

STATE OF MICHIGAN
COURT OF APPEALS

MERCANTILE BANK MORTGAGE
COMPANY, L.L.C.,

Plaintiff-Appellee,

v

FRED KAMMINGA, KAMMINGA
COMPANIES, L.L.C., and JACKIE
KAMMINGA,

Defendants-Appellants,

and

WESTGATE VILLAGE TOWNHOUSES, L.L.C.,
WESTGATE COACH HOMES ASSOCIATION,
and CHEMICAL BANK,

Defendants.

MERCANTILE BANK MORTGAGE
COMPANY, L.L.C.,

Plaintiff-Appellee,

v

FRED KAMMINGA, KAMMINGA
COMPANIES, L.L.C., JACKIE KAMMINGA,
WESTGATE COACH HOMES ASSOCIATION,
and CHEMICAL BANK,

Defendants,

and

WESTGATE VILLAGE TOWNHOUSES, L.L.C.,

Defendant-Appellant.

UNPUBLISHED
September 20, 2012

No. 307563
Kent Circuit Court
LC No. 11-000722-CK

No. 308134
Kent Circuit Court
LC No. 11-000722-CK

Before: WILDER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

In Docket No. 307563, defendants Fred Kamminga, Kamminga Companies, LLC and Jackie Kamminga appeal as of right an order denying defendants' motion for summary disposition of plaintiff's claim on the basis of res judicata. In Docket No. 308134, defendant Westgate Village Townhouses, LLC appeals the same order on the same ground. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2006, plaintiff loaned Westgate approximately \$5.5 million to finance a condominium development, secured by a mortgage on the property. In the following years, the Westgate Coach Homes condominium development was built, and Westgate sold many of the units to third-party purchasers and the amount owed on the loan was reduced. On January 12, 2009, Fred Kamminga, one of the owners of Westgate, signed two deeds on behalf of Westgate transferring two condominium units, Units 3 and 8, to his wholly-owned entity, Kamminga Companies, LLC. Kamminga Companies thereafter granted Chemical Bank a second mortgage against Units 3 and 8.

A. THE RECEIVERSHIP

In 2009, Westgate defaulted on the loan. On November 13, 2009, plaintiff filed a complaint against Westgate, seeking judicial appointment of a receiver over the property to prevent waste. The receiver was sought pursuant to MCL 600.2927(2), which provides:

Receiver to prevent waste; collection of rents and income. If such mortgagor or grantor in such instrument fails to pay such taxes or insurance premiums upon property subject to the terms of a mortgage, trust mortgage, or deed of trust containing such agreement the circuit court having jurisdiction of such property may, in its discretion upon complaint or motion filed by such mortgagee, grantee, assignee thereof or trustee under such instrument and upon such notice as the court may require, appoint a receiver of the property for the purpose of preventing such waste. Subject to the order of the court, the receiver may collect the rents and income from such property and shall exercise such control over such property as to such court may seem proper.

At the time plaintiff requested a receiver, it did not have management rights over the property. Therefore, in requesting that a receiver be appointed, plaintiff sought independent management during the foreclosure by advertisement process. The receivership action involved only a single count for the appointment of a receiver, and Westgate was the only named defendant. No other claim was made against Westgate nor was any other relief requested. Instead, the request for a receiver was a stand-alone statutory claim aimed at combating waste. On November 24, 2009, the trial court appointed a receiver, allowing the receiver to "apply all remaining sums received . . . that are not required for the Operating Account to principal, interest, late charges, prepayment premiums, escrow charges, and costs of collection due or to become due to [Mercantile] under the loan documents described in [Mercantile's] complaint."

Meanwhile, on November 16, 2009, three days after filing the receivership action, plaintiff commenced an advertised foreclosure for 70 of the 74 condominium units. Plaintiff did not seek an advertised foreclosure for Units 3, 5, 8, or 89. Westgate moved to enjoin, stay, or otherwise declare invalid plaintiff's proposed foreclosure by advertisement, arguing that MCL 600.3204(1)(b) precluded foreclosure by advertisement. Because the statute requires that an "action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage," Westgate argued that, by instituting an action seeking a receivership of the property, plaintiff had elected its remedy and could not proceed with foreclosure by advertisement. The trial court disagreed:

As a general rule, a suit to appoint a receiver "during the pendency of the advertisements" is "not a suit brought to recover the debt secured by the mortgage and, therefore, is not a bar to foreclosure by advertisement" under Michigan law.

Here, Plaintiff Mercantile simply asked the Court to appoint such an unbiased receiver and the Court did so, placing substantial restriction upon the power of that receiver. . . . Mercantile did not take this step "to recover the debt secured by the mortgage," as contemplated by MCL 600.3204(1)(b). Indeed, the Court is hard-pressed to think of a less efficacious method of accomplishing that goal than asking a Court to put a receiver independent of the parties in a position to exercise discretion in applying some surplus funds to debt service after all other obligations are met.

* * *

Here, Plaintiff Mercantile has chosen its remedy: foreclosure by advertisement. There is no bar in MCL 600.3204(1)(b) to the exercise of foreclosure by advertisement because neither the suit against the guarantors nor this action to appoint a receiver constitutes an "action or proceeding . . . at law, to recover the debt secured by the mortgage" within the meaning of MCL 600.3204(1)(b). Consequently, the motion filed by Defendant Westgate to enjoin, stay, or otherwise declare invalid a foreclosure by advertisement must be denied.

Plaintiff purchased the 70 condominium units at a December 16, 2009, a sheriff's sale for \$3.1 million. Plaintiff now had control of the property and was in a position to assert its management rights and obligations. As such, a receiver was no longer necessary. On December 20, 2010, the parties agreed to dismiss plaintiff's receivership action with prejudice.

B. FORECLOSURE – THE CURRENT CASE

Thereafter, on January 21, 2011, plaintiff filed a complaint seeking judicial foreclosure as to the four remaining condominium units. Defendants attempted to have the case re-assigned to the judge who presided over the receivership action. The request was denied because the judge in judicial foreclosure action determined that the claims did not arise out of the same transaction

for purposes of MCR 8.111(D)(2).¹ The parties later filed cross-motions for summary disposition, with defendants seeking summary disposition, in part, on the ground that res judicata barred plaintiff's present action. The trial court denied defendants' motion and granted summary disposition in favor of plaintiff, finding that res judicata did not bar plaintiff's foreclosure action:

This Court agrees with [the judge in the receivership action] holding that the Receivership Action was not an action or proceeding to recover the debt.

Therefore, the instant action is the first one to assert a claim against Westgate and, consequently, res judicata does not apply. Additionally, MCR 2.203(A)[²], cited by the Defendants, mandates compulsory joinder of claims when there is "a pleading that states a *claim* against an opposing party." Again, this Court finds that the Receivership Action did not involve a claim against Westgate, making MCR 2.203(A) also inapplicable.

Further, this Court agrees with [plaintiff] that its claim in the instant action does not arise from the "same transaction" involved in the Receivership Action, as required under the doctrine of res judicata. . . .

As Mercantile argues, the Receivership Action concerned protecting the Property against waste by appointing a receiver, whereas the instant action concerns Westgate's debt to Mercantile under a promissory note, Mercantile's mortgage against the Property securing that debt, and the priority of other interests in the Property, although that issue is not in dispute. The theories of relief in the two actions do not arise from a single group of operative facts.

The trial court's opinion also noted that neither the debt owed to plaintiff nor plaintiff's mortgage had been extinguished by the 2009 foreclosure and sheriff's sale:

In the 2009 foreclosure by advertisement, Mercantile foreclosed on 70 of the 74 units of the Property, and its winning bid at the sheriff's sale did not satisfy the amount due under the mortgage. As Mercantile argues, a partial foreclosure will not discharge the entire mortgage. Because the entire amount due under the mortgage was not paid by the 2009 foreclosure by advertisement, it did not

¹ MCR 8.111(D)(2) provides: "if an action arises out of the same transaction or occurrence as a civil action previously dismissed or transferred, the action must be assigned to the judge to whom the earlier action was assigned."

² MCR 2.203(A) provides:

In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.

destroy the liens against the four excluded units, and Mercantile is entitled to recover the remaining amount due under the mortgage against those units.

On November 17, 2011, the trial court entered a judgment and order of foreclosure. The trial court entered a money judgment in favor of plaintiff and against Westgate in the amount of \$1,466,400.87 plus interest. The final order stated that plaintiff's mortgage was valid and enforceable, that it secured the full amount of plaintiff's money judgment, and that it encumbered the four remaining units. The final order also provided that plaintiff may foreclose on the four units and sell them at a sheriff's sale in order to satisfy plaintiff's money judgment, in whole or in part.

Defendants now appeal as of right.³

II. STANDARD OF REVIEW

This Court reviews “de novo the decision of the trial court on the motion for summary disposition.” *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). “The applicability of the doctrine of res judicata is a question of law that is also reviewed de novo.” *Rinas v Mercer*, 259 Mich App 63, 67; 672 NW2d 542 (2003).

“In reviewing a motion for summary disposition under MCR 2.116(C)(7), we accept the contents of the complaint as true unless the moving party contradicts the plaintiff's allegations and offers supporting documentation.” *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). A court should grant summary disposition under MCR 2.116(C)(7) where it finds that plaintiffs' claims are barred by the doctrine of res judicata. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991).

III. ANALYSIS

On appeal, defendants argue that res judicata barred plaintiff's action for judicial foreclosure and, thus, the trial court erred in denying their motion for summary disposition. Specifically, defendants argue that plaintiff should have brought the claims alleged in the instant action in its 2009 receivership action. We disagree.

“The burden of establishing the applicability of res judicata is on the party asserting the doctrine.” *Richards v Tibaldi*, 272 Mich App 522, 531; 726 NW2d 770 (2006).

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the

³ On February 6, 2012, this Court consolidated the appeals “to advance the efficient administration of the appellate process.” *Mercantile Bank Mtg Co, LLC v Kamminga*, unpublished order of the Court of Appeals, entered February 6, 2012 (Docket Nos. 307563, 308134). Thereafter, Westgate and Kamminga filed a joint appellate brief, raising the issue now before this Court.

prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. [*Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007) (citations omitted).]

In this case, plaintiff's receivership action was brought under MCL 600.2927(2) and sought to preserve the property and prevent waste during the 2009 foreclosure proceedings and redemption period. Appointment of a receiver is for the equal benefit of all the parties. See *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 528; 730 NW2d 481 (2007) (noting that a court-appointed receiver is "charged with the task of preserving property and assets during ongoing litigation" and "is not appointed as the agent of, or for the benefit of, one party or the other; rather he or she is appointed to protect and benefit both parties equally").

In arguing that res judicata is inapplicable, we believe plaintiff has conflated the term "action" as it is used in MCL 600.3204(1)(b) and "action" as used in determining whether res judicata applies. Plaintiff's receivership action was not an "action" against Westgate for purposes of MCL 600.3204(1)(b), which requires a mortgagee to elect a remedy upon default, but it was nevertheless a request for equitable relief. A verified complaint was filed against Westgate asserting waste and, while plaintiff did not seek to litigate any claims nor did it ask the trial court to make a determination as to liabilities under the mortgage, it nevertheless sought statutory equitable relief in the form of a receivership to protect its collateral from waste. Thus, while plaintiff's argument that the appointment of a receiver, which was to benefit all parties equally, is well-taken, plaintiff's 2009 receivership action constituted a "prior action" against Westgate for purposes of analyzing the first element of res judicata, which simply asks whether the prior action was decided on the merits.⁴ Accordingly, we conclude that the prior receivership action was decided on the merits.⁵

However, we conclude the third element of res judicata was not met. "This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, *could have raised* but did not." *Washington*, 478 Mich at 418 (emphasis added). "[T]his Court uses a transactional test to determine if the matter could have been resolved in the first case." *Id.* at 420, citing *Adair v Michigan*, 470 Mich 105, 123; 680 NW2d 386 (2004). Under the transactional test, the assertion of different theories of relief constitutes a single cause of action when a single group of operative facts give rise to the assertion of relief.

⁴ It is also undisputed that the stipulated order of dismissal with prejudice constituted a final judgment on the merits in the receivership action. *Mitchell v Dahlberg*, 215 Mich App 718, 724; 547 NW2d 74 (1996) ("[A] voluntary dismissal with prejudice is a final judgment on the merits for res judicata purposes")

⁵ There appears to be no genuine dispute as to the second element of the three-part test: that is, both the receivership action and the action seeking judicial foreclosure involved the same parties or their privies.

Adair, 470 Mich at 124. “Whether a factual grouping constitutes a ‘transaction’ for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit.” *Id.* at 125 (quotation and citation omitted; emphasis removed).

Plaintiff’s receivership action sought equitable relief in the form of judicial appointment of a receiver to protect the property from waste, which was for the benefit of all the parties. It was a stand-alone statutory claim. The receivership had nothing to do with the mortgage liens and, while the receivership was ultimately terminated, the liens remained in full force and effect.⁶ The receivership would not have resolved anything but the issue of waste and temporary management of the property. Therefore, the only operative facts in the receivership action were those facts necessary for a determination as to whether a receiver was necessary to prevent waste.

In contrast, plaintiff’s judicial foreclosure action was clearly adversarial in that it sought to foreclose on the remaining four condominium units in order to collect the debt secured by the mortgage. The operative facts in the foreclosure action included the amount of Westgate’s debt remaining after foreclosure, plaintiff’s right to foreclose under the mortgage, and the priority of interests in the property. None of the facts for resolving the receivership action were relevant to the judicial foreclosure action. Plaintiff’s ability to prove the need for a statutory receivership had no bearing on the merits of plaintiff’s judicial foreclosure action, as the two claims were distinct from one another.

We therefore conclude that the operative facts of the two cases were not related in motivation and did not “form a convenient trial unit” for purposes of res judicata. The relief that plaintiff asserted in its two actions did not rely on a single group of operative facts and the two actions did not constitute a single transaction for the purposes of res judicata. Plaintiff’s receivership action was motivated by a need to protect and manage real estate, whereas plaintiff’s foreclosure action was motivated by plaintiff’s desire to recover a monetary judgment and collateral. Accordingly, we find that the trial court properly determined that res judicata did not bar the present foreclosure action and, thus, defendant was not entitled to summary disposition under MCR 2.116(C)(7).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ Kirsten Frank Kelly

⁶ We also note that nothing precludes successive receiverships. It would strain reason to allow successive receiverships without violating the principles of res judicata while prohibiting a separate and unrelated cause of action for enforcement of a lien because there was a prior receivership action.