



IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY

PHENON WALKER, <i>et al.</i> ,	)	CASE NO. CV-20-935356
	)	
Plaintiffs,	)	JUDGE SHANNON M. GALLAGHER
	)	
vs.	)	
	)	<b><u>OPINION AND ORDER</u></b>
BANK OF NEW YORK MELLON	)	
TRUST COMPANY, <i>et al.</i> ,	)	
	)	
Defendant	)	

***Shannon M. Gallagher, J.:***

This matter is before the court on a motion to dismiss filed by defendants the Bank of New York Mellon Trust Company, Na; Specialized Loan Servicing LLC; Mortgage Electronic Registration Systems, Inc.; and JPMorgan Chase Bank as Trustee. Based upon this court's entry, dated October 29, 2020, the motion to dismiss is being construed as a motion for summary judgment because it presents matters outside of the pleadings. Based upon the evidence presented, defendants' motion to dismiss, construed as a motion for summary judgment, is granted. There remain no genuine issues of material fact and defendants are entitled to judgment as a matter of law.

**I. Facts and Procedural History**

Plaintiffs Phenon Walker and Whole Sailing, LLC filed this action against seventeen defendants, including the Bank of New York Mellon Trust Company, Na, Specialized Loan Servicing LLC, Mortgage Electronic Registration Systems, Inc., JPMorgan Chase Bank as Trustee, Mortgage Electronic Registration, First National Bank of Arizona, and several other banking institutions and individuals.

Plaintiffs' claims against defendant Lerner, Samson & Rothfus were dismissed with prejudice on October 22, 2020. Plaintiffs' claims against defendants GMAC Mortgage, LLC ("GMACM") (improperly named as GMAC Mortgage Corporation), Residential Funding Corporation ("RFC"), Residential Asset Mortgage Products, Inc. ("RAMP"), Judy Faber, Matt Favorite, Verdine A. Freeman, Sandy Broughton, and Karen Steffensen are stayed pending resolution of their bankruptcy proceedings. Defendants First National Bank of Arizona and First National Bank of Nevada have never entered an appearance.

Plaintiff Walker is the managing member of Whole Sailing, LLC. Whole Sailing was, at the time of filing, the titled owner of the Property at issue, located at 13880 Edgewater Drive, Lakewood, Ohio. Plaintiff purchased the property in April 2003, and took out a loan with the First National Bank of Arizona.

Plaintiffs allege that the lender engaged in fraudulent behavior in how it subsequently transferred the loan, and lacked standing to pursue the foreclosure action. Plaintiffs' complaint contains the following claims: (1) violations of the Federal and State protections and laws; (2) Fraud/Misrepresentation; (3) Intentional infliction of emotional distress; (4) civil conspiracy; (5) Violations of Ohio Corrupt Practices Act and RICO; (6) Fraudulent inducement; (7) a declaratory judgment action for quiet title, asking that the court transfer the property to the plaintiffs; and (8) slander of title. Plaintiffs seek \$75,000 in damages.

This case was initially filed on May 2, 2018. On October 12, 2018, defendants filed a motion for summary judgment, arguing that plaintiffs' claims are barred by res judicata and the statute of limitations. The motion advised that the property at issue was the subject of a foreclosure action, filed in April 2013, Cuyahoga County case number CV-13-806009. In the foreclosure action, the Bank of New York alleged that it was entitled to enforce plaintiff's

promissory note and the mortgage securing the note. Summary judgment was granted in the Bank's favor, and the Eighth District affirmed the decision. Sheriff's sale was scheduled for May 14, 2018. On May 2, 2018, plaintiffs filed their initial complaint, as well as a motion to stay execution of Order of Sale, arguing that the Bank's attempts to execute on its judgment should be stayed due to alleged issues with the indorsements on the note and the assignments of the mortgage, and because plaintiffs had just filed this lawsuit.

The court in the foreclosure case denied plaintiffs' motion to stay and determined that the issues raised in the motions had already been litigated, or could have been litigated, prior to the final judgment order, issued on April 6, 2016. The Sheriff's sale took place on June 18, 2018, and the court confirmed the sale on July 5, 2018.

On December 27, 2018, plaintiffs voluntarily dismissed their complaint. On July 29, 2020, plaintiffs re-filed their complaint. On October 14, 2020, defendants filed a motion to dismiss, which the court is construing as a motion for summary judgment. On December 20, 2020, plaintiffs' attorney filed a motion to withdraw as counsel, which the court granted on February 2, 2021. The court granted plaintiffs leave to hire new counsel until April 16, 2021. Plaintiff Whole Sailing, LLC is a corporation and cannot proceed without an attorney. Accordingly, plaintiff Whole Sailing, LLC's claims are dismissed.

Defendants' motion for summary judgment is now fully briefed. Based upon the evidence presented, plaintiff Phenon Walker's claims are barred by res judicata and the applicable statute of limitations. Defendants are granted judgment as a matter of law.

## **II. Law and Analysis**

Pursuant to Civ. R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a

matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the nonmoving party. *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 715 N.E.2d (1999); *Temple v. Wean United Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1997). When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996). The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.*, 59 Ohio St.3d 108, 111, 570 N.E.2d 1095 (1991).

Defendants argue that plaintiff's claims are barred by *res judicata*. *Res judicata* operates as "a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Brown v. Dayton*, 89 Ohio St.3d 245, 247, 2000-Ohio-148, 730 N.E.2d 958. *Res judicata* encompasses both claim preclusion and issue preclusion.

