[Cite as *ProMedica Fed. Credit Union v. Wardrop*, 2014-Ohio-965.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

ProMedica Federal Credit Union

Appellee

v.

Patricia J. Wardrop, et al.

Defendants

[Sandra L. Huskins—Appellant]

Court of Appeals No. L-13-1075

Trial Court No. CI0201007895

DECISION AND JUDGMENT

Decided: March 14, 2014

* * * * *

Thomas J. Kelley and Eugene F. Canestraro, for appellee.

Mark R. McBride, for appellant.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Sandra Huskins, acting as executrix of the estate of Norbert R. Clendenin, appeals the judgment of the Lucas County Court of Common Pleas, granting summary judgment in favor of appellee, ProMedica Federal Credit Union.

A. Facts and Procedural Background

{¶ 2} This case is related to a prior action brought by appellant against Patricia Wardrop in the Lucas County Court of Common Pleas. In the prior suit, appellant alleged that Wardrop, who was Norbert's caretaker prior to his death, manipulated Norbert and converted a substantial portion of his assets. The complaint asserted claims for wrongful conversion, fraud, breach of fiduciary duties, breach of standards of care, good faith, and fair dealing, and negligence. The case was assigned to Judge Jennings. Notably, ProMedica was not a party to the action.

{¶ 3} On July 17, 2009, appellant filed a motion for a temporary restraining order, seeking to prohibit Wardrop from disposing of her property. That same day, the court granted the motion and restrained Wardrop from "selling, secreting, liquidating, transferring, encumbering or disposing of any and all of [her] assets, both business and personal until further Order of this Court." Further, the court issued an order scheduling the matter for a hearing on the estate's motion for preliminary injunction. Following the hearing, the court granted the preliminary injunction, thereby prohibiting Wardrop from transferring or encumbering her property.

{¶ 4} During the pendency of the prior suit, and after the injunction was imposed, Wardrop was convicted on criminal charges stemming from the same conduct that gave rise to the civil suit. As part of her sentence, Wardrop was ordered to pay $200,000 in restitution to the estate. In order to do so, she took out a loan in the amount of $124,000 from ProMedica, which was secured by a mortgage on her residence located in Toledo,

Ohio. The proceeds of the loan were paid directly to the estate as partial satisfaction of the restitution obligation.

{¶ 5} On March 23, 2010, appellant filed a motion to show cause, seeking to find Wardrop in contempt of court for encumbering her property in contravention of the preliminary injunction. A hearing was held before Judge Jennings. Once again, ProMedica was not a party to these proceedings, nor did it receive notice of appellant's motion to show cause. On June 29, 2010, Judge Jennings entered an order holding Wardrop in contempt and declaring the mortgage void ab initio.

{¶ 6} Five months later, ProMedica instituted the underlying foreclosure action against Wardrop and appellant. The case was assigned to Judge Zmuda. In its complaint, ProMedica requested a declaratory judgment clarifying that Judge Jennings' June 29, 2010 order was "void as to [ProMedica], and further that [ProMedica] has a valid and enforceable first mortgage on the subject premises." Additionally, ProMedica sought foreclosure of the property due to Wardrop's failure to make the required payments.

{¶ 7} On June 3, 2011, ProMedica filed a motion for summary judgment, arguing that foreclosure was proper as Wardrop defaulted on her loan obligations under the mortgage. ProMedica also contended that it was entitled to a judicial declaration that its mortgage was valid because it never received notice or an opportunity to be heard in the contempt proceeding.

{¶ 8} Appellant responded by filing her own motion for summary judgment, arguing that the contempt proceedings were valid as to ProMedica and, consequently,

ProMedica's mortgage was void ab initio. On March 29, 2013, following a hearing on the motion, Judge Zmuda granted ProMedica's motion for summary judgment, concluding that Judge Jennings' order was void as to ProMedica and that foreclosure was appropriate.

B. Assignment of Error

{¶ 9} Appellant has timely appealed the trial court's grant of summary judgment, assigning the following error for our review:

> The trial court erred as a matter of law when it granted ProMedica's motion for summary judgment and denied the Estate's motion for summary judgment.

