Circuit Court for Montgomery County
Case No. 424581V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 49

September Term, 2017

SUSAN LINDAUER

v.

OCWEN LOAN SERVICING, LLC, *et al*.

Woodward, C.J.,
Fader
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: July 31, 2018

Susan Lindauer, appellant, appeals from an order, issued by the Circuit Court for Montgomery County, dismissing her complaint against appellees[1] for negligence, fraud, wrongful foreclosure, breach of contract, and breach of the implied covenant of good faith and fair dealing. Lindauer raises five issues on appeal, which reduce to one: whether the circuit court erred in dismissing her complaint. For the reasons that follow, we affirm.

BACKGROUND

In 2007, Lindauer obtained a $300,000 loan from American Heritage Lending Company that was secured by a deed of trust on her home in Takoma Park, Maryland. On November 30, 2015, O'Sullivan and Bush, acting as substitute trustees, filed a foreclosure action in the circuit court, alleging that Lindauer had defaulted on her loan (the foreclosure action). That foreclosure action remains pending and, at present, no foreclosure sale has occurred.

Lindauer subsequently filed a pleading in the foreclosure action entitled "Foreclosure Rebuttal and Counter Lawsuit for Mortgage Fraud." That pleading named Ocwen as a defendant and claimed that Ocwen had committed fraud by failing to properly

[1] Appellees are Ocwen Loan Servicing, LLC, the servicer for Lindauer's deed of trust loan (Ocwen); US. Bank National Association, As Trustee for BNC Mortgage Loan Trust 2007-2 Mortgage Pass-Through Certificates, Series 2007-2, the current holder of the note securing Lindauer's deed of trust loan (US Bank); Lauren H.G. O'Sullivan and Lauren Bush, two of the substitute trustees appointed under the deed of trust; and Mortgage Electronic Registration Systems, Inc., who was the original beneficiary under the deed of trust, as nominee for Lindauer's lender and its successors and assigns (MERS). Lori Dasch and Brandy Berns, both of whom were employees of Ocwen, were also named as defendants in Lindauer's complaint but are not parties to this appeal.

(continued)

apply her loan payments. As a result, Lindauer alleged that she had fallen behind on her loan payments, been unable to refinance her loan to a more favorable interest rate and suffered damage to her credit rating. As relief, Lindauer sought monetary damages but did not request a stay or dismissal of the foreclosure action. In fact, she acknowledged that she had not made any payments on her loan since 2014. Because Ocwen was not a party to the foreclosure action, the circuit court treated Lindauer's pleading as a separate civil action and assigned it a new case number (first civil action).[2]

In May 2016, appellant filed a pleading entitled "Defendant's Second Amended Filing, Affirmative Defenses and Counter-Claim filed pursuant to Md Rule 2-341(a)," which the court treated as an amended complaint in the first civil action. The amended complaint named Ocwen and U.S. Bank as defendants and essentially raised two claims. First, as in the original complaint, she alleged that Ocwen and U.S. Bank had committed fraud by failing to properly apply her mortgage payments. Second, she challenged the substitute trustees' standing to foreclose, claiming that U.S. Bank was not the lawful holder of the note and that various documents contained in the Order to Docket were either forged or invalid. Specifically, she claimed that: (1) U.S. Bank was not the holder of the note because the allonges reflecting the transfer of the note were not permanently affixed to the note and because the second allonge did not identify her loan number; (2) the document naming O'Sullivan and Bush as substitute trustees was invalid because U.S. Bank did not

[2] Neither party contends that the circuit court erred in not consolidating this complaint with the foreclosure action.

have authority to foreclose on the note; and (3) that the assignment of the deed of trust from MERS to U.S. Bank was invalid because MERS did not have a beneficial interest in the note and because the assignment did not have an authorizing signature. The circuit court ultimately entered an order dismissing Lindauer's amended complaint with prejudice on October 17, 2016. Lindauer did not file a notice of appeal from that order.

However, approximately two months before the first civil action was dismissed with prejudice, Lindauer filed yet another complaint, which the court again treated as a separate civil action and assigned a new case number (the second civil action).[3] That complaint, which is the subject of this appeal, alleged that: (1) Ocwen and U.S. Bank were negligent, committed fraud, committed a breach of contract, and committed a breach of the implied covenant of good faith and fair dealing by failing to properly apply her loan payments; (2) Ocwen was negligent and committed fraud and by allowing fraudulent documents to be filed in the foreclosure action;[4] (3) O'Sullivan and Bush were negligent and committed fraud by allowing fraudulent documents to be filed in the foreclosure action; (4) Ocwen's employees, Berns and Dasch, committed fraud by signing the fraudulent documents that were filed in the foreclosure action; (5) Ocwen, U.S. Bank, O'Sullivan, and Bush had wrongfully foreclosed on her property because they lacked standing; and (6) MERS had committed fraud and breached the implied covenant of good faith and fair dealing by

[3] Again, neither party contends that this complaint should have been treated as part of either the foreclosure action or the first civil action.

[4] As in her first civil action, Lindauer claimed that the allonges to the note, the assignment of the deed of trust MERS to U.S. Bank, and document naming O'Sullivan and Bush as substitute trustees were either forged or invalid.

assigning the deed of trust to U.S. Bank without legal authority. Following a hearing, the circuit court dismissed Lindauer's complaint with prejudice finding that she had failed to state a cause of action for which relief could be granted. This appeal followed.