Claim preclusion prevents subsequent actions by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action. *O'Nesti v. DeBartolo Realty Co.*, 113 Ohio St.3d 59, 2007-Ohio-1102, P6. Claim preclusion bars subsequent actions encompassing claims that were actually litigated as well as those claims that *could* have been litigated in the previous suit. *Id.* *Res judicata* requires a plaintiff to present all grounds for relief in the first action or be forever barred from asserting them. *Grava v. Parkman Township*, 73 Ohio St. 3d 379, 382, 653 N.E.2d 226 (1995).

Issue preclusion, also known as collateral estoppel, serves to prevent re-litigation of any fact or point that was determined by a court of competent jurisdiction in a prior action between

the same parties or their privies. *Id.* at P7. Issue preclusion can apply even if the causes of action differ. *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E. 3d 1060, P40.

Plaintiffs' claims all arise from the origination of the note and mortgage in 2003, the alleged sale of the loan to defendant GMAC in 2006, the execution and recording of a corporation assignment of mortgage in 2006, and the execution and recording of an assignment of mortgage in 2008. In the complaint, plaintiff alleges that the mortgage and note were fraudulently transferred, and that various documents submitted in the foreclosure action were used as false evidence. Plaintiff alleges that no defendant had or has standing to pursue collection proceedings, nor was any defendant a holder of the note.

These claims arise from the same issues that were litigated in the foreclosure action – whether the Bank of New York had standing to pursue a foreclosure action against plaintiffs by establishing that the mortgage and note were properly assigned through a traceable chain of title.

The foreclosure court granted summary judgment in favor of the bank, finding that the Bank of New York had standing and was entitled to a judgment and decree of foreclosure. Plaintiffs are now precluded from arguing that the indorsements on the note and assignments of the mortgage were fraudulent.

Further, *res judicata* bars subsequent actions encompassing claims that were actually litigated as well as those claims that *could* have been litigated in the previous suit. Civ. R. 13(A) requires all existing claims between opposing parties that arise out of the same transaction or occurrence to be litigated in a single lawsuit, regardless of which party initiates the lawsuit. *Rettig Enters. v. Koehler*, 68 Ohio St. 3d 274, 278, 626 N.E.2d 99 (1994). A compulsory counterclaim exists if that claim is logically related to the opposing party's claim such that separate trials on each of their respective claims would involve a substantial duplication of effort

and time by the parties and the courts. *Dixon v. Huntington Nat'l Bank*, 8<sup>th</sup> Dist. Cuyahoga No. 100572, 2014-Ohio-4079, P32.

In plaintiffs' answer to the foreclosure complaint, filed on January 15, 2014, plaintiffs alleged that they may have claims against the Bank of New York, including alleged violations of the Ohio Consumer Sales Practices Act. Plaintiffs also challenged the Bank's standing to enforce the note and alleged that the Bank may have committed fraud as the note and mortgage have been sold into securitization and the Bank may have misrepresented its legal status in this case. This is evidence that plaintiffs were aware of potential claims against defendants during the prior foreclosure action and should have filed counterclaims.

Plaintiffs argue in their brief in opposition that the claims in their complaint arise from the defendants' misconduct during the prosecution of the prior foreclosure action, and are therefore not barred by res judicata. Yet, plaintiffs' answer in the foreclosure action indicates that the plaintiffs were at least aware that they might have claims against defendants yet never filed counterclaims. Plaintiffs' complaint in this action does not specify any wrongdoing during the foreclosure action, other than the defendants' act in filing the foreclosure action in the first place.

Finally, most of plaintiffs' claims are barred by the applicable statute of limitations. Plaintiffs' complaint alleges that defendants' illegal action took place over the following events: The origination of the note and mortgage in 2003; the alleged sale of the loan to Defendant GMAC in 2003; the execution and recording of a corporation assignment of mortgage in 2006; the execution and recording of an assignment of the mortgage in 2008; and the filing of the foreclosure action in 2013. Plaintiffs would have been aware of any potential claims in 2013 or at the latest in 2014 when they filed their answer to the foreclosure action.

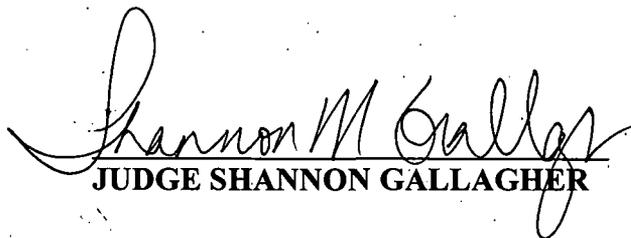
Plaintiff alleges multiple violations of the Fair Debt Collection Practices Act (FDCPA) and the Ohio Consumer Sales Practices Act (OCSPA), and the Real Estate Settlement Procedures Act (RESPA). The FDCPA has a one-year statute of limitations, the OCSPA has a two year statute of limitations, and the RESPA has a one year statute of limitations. Plaintiffs' claims for fraud, fraudulent inducement, and IIED are subject to a 4-year statute of limitations. All of the events giving rise to Plaintiffs' claims arose prior to 2013, and are therefore barred by the applicable statutes of limitation.

Accordingly, defendants are entitled to judgment as a matter of law and plaintiffs' claims are dismissed with prejudice. Costs to plaintiffs.

**IT IS SO ORDERED.**

6/28/21

**DATE**

  
**JUDGE SHANNON GALLAGHER**