[Cite as *Mosley v. Bank One, N.A.*, 2010-Ohio-3882.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94253

TRACIE MOSLEY, ET AL.

PLAINTIFFS-APPELLANTS

vs.

BANK ONE, N.A., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-671066

BEFORE: Cooney, J., Boyle, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 19, 2010

ATTORNEY FOR APPELLANTS

Susan M. Gray
22255 Center Ridge Rd.
Suite 210
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEES

For Bank One, N.A., et al.

Justin W. Ristau
Nelson M. Reid
Brickler & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291

Lana M. Knox-Guthrie
Brickler & Eckler LLP
1375 East Ninth Street, Suite 1500
Cleveland, Ohio 44114

For Lutheran Housing Corporation

Lutheran Housing Corporation
13944 Euclid Avenue, Suite 208
Cleveland, Ohio 44112

COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiffs-appellants Tracie Mosley and Paula Kurnava (collectively referred to as "appellants") appeal the dismissal of their amended complaint against defendants-appellees JP Morgan Chase Bank, Chase Home Finance, JP

Morgan Chase & Co. (collectively referred to as "the Chase defendants") and Bank One. Appellants also appeal the denial of their motion to file a second amended complaint. We find no merit to the appeal and affirm.

{¶ 2} In September 2008, appellants filed an amended complaint against Bank One and the Chase defendants claiming that Bank One conspired with individuals identified in the amended complaint as Jerry Ponsky ("Ponsky") and Simon Hoffman and others to deceive appellants and induce them to buy a home at a greatly inflated price so that they would profit from the sale. Bank One allegedly protected itself and profited by immediately selling the mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS"), a third party.

{¶ 3} The amended complaint alleges that in August 2002, appellants responded to a flier displayed in the lobby of their apartment building by a company called USA Builders, which purported to assist first-time home buyers in finding homes for purchase. In October 2002, appellants decided to buy a house on Darwin Avenue and, on Ponsky's advice, they applied for a loan with Bank One. To improve their credit score, Ponsky satisfied a car loan on Mosley's behalf in the amount of $15,000 so that the loan application would indicate that Mosley had less debt than he actually had. Appellants then executed a second mortgage on the property to repay Ponsky for this loan. On Ponsky's recommendation, appellants also signed a fake "gift letter," which indicated that they had more money in their checking account than they actually had.

{¶ 4} Appellants executed a promissory note in the amount of the purchase price plus interest and delivered it to Bank One. Soon after the promissory note and mortgage were executed, Bank One sold the mortgage to MERS, while Bank One remained the servicer. Bank One later merged with JP Morgan Chase Bank and the other Chase defendants. The amended complaint alleges that the Chase defendants are the successors by merger to Bank One and thus have successor liability for Bank One's misdeeds.

{¶ 5} In May 2004, MERS filed a foreclosure action against appellants alleging that appellants had defaulted on their mortgage. Appellants filed an answer and asserted counterclaims against MERS and Bank One for civil conspiracy, fraud, conversion, RICO violations, and a violation of the obligation of good faith and fair dealing. These claims are identical to the claims appellants set forth in the amended complaint in the case at bar except that in this case, appellants assert these claims against Bank One and the Chase defendants instead of MERS and Bank One.[1]

{¶ 6} After appellants filed the amended complaint, the Chase defendants filed separate motions to dismiss, arguing that appellants failed to state a claim upon which relief could be granted, that the amended complaint does not assert any allegations against them, that all claims were barred by the applicable

[1]Although appellants made the same claims against Bank One in the foreclosure action, they apparently never joined Bank One as a necessary party.

statutes of limitations, and that they failed to plead the fraud and RICO claims with particularity as required by Civ.R. 9(B). Appellants responded to the motions and sought leave to file a second amended complaint to cure any defects in their amended complaint. The trial court granted the motions to dismiss without stating its reasons and denied appellants' motion for leave to file a second amended complaint. Appellants now appeal, raising two assignments of error.

{¶ 7} In their first assignment of error, appellants argue the trial court erred in granting the Chase defendants' motions to dismiss. In the second assignment of error, appellants argue the trial court erred in denying their motion for leave to file a second amended complaint. However, based on our review of the record and this court's decision in the underlying foreclosure action, *Mortgage Electronic Registration Systems, Inc. v. Mosley,* Cuyahoga App. No. 93170, 2010-Ohio-2886 ("MERS" or foreclosure case), we find that appellants' claims are barred by res judicata.

{¶ 8} A determination of whether the doctrine of res judicata bars an action is a question of law that an appellate court reviews de novo. *Payne v. Cartee* (1996), 111 Ohio App.3d 580, 586-87. In discussing the doctrine of res judicata the Ohio Supreme Court has held:

> "A valid final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."

Grava v. Parkman Twp. (1995), 73 Ohio St.3d 379, 653 N.E.2d 226, syllabus.

{¶ 9} Res judicata operates as a complete bar to any subsequent action on the same claim between the parties to the original action as well as those in privity with them. *Brown v. Dayton*, 89 Ohio St.3d 245, 247, 2000-Ohio-148, 730 N.E.2d 958. In determining whether privity exists, a contractual or beneficiary relationship is not required. Id. Rather, the *Brown* court explained:

> "'In certain situations * * * a broader definition of "privity" is warranted. As a general matter, privity "is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata." *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring).' *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, 637 N.E.2d 917, 923." Id. at 248.

{¶ 10} The *Grava* court explained that for two suits to be based upon the same transaction, there must be a "common nucleus of operative facts." If the two suits share a common nucleus of operative facts, then a plaintiff cannot bring the second action "even though [plaintiff] is prepared * * * (1) To present evidence or grounds or theories of the case not presented in the first action, or (2) To seek remedies or forms of relief not demanded in the first action." *Grava* at 383.

{¶ 11} In the instant case, appellants allege the same facts and seek to bring the same claims against Bank One and the Chase defendants that they previously raised in the foreclosure action.[2] MERS purchased appellants'

[2]The counterclaims Mosley raised in the foreclosure action are identical to the claims in the instant case and were directed at Bank One and MERS. This court found no merit to Mosley's claims involving Bank One. *MERS* at ¶33, 36, 46-48.

mortgage from Bank One. Therefore, privity exists between Bank One and MERS. There is also privity between Bank One and the Chase defendants because the Chase defendants are the successors by merger with Bank One, as appellants alleged in their amended complaint. Moreover, appellants alleged in the foreclosure case that Bank One participated in the alleged fraud perpetrated against them. Having determined that appellants' claims share "a common nucleus of operative facts" and arose out of the same transaction that was the subject of the foreclosure action, we find that appellants' claims in this subsequent case are barred by res judicata.

{¶ 12} Accordingly, the first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

MARY J. BOYLE, P.J., CONCURS;
FRANK D. CELEBREZZE, JR., J., CONCURS IN JUDGMENT ONLY