DISCUSSION

The circuit court determined that Lindauer had failed to state a claim for which relief could be granted. However, we do not believe it is necessary to address the merits of each and every claim raised in Lindauer's complaint because, with the exception of her claims against MERS, all her claims were barred under the doctrine of *res judicata*.[5] *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." *Norville*, 390 Md. at 106 (internal quotation marks and citation omitted). By preventing parties from relitigating matters that "have been 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)) (emphasis in original). Under Maryland law, the elements of *res judicata*, or claim preclusion, are: (1) that the parties in

[5] Although Lindauer's complaint was not dismissed on *res judicata* grounds, appellees argued in the circuit court that her second civil action had raised claims that were identical to those raised in the first civil action, which had been dismissed with prejudice. In any event, an appellate court may *sua sponte* raise the issue of *res judicata*. *See Anne Arundel County Bd. of Educ. v. Norville*, 390 Md. 93, 105 (2005); *Holloway v. State*, 232 Md. App. 272, 282-83 (2017).

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).

With the exception of Lindauer's claims against MERS, all three elements of *res judicata* were clearly met in this case. First, all other appellees were either parties in the first civil action or in privity with those parties. Lindauer, Ocwen, and U.S. Bank were, of course, named parties in the first civil action. Moreover, O'Sullivan and Bush were in privity to Ocwen because, as substitute trustees, they were acting on behalf of Ocwen, who was the loan servicer and authorized agent of U.S. Bank, the note holder. *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."); *see also Proctor v. Wells Fargo Bank, N.A.*, 28 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 mortgage such that the privity component of claim preclusion is satisfied" (internal quotation marks and citation omitted)).[6] Finally, Berns and Dasch were in privity with Ocwen because they were employed by Ocwen and were acting within the scope of employment at the time the alleged fraud occurred. *See deLeon v. Slear*, 328 Md. 569, 587 (1992) (holding that

[6] In fact, although O'Sullivan and Bush were not named defendants in the first civil action, they were accused of fraud on several occasions in the amended complaint.

defendant nurses were in privity with the hospital who employed them by virtue of their employment relationship).

Second, there is no question that Lindauer raised the same claims in both actions, specifically that Ocwen and U.S. Bank had failed to properly apply her loan payments and that they lacked standing to foreclose on her property because of alleged defects in the note, the assignment of the deed of trust, and the document appointing the substitute trustees. *See generally Richman*, 354 Md. at 493 (noting that for the purposes of *res judicata* a claim includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the claim arose). In fact, in both cases Lindauer sought almost identical monetary relief.

Finally, because the first civil action was dismissed with prejudice, there was a final judgment on the merits for *res judicata* purposes. *See Claibourne v. Willis*, 347 Md. 684, 692 (1997) ("The dismissal with prejudice . . . has the same *res judicata* effect as a final adjudication on the merits favorable to the defendant."); *Parks v. State*, 41 Md. App. 381, 386 (1979) ("A dismissal 'with prejudice' has been held to be as conclusive of the rights of the parties as if the action had been prosecuted to a final adjudication on the merits adverse to the complainant.").[7]

We are also persuaded that, although not barred by *res judicata*, Lindauer's claims against MERS for fraud and breach of the covenant of good faith and fair dealing were also

[7] In her reply brief, Lindauer contends that the circuit court erred in dismissing the first civil action with prejudice. However, that issue is not properly before us because Lindauer did not file a notice of appeal from that judgment.

properly dismissed. As to the fraud claim, Lindauer failed to allege how she relied on the allegedly fraudulent assignment of the deed of trust. *See White v. Kennedy Krieger Institute, Inc.*, 221 Md. App. 601, 635 (2015) ("Reliance at its core is the action or inaction of a party that results from the misrepresentation of another"). And, her claim for breach of the implied covenant of good faith and fair dealing fails as a matter of law because that claim is not an independent cause of action in Maryland but part of an action for breach of contract. *See Mount Vernon Properties, LLC v. Branch Banking and Trust Co.*, 170 Md. App. 457 (2006).[8] In any event, Lindauer could not establish damages for either claim because, although the foreclosure action has been filed, she remains in possession of her home and no sale has occurred. Finally, and perhaps most importantly, the assignment of the deed of trust, even if improper, would not affect the substitute trustees' ability to foreclose on the property. *See Svreck v. Rosenberg*, 203 Md. App. 705, 727 (2012).

Based on the foregoing, we find no error in the circuit court's dismissal of Lindauer's complaint. We note, however, that this case is in a unique procedural posture because the foreclosure action is still pending. Because no final judgment has been entered in the foreclosure action, the record in that case is not before us, and the type of relief available to Lindauer in the foreclosure action is different than the relief that was available in the first and second civil actions, we offer no opinion as to what effect, if any, the

[8] Lindauer did not raise a breach of contract claim against MERS and even if her breach of the covenant of good faith and fair dealing claim were construed as such, it would still fail as a matter of law because she did not allege what terms of the note or deed of trust MERS violated.

dismissal of the first and second civil actions has on the foreclosure action or on the merits of any defenses that Lindauer may raise in that case.

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

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