

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., Nominee for Lender  
COUNTRYWIDE HOME LOANS, INC., d/b/a  
AMERICA'S WHOLESALE LENDER,

Plaintiff-Appellant,

v

ALLEN FAYAD FAYAD,

Defendant,

and

SOUAD FOUAD FAYAD,

Defendant-Appellee.

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UNPUBLISHED  
August 4, 2005

No. 261774  
Wayne Circuit Court  
LC No. 04-409673-CH

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion for summary disposition and granting summary disposition in favor of defendant Souad Fouad Fayad (Souad). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On February 12, 2001, Souad filed a complaint for divorce from defendant Allen Fayad Fayad (Allen). While the divorce was pending, Allen received conveyance of property by warranty deed that referred to him as "Allen Fayad, a single man." Thereafter, Allen, as a single man, granted a mortgage on the property to plaintiff's predecessor in interest as security for a note in the amount of \$235,000. The judgment of divorce, entered on August 29, 2001, awarded the property to Souad. Each party discharged any rights, including dower rights, in property held by the other party.

On March 27, 2002, plaintiff filed suit against Allen and Souad, seeking judgment quieting title to the property in Allen's name, subject to the mortgage, a declaration that the mortgage was a valid first lien, and an order requiring that the mortgage be recorded. In her answer, Souad asserted that because she and Allen owned the property as tenants by the entireties, Allen was without authority to act alone to mortgage the property. Subsequently, the parties stipulated to a dismissal of the entire case with prejudice. On March 31, 2004, plaintiff

filed the instant suit, seeking an order removing the notice of lis pendens and quieting title in a recordable form. In her answer and affirmative defenses, Souad asserted that the doctrine of res judicata barred plaintiff from asserting that the property was not held by Souad and Allen as tenants by the entirety. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that its mortgage was a valid first lien on the property. The trial court denied plaintiff's motion for summary disposition and granted summary disposition in favor of Souad, finding that the present action was barred by the doctrine of res judicata because plaintiff could have litigated the issue of the validity of the mortgage in the 2002 action.

Plaintiff argues that the trial court erred by denying its motion for summary disposition and granting summary disposition in favor of Souad. We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to the facts or evidence in a prior action. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata requires that: (1) the prior action was decided on the merits; (2) the matter contested in the second case was or could have been resolved in the first case; and (3) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). We review de novo the applicability of the doctrine of res judicata. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999).

Plaintiff asserts that the doctrine of res judicata is not applicable because its purchase money mortgage is valid as a matter of law. Furthermore, plaintiff contends that collateral estoppel is inapplicable in this case because consent judgments are not given preclusive effect, the validity of the mortgage was not litigated or determined in the 2002 action, and the issue of the validity of the mortgage was not essential to the 2002 action. Plaintiff seemingly confuses the doctrines of res judicata and collateral estoppel and improperly focuses its argument on the elements of the latter doctrine. The trial court granted summary disposition in favor of Souad on the ground that res judicata barred the instant action, in which plaintiff sought removal of the notice of lis pendens and a declaration that its mortgage is a valid first lien. In the 2002 action, plaintiff sought the same declaration regarding the mortgage, asserting that Allen and Souad owned the property as tenants by the entirety. Souad did not dispute this assertion, but alleged that Allen had no authority to mortgage the property without her consent. The issue of the validity of the mortgage was raised in the 2002 action, which the parties stipulated to dismiss with prejudice. A voluntary dismissal with prejudice constitutes a decision on the merits for purposes of application of res judicata. *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 395; 573 NW2d 336 (1997). The issue of the validity of the mortgage could have been litigated and resolved in the 2002 action. Similarly, the issue of the validity of the notice of lis pendens could have been raised and litigated in the 2002 action. Accordingly, the trial court correctly concluded that res judicata applied to bar the instant action. See *Baraga Co*, *supra* at 269.

Affirmed.

/s/ Brian K. Zahra  
/s/ Hilda R. Gage  
/s/ Christopher M. Murray