II. Standard of Review

{¶ 10} We review summary judgment rulings de novo, applying the same standard as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996); *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129, 572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his

favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978); Civ.R. 56(C).

III. Analysis

{¶ 11} In appellant's sole assignment of error, she argues that the trial court erred in granting ProMedica's motion for summary judgment and denying her motion for summary judgment. Specifically, appellant contends that Judge Zmuda should not be permitted to invalidate the decision of another, co-equal judge on the same court. She supports her argument by referencing the jurisdictional-priority rule along with the doctrines of res judicata and lis pendens. We will address these issues in turn.

A. Jurisdictional-Priority Rule

{¶ 12} Invoking the jurisdictional-priority rule, appellant first asserts that "[t]rial courts, having as they have the same or equal authority, and exercising as they do concurrent and coordinate jurisdiction, should not, cannot, and are not permitted to interfere with one another's respective cases, much less with their orders or judgments." Appellant goes on to state that, were we to find in favor of ProMedica, we would be "creating new law in this state" and "taking a bold step, the likes of which courts are customarily loath to undertake."

{¶ 13} In response, ProMedica contends that the jurisdictional-priority rule is inapplicable here because the claims in the foreclosure action are dissimilar to the claims in the contempt proceeding. ProMedica notes that it was not a party to the contempt

proceeding. Further, ProMedica asserts that the contempt proceeding was not pending at the time the foreclosure complaint was filed.

{¶ 14} The jurisdictional-priority rule provides that "[a]s between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties." *State ex rel. Phillips v. Polcar*, 50 Ohio St.2d 279, 364 N.E.2d 33 (1977), syllabus. "In general, the jurisdictional-priority rule applies when the causes of action are the same in both cases, and if the first case does not involve the same cause of action or the same parties as the second case, the first case will not prevent the second." *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 429, 751 N.E.2d 472 (2001); *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, ¶ 13. However, "the jurisdictional-priority rule applies even when the causes of action are not the same if the suits present part of the same 'whole issue.'" *State ex rel. Otten v. Henderson*, 129 Ohio St.3d 453, 2011-Ohio-4082, 953 N.E.2d 809, ¶ 29. "Actions comprise part of the 'whole issue' when: (1) there are cases pending in two different courts of concurrent jurisdiction involving substantially the same parties; and (2) the 'ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where the suit originally commenced.'" *Instant Win, Ltd. v. Summit Cty. Sheriff*, 9th Dist. Summit No. 20762, 2002 WL 533475, *1 (Apr. 10, 2002), quoting *Michaels*

Bldg. Co. v. Cardinal Fed. S. & L. Bank, 54 Ohio App.3d 180, 183, 561 N.E.2d 1015 (8th Dist.1988).

{¶ 15} Here, the two causes of action are clearly dissimilar, one being a foreclosure action and the other being a conversion action to recover funds allegedly stolen by Wardrop while she was Norbert's caretaker. Further, appellant acknowledges that ProMedica was not a party to the contempt proceedings. Thus, the two suits do not present part of the same "whole issue." Therefore, we conclude that the jurisdictional-priority rule is inapplicable. Our conclusion is reinforced by the fact that both cases were filed in the same court. In applying the rule to a similar situation, another Ohio court has held that "the jurisdictional priority rule contemplates cases pending in two different courts of concurrent jurisdiction-not two cases filed in the same court." *Fenner v. Kinney*, 10th Dist. Franklin No. 02AP-749, 2003-Ohio-989, ¶ 14; *see also Jarvis v. Wells Fargo Bank*, 7th Dist. Columbiana No. 09 CO 6, 2010-Ohio-3283, ¶ 16 ("The jurisdictional priority rule does not apply when two complaints are filed in the same court."), citing *Bright v. Family Medicine Found., Inc.*, 10th Dist. Franklin No. 02AP-1443, 2003-Ohio-6652, ¶ 13. Consequently, the jurisdictional-priority rule does not apply in this case.

B. Res Judicata

{¶ 16} In addition to her argument regarding the jurisdictional-priority rule, appellant contends that the trial court's decision violated principles of res judicata. Specifically, appellant relies upon the doctrine of collateral estoppel in making her

argument that Judge Jennings' decision was controlling in the foreclosure action before Judge Zmuda.

{¶ 17} In Ohio, "[t]he doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. Collateral estoppel "precludes the relitigation, in a second action, of an issue that had been actually and necessarily litigated and determined in a prior action that was based on a different cause of action." *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). Collateral estoppel bars parties in privity with the original party from relitigating identical issues in subsequent actions. The following four elements must be met before collateral estoppel will apply:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; * * * (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; * * * (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and * * * (4) The issue must have been identical to the issue involved in the prior suit. *Monahan v. Eagle Picher Indus., Inc.*, 21 Ohio App.3d 179, 180-181, 486 N.E.2d 1165 (1st Dist.1984).

{¶ 18} ProMedica claims, and the trial court concluded, that collateral estoppel does not apply in this case because ProMedica was not a party or in privity with a party to the contempt proceeding. The Ohio Supreme Court has formerly recognized that "the concept of privity for purposes of res judicata is 'somewhat amorphous.'" *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, 905 N.E.2d 1210, ¶ 33, quoting *Brown v. Dayton*, 89 Ohio St.3d 245, 248, 730 N.E.2d 958 (2000). Parties have been held to be in privity with one another based on the existence of a contractual or beneficiary relationship. *Howell v. Richardson*, 45 Ohio St.3d 365, 367, 544 N.E.2d 878 (1989). Further, "[a]n interest in the result of and active participation in the original lawsuit may also establish privity." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 9. "Similarly, a 'mutuality of interest, including an identity of desired result,' might also support a finding of privity." *Id.*, quoting *Brown* at 248.

{¶ 19} Here, appellant argues that "as purported mortgagor and mortgagee, ProMedica and Nurse Wardrop are in privity for purposes of res judicata." In making her argument, appellant cites to *EMC Mtge. Corp. v. Jenkins*, 164 Ohio Ap.3d 240, 2005-Ohio-5799, 841 N.E.2d 855 (10th Dist.). However, appellant's reliance upon *EMC Mtge. Corp.* is misplaced. *EMC Mtge. Corp.* was a foreclosure action brought by EMC, as assignee of a note and mortgage that Jenkins executed four years prior. In those four years, two prior foreclosure actions were filed, and subsequently dismissed, by the former holder of the note and mortgage, Chase Manhattan Bank. *Id.* at ¶ 2. After EMC filed its

complaint, Jenkins moved to dismiss the action, arguing that the court lacked jurisdiction over the matter because Chase's second voluntary dismissal constituted an adjudication on the merits under the two-dismissal rule set forth in Civ.R. 41(A)(1). *Id.* at ¶ 5. The trial court disagreed, and denied the motion. In its decision, the trial court concluded that the two-dismissal rule did not apply because the claims set forth in Chase's second complaint were not dismissed by the same plaintiff as the claims set forth in Chase's first complaint. *Id.* at ¶ 15.

{¶ 20} On appeal, Jenkins argued that the trial court erroneously denied the motion to dismiss in contravention of the two-dismissal rule. *Id.* at ¶ 6. EMC argued that the rule did not apply because it was not a party to the first two foreclosure actions brought by Chase. *Id*. at ¶ 16. The Tenth District Court of Appeals began its analysis by noting that the two-dismissal rule bars a third filing of a claim under the doctrine of res judicata. *Id.* at ¶ 8. Ultimately, the court concluded that EMC, while not a party to the first two actions, was in privity with Chase by virtue of its relationship as assignee of the note and mortgage. *Id.* at ¶ 21. Thus, the court held that res judicata barred EMC's attempt to recover in the underlying foreclosure action. *Id.*

{¶ 21} Having examined *EMC Mtge. Corp.* carefully, we find it is inapplicable to the case before us. While we agree with appellant that *EMC Mtge. Corp.* stands for the proposition that "[a]n assignee of an interest in a promissory note and mortgage is in privity with its assignor for purposes of res judicata," we find no such relationship between ProMedica and Wardrop. Rather, ProMedica and Wardrop are mortgagee and

mortgagor, respectively. Appellant has cited no cases to support her position that a mortgagee is in privity with a mortgagor.

{¶ 22} Upon due consideration, we find that there is no contractual or beneficiary relationship between ProMedica and Wardrop that would lead us to conclude that the parties are in privity. Moreover, ProMedica was not an active participant in the contempt proceedings, and was not a party in the underlying conversion suit. Indeed, apart from Judge Jennings' finding that ProMedica's mortgage was void ab initio, ProMedica had no interest in the contempt proceedings. Finally, the parties do not share an "identity of desired result" in this case. As ProMedica notes in its appellate brief, Wardrop stood to benefit from Judge Jennings' determination that the mortgage was void ab initio, insofar as such a ruling would effectively allow her to reuse her residence to satisfy the civil judgment after having already used ProMedica's loan to satisfy the criminal restitution order. In actuality, appellant's interests are more closely aligned with Wardrop's interest than ProMedica's interests. Therefore, we cannot conclude that ProMedica was in privity with Wardrop. Consequently, res judicata does not bar ProMedica's foreclosure action.

C. Lis Pendens

{¶ 23} Next, appellant argues that ProMedica's mortgage is void under the doctrine of lis pendens.

{¶ 24} In Ohio, the doctrine of lis pendens is codified in R.C. 2703.26, which provides: "When a complaint is filed, the action is pending so as to charge a third person with notice of its pendency. While pending, no interest can be acquired by third persons

in the subject of the action, as against the plaintiff's title." The following elements must be met in order for lis pendens to apply in a particular case:

> "(1) The property must be of a character to be subject to the rule;
>
> (2) the court must have jurisdiction both of the person and the res; and
>
> (3) the property or res involved must be sufficiently described in the pleadings. It may be added that the litigation must be about some specific thing that must be necessarily affected by the termination of the suit." *Beneficial Ohio, Inc. v. Ellis*, 121 Ohio St.3d 89, 2009-Ohio-311, 902 N.E.2d 452, ¶ 14, quoting *Cook v. Mozer*, 108 Ohio St. 30, 37, 140 N.E. 590 (1923).

{¶ 25} Concerning the third element, Ohio courts "have held that the property described in the complaint must be directly affected by the judgment in the pending suit." *Katz v. Banning*, 84 Ohio App.3d 543, 548, 617 N.E.2d 729 (10th Dist.1992), citing *Levin v. George Fraam & Sons, Inc.*, 65 Ohio App.3d 841, 842, 585 N.E.2d 527 (9th Dist.1990); *Stone v. Equitable Mtge. Co.*, 25 Ohio App. 382, 388, 158 N.E. 275 (9th Dist.1927). Consequently, the property described "must be at the very essence of the controversy between the litigants." *Levin* at 846.

{¶ 26} Here, appellant's argument concerning lis pendens fails under the third element. Indeed, appellant's complaint did not include a description of Wardrop's residence. Even if it included such a description, Wardrop's residence was not "at the very essence of the controversy." Instead, the controversy involved appellant's attempt

to recover money damages for Wardrop's conversion of Norbert's property at the end of his life. "[I]f the object of the action is merely to recover a money judgment, there can be no lis pendens, though the cause of action may arise out of property specified in the petition or complaint * * *." *Stone* at 388. Ultimately, Wardrop's residence was merely a potential source of revenue from which appellant could be compensated upon prevailing in the underlying action, which is not a sufficient basis to invoke the doctrine of lis pendens. *See Levin* at 846 ("It is not sufficient that the property be the source out of which the plaintiff will be compensated."). Therefore, we conclude that the doctrine of lis pendens is inapplicable in this case.

{¶ 27} Having determined that appellant's arguments are without merit, we find her sole assignment of error not well-taken.

IV. Conclusion

{¶ 28} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

14.

Mark L. Pietrykowski, J.

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JUDGE

Stephen A. Yarbrough, P.J.

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JUDGE

James D. Jensen, J.
CONCUR.

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JUDGE