale.”); *Awad v Gen Motors Acceptance Corp*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2012 (Docket No. 302692) (“Although she filed suit before expiration of the redemption period, [plaintiff] made no attempt to stay or otherwise challenge the foreclosure and redemption sale. Upon the expiration of the redemption period, all of

[plaintiff's] rights in and title to the property were extinguished, and she no longer had a legal cause of action to establish standing.”). We hold that by failing to redeem the property within the applicable time, plaintiff lost standing to bring her claim.

Plaintiff's claims were also barred by the principles of res judicata and collateral estoppel.

“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.” *Begin v Mich Bell Tel Co*, 284 Mich App 581, 598; 773 NW2d 271 (2009), overruled on other grounds 494 Mich 10; 831 NW2d 849 (2013).

Consequently, res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.

Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. [*Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999) (internal citations omitted).]

Similarly,

Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. [*Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006) (internal citations omitted).]

Here, the prior eviction involved the same parties as the present case, the case was decided on its merits, and plaintiff raised the argument that the foreclosure was void *ab initio*; therefore, res judicata and collateral estoppel precluded plaintiff from bringing this quiet title action.

Moreover, even if plaintiff had standing to sue and even if the principles of res judicata and collateral estoppel did not prevent plaintiff from bringing her claim, defendant was nevertheless entitled to summary disposition where plaintiff failed to demonstrate prejudice as a result of the foreclosure irregularity.

MCL 600.3204(3) provides that “[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under [MCL 600.3216] evidencing the assignment of the mortgage to the party foreclosing the

mortgage.” In *Kim v JPMorgan Chase Bank, NA*, 295 Mich App 200, 813 NW2d 778 (2012), the defendant was not the original mortgagee and, like defendant here, acquired its interest in the mortgage by assignment from the FDIC, who was the receiver for the failed bank. The defendant argued that it was relieved of recording its interest in the mortgage because it acquired such interest “by operation of law.” *Id.* at 202, 205. This Court disagreed and held:

pursuant to the plain language of MCL 600.3204 (3), defendant was required to record its mortgage interest before the sheriff’s sale. Because defendant failed to do so, it was not statutorily authorized to proceed with the sale. See MCL 600.3204(3) (“If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title *shall* exist prior to the date of sale....” (emphasis added)); see also *Davenport v HSBC Bank USA*, 275 Mich App 344, 347–348; 739 NW2d 383 (2007) (“Because defendant lacked the statutory authority to foreclose, the foreclosure proceedings were void ab initio.”). Accordingly, the trial court erred by granting summary disposition for defendant and denying summary disposition for plaintiffs when they were entitled to set aside the sheriff’s deed. [*Kim*, 295 Mich App at 208.]

In the trial court, plaintiff argued that the “[t]he only issue that’s really before the Court is whether res judicata and collateral estoppel is a defense to the Kim case.” Counsel argued: “So, if Kim says what happened in this case is void ab initio, then does that apply retroactively to res judicata and to collateral estoppel? And, we say of course it does, because . . . if it’s void ab initio, that means it didn’t happen. And if it didn’t happen, then you can’t say, well, res judicata applies.” Plaintiff’s counsel went on to state “The question is does it apply to the District Court. And, what I would state to the Court that on January the 30th of this year in the District Court . . . we specifically raised Kim versus JP Morgan. So, without question it has been preserved, it should be given retroactive effect, and collateral estoppel and res judicata should not be a defense to the Kim case.”

However, our Supreme Court subsequently reversed that portion of the *Kim* case that held an irregularity in recording a mortgage interest rendered a foreclosure void *ab initio*. In *Kim v JP Morgan Chase Bank, NA*, 493 Mich 98, 115–116; 825 NW 329 (2012), our Supreme Court explained:

[W]e hold that defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void ab initio. Because the Court of Appeals erred by holding to the contrary, we reverse that portion of its decision. We leave to the trial court the determination of whether, under the facts presented, the foreclosure sale of plaintiffs’ property is voidable. In this regard, to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant’s noncompliance with the statute.

Plaintiff fails to acknowledge our Supreme Court’s decision and does not even cite it on appeal. Additionally, plaintiff makes no argument that she was prejudiced as a result of defendant’s failure to record its interest. As such, she is not entitled to relief.

Plaintiff's remaining arguments – that defendant's conduct resulted in “deceptive act and/or unfair practice” – should be deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Although plaintiff complains that there was robo-signing, she submits no evidence to support her claim.

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly