18-P-897 Appeals Court

TAMMY M. DUROSS vs. SCUDDER BAY CAPITAL, LLC, & another.[1]

No. 18-P-897.

Plymouth. May 8, 2019. - January 17, 2020.

Present: Milkey, Hanlon, & Sacks, JJ.

Res Judicata. Collateral Estoppel. Mortgage, Foreclosure. Real Property, Mortgage. Summary Process.

Civil action commenced in the Superior Court Department on May 29, 2015.

A pretrial motion to dismiss a claim against the postforeclosure buyer was heard by Frank M. Gaziano, J., and a motion to dismiss claims against the foreclosing mortgagee was heard by Christopher J. Muse, J.

Rockwell P. Ludden for the plaintiff.
John F. White, Jr., for Scudder Bay Capital, LLC.
Dina M. Swanson for Alan M. Kearney.

HANLON, J. Seeking recovery of her home after what she claims was an ineffective foreclosure, the plaintiff, Tammy

[1] Alan M. Kearney.

Duross, sued the foreclosing mortgagee, Scudder Bay Capital, LLC (Scudder Bay), and its postforeclosure buyer, Alan M. Kearney. Duross now appeals from judgments that dismissed her claims as precluded by a judgment in an earlier eviction case. We affirm the dismissal of all claims predicated on Duross's theory that the foreclosure was ineffective to pass title to Scudder Bay. In so doing, we hold that G. L. c. 239, § 7, does not bar application of the doctrine of issue preclusion to summary process judgments determining title. We reverse so much of the judgment in favor of Scudder Bay as dismisses Duross's claims predicated on acts or omissions unrelated to the title question.

Background. 1. Foreclosure and eviction. On or about July 31, 1997, Duross purchased the home known as 120 South Street, Hingham (the property). On April 18, 2006, Duross signed a note payable to Option One Mortgage Corporation (Option One) in the amount of $600,000. Duross's note was secured by a mortgage on the property given to Option One as mortgagee. After various assignments to various entities, Duross's mortgage was assigned to Scudder Bay in June 2010.

Scudder Bay foreclosed on August 20, 2012, was the top bidder at its own auction, and purchased the property for $100,000. Thereafter, Scudder Bay brought a summary process action in the Southeast Housing Court to evict Duross and her children. On or about May 16, 2013, a Housing Court judge

allowed Scudder Bay's motion for summary judgment. A judgment for possession entered in favor of Scudder Bay on May 17, 2013. In June 2014, Scudder Bay sold the property to defendant Kearney for $490,000.

2. The instant action. On May 29, 2015, Duross brought the instant action in Plymouth Superior Court against Scudder Bay and Kearney.[2] Much of the complaint focuses on the securitization process by which Duross's loan was sold into a trust. Because this case rises and falls on the doctrine of issue preclusion, we shall endeavor to identify the nature of each of Duross's separate counts.

Duross's counts 1 through 6 all alleged that, because the loan was sold into a trust that issued certificates to investors, Scudder Bay had no authority to foreclose under the mortgage and note instruments, or that (because it lacked such authority) the foreclosure violated provisions of the mortgage or the Commonwealth's foreclosure statutes. Count 8 alleged negligent infliction of emotional distress predicated on "false information pertaining to ownership of the loan and its attendant right of enforcement." Count 14 claimed that, by

[2] Her verified amended complaint is ninety pages and 285 paragraphs long, and is in no way a "short and plain statement" of her claims. See Mass. R. Civ. P. 8 (a), 365 Mass. 749 (1974).

foreclosing, Scudder Bay violated the Massachusetts Civil Rights Act, G. L. c. 12, § 11I. Count 15 asserted that the foreclosure violated public policy.[3] Count 16 alleged unjust enrichment based on the foreclosure. All of counts 1 through 6, 8, and 14 through 16 sought both monetary damages and equitable relief including "rescission" of the foreclosure, or, in the case of count 16, "return" of the home.[4] Count 17, the only count alleged against both Scudder Bay and Kearney, sought a declaration that the foreclosure is null and void, that Kearney is not a bona fide purchaser for value, and that Duross is the sole owner in fee simple of the property. All of these counts (i.e., counts 1 through 6, 8, and 14 through 17) depended entirely on Duross's underlying premise that, as a byproduct of

[3] We have doubts as to whether count 15 states a cause of action, but we need not consider the question.

[4] Duross's request for rescission implies a technically valid foreclosure by which title passed to Scudder Bay. See Merriam-Webster's Collegiate Dictionary 1059 (11th ed. 2005) (defining rescind as "to take away," "take back," "cancel," or "make void"). However, considering Duross's complaint as a whole, we construe it as seeking a declaration that the foreclosure was invalid at the time it occurred and that, accordingly, title never passed to Scudder Bay.

the securitization process, Scudder Bay, the ultimate assignee of the note and mortgage,[5] lacked authority to foreclose.[6]

In contrast, counts 7, 9 through 11, and 13 asserted legal theories based on a mix of allegations, including not only the allegedly wrongful foreclosure, but also acts and omissions allegedly occurring in the broader scope of the parties' dealings.[7] Specifically, counts 7, 9, and 13 alleged torts or violations of Federal and State consumer protection statutes, and counts 10 and 11 asserted contract-based claims in which Duross alleged breach of the implied covenant of good faith and fair dealing.[8]

---

[5] The record appendix includes an allonge to the note that is specially indorsed to Scudder Bay. See G. L. c. 106, § 3-205 (a).

[6] This resulted, in Duross's view, from Scudder Bay's asserted failure to hold the "beneficial interest" in the note. Although we do not reach the merits, we note that this court has recently rejected a very similar theory. See Mitchell v. U.S. Bank Nat'l Ass'n, 95 Mass. App. Ct. 901 (2019).

[7] For example, prior to the foreclosure, Duross brought two adversary proceedings in Bankruptcy Court; the parties settled those actions. Duross's amended Superior Court complaint alleged that Scudder Bay had acted in violation of the implied covenant of good faith and fair dealing by preventing her from refinancing the mortgage pursuant to the settlement agreement, which violation, she alleged, led to the judgment against her in the Housing Court summary process action.

[8] To the extent Duross alleged that the covenant of good faith and fair dealing was implied in the mortgage and note, and that this covenant was breached, these claims were also dependent on the underlying theory that Scudder Bay lacked authority to enforce these instruments. Counts 10 and 11 were

In January 2016, Kearney moved to dismiss count 17 of the complaint, the only count asserted against him. Kearney's motion was allowed on May 12, 2016, with the motion judge (first judge) issuing a detailed memorandum and order grounded in principles of res judicata. The first judge then left the Superior Court bench, and a different judge (second judge) allowed Scudder Bay's motion to dismiss the remaining counts, adopting the reasoning set forth by the first judge in his memorandum and order.[9] On April 6, 2018, the Superior Court entered two judgments (one pertaining to each defendant) dismissing counts 1 through 11 and 13 through 17 of the complaint. Duross filed her notice of appeal on May 4, 2018.

Discussion. "'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another. It comprises 'claim preclusion' and 'issue preclusion.'" Heacock v. Heacock, 402 Mass. 21, 23 n.2

---

not, however, limited to this theory. They also asserted violations of the covenant of good faith and fair dealing implied in the settlement agreement filed in the bankruptcy proceedings (see note 7, supra).

[9] Duross then brought two motions pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974). In response, the second judge vacated the dismissal of count 12, for conversion of personal property; that claim was later dismissed by voluntary stipulation. Deeming the motions premature as to the other counts, the judge considered them as requests for reconsideration and issued a denial.

(1988). "The doctrine of claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action. . . . This is so even though the claimant is prepared in a second action to present different evidence or legal theories to support his claim, or seeks different remedies." Id. at 23.

Issue preclusion, also known as "collateral estoppel," "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." Heacock, 402 Mass. at 23 n.2. "Before precluding a party from relitigating an issue, 'a court must determine that (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication.'" Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005), quoting Tuper v. North Adams Ambulance Serv., Inc., 428 Mass. 132, 134 (1998). The fourth and final requirement is that "the issue decided in the prior adjudication must have been essential to the earlier judgment." Kobrin, supra at 844, quoting Tuper, supra at 134-135.

Here, the motion judges relied on issue preclusion, holding that the defendants had "established all four parts of the issue preclusion standard" and that Duross's claims were barred by the judgment issued in the Housing Court eviction case. There was, and is, no question as to whether the Housing Court had issued a final judgment on the merits (it had), or whether Duross was a party to the prior adjudication (she was). See Kobrin, 444 Mass. at 843.

As to whether an identical issue was presented in the two cases, see Kobrin, 444 Mass. at 843, the first judge concluded that, in the eviction case, Duross had "actively litigated her claim of superior title based upon Scudder Bay's alleged lack of authority to foreclose." He also concluded that the Housing Court judge's determinations as to the "validity of the assignments and Scudder Bay's authority to foreclose" were essential to the judgment in the eviction action. See Kobrin, supra at 844. Ultimately, he determined that, as a matter of law, "[s]ince the Housing Court has previously decided that Scudder Bay obtained proper title to the property according to the power of sale provided in the mortgage, Duross is precluded from relitigating the same issue in the Superior Court." The second judge adopted all of these legal conclusions. We review de novo, see Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct.

687, 691 (2016), focusing on the last two prongs of the analysis.

1. Identity of issues. "Issue preclusion can be used only to prevent relitigation of issues actually litigated in the prior action. . . . Accordingly, we look to the record to see what was actually litigated." Kobrin, 444 Mass. at 844. See Boyd v. Jamaica Plain Co-operative Bank, 7 Mass. App. Ct. 153, 160 (1979).

In the eviction case, Duross argued at summary judgment that "[t]he material facts in the case at bar undoubtedly raise genuine issues relative to [Scudder Bay's] ownership and alleged title in [Duross's] mortgage and note, as required under Massachusetts law. . . . In this case, . . . [Scudder Bay] . . . has failed to establish itself with any legal standing to foreclose on [Duross's] property." Duross also argued that summary judgment for Scudder Bay could not enter due to evidence showing that Scudder Bay "fails to hold proper, legal standing in the property's chain of title through a valid assignment conveyance or otherwise recognized by Massachusetts law." She also argued, "[Scudder Bay] failed to establish that it is the legal and present holder of [Duross's] mortgage and therefore cannot enforce the terms of the mortgage. The facts clearly present genuine issues that [Scudder Bay] . . . never received a

legally effective conveyance mortgage title interest in [Duross's] mortgage and note."

It is apparent from these quotations drawn from Duross's Housing Court filing that the issue "actually litigated" in that action was whether Scudder Bay had authority to enforce the mortgage and the note. See Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 571 (2012). Based on facts in the record that he determined were undisputed, the Housing Court judge ruled on this issue, concluding that Scudder Bay "clearly complied with the various tests set forth in Bank of New York v. Bailey, 460 Mass. 327 (2011); U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637 (2011) and Eaton[, supra]." In allowing Scudder Bay's motion, the Housing Court judge added that Scudder Bay had "sustained its burden to show that it obtained title through appropriate assignments, that it held the mortgage at the time of the foreclosure sale on August 20, 2012, that it held the promissory note, and, finally, that it conducted the foreclosure sale according to the statute."[10]

[10] The Housing Court judge also allowed Scudder Bay's motion to strike Duross's counterclaims and affirmative defenses on the ground that Duross was not entitled to bring them pursuant to G. L. c. 239, § 8A, because there was no landlord-tenant relationship between the parties. We note that seven months after the Housing Court judge struck Duross's counterclaims, the Supreme Judicial Court held in Bank of Am., N.A. v. Rosa, 466 Mass. 613 (2013), that "the Housing Court has jurisdiction to hear defenses and counterclaims that challenge the title of a plaintiff in a postforeclosure summary process action . . . ."

That Duross may have articulated in Superior Court a somewhat new or different theory as to why she should have prevailed in the Housing Court on the question of Scudder Bay's authority to foreclose does not mean that the question was not already "actually litigated." Here, the key issue presented in the Superior Court action -- i.e., whether Scudder Bay had authority to foreclose -- is identical to the primary issue litigated in the Housing Court eviction case. Accordingly, collateral estoppel applies.

2. Necessary to judgment. Additionally, we have no doubt that the question of Scudder Bay's authority to foreclose was essential to the Housing Court's judgment. "The purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be shown and legal title may be put in issue." Wayne Inv. Corp. v. Abbott, 350 Mass. 775, 775 (1966). See Sheehan Constr. Co. v. Dudley, 299 Mass. 51, 53 (1937). Accordingly, Scudder Bay has satisfied all required elements for

---

Id. at 615. However, while Duross's counterclaims likely would not have been struck if the judge had had the benefit of the Rosa decision, that does not alter the fact that Scudder Bay's authority to foreclose was in fact challenged and actually litigated as part of its affirmative case. See Bailey, 460 Mass. at 333 ("Challenging a plaintiff's entitlement to possession has long been considered a valid defense to a summary process action for eviction where the property was purchased at a foreclosure sale").

application of issue preclusion based on the Housing Court judgment.

3. Effect of G. L. c. 239, § 7. We now turn to the question whether there is a statutory bar to application of issue preclusion here. Duross argues that res judicata (whether issue preclusion or claim preclusion) cannot attach to summary process decisions because G. L. c. 239, § 7, provides, in pertinent part, "The judgment in an action under this chapter shall not be a bar to any action thereafter brought by either party to recover the land or tenements in question, or to recover damages for any trespass thereon[.]" On its face, this language speaks to whether a summary process judgment serves as a bar to actions to recover property, not to whether issues actually litigated in a summary process action can be relitigated in a new action. To understand the import of this statute, we consider how it has been interpreted over time.

Section 7 of the summary process statute has existed in substantially similar form since at least 1902. See R. L. 1902, c. 181, § 9;[11] Edwards v. Columbia Amusement Co., 215 Mass. 125,

[11] Revised Laws 1902, c. 181, § 9, provided as follows:

"The judgment in an action under the provisions of this chapter shall not be a bar to any action thereafter to be brought by either party to recover the land or tenements in question."

128 (1913). Nonetheless, in Edwards, the court recognized that the statute did not bar the application of issue preclusion to the question of the effectiveness of the defendant's lease. Id. at 127-128. In so doing, the court distinguished between an issue -- effectiveness of the lease -- and a potential claim -- for title to the property -- with the implication that although a claim of title would have survived the prior litigation, the issue concerning effectiveness of the lease had, indeed, been finally and fully resolved.[12] Id. at 128. Similarly, in Gordon v. Sales, 337 Mass. 35, 36 (1958), the Supreme Judicial Court held that it would not revisit the adequacy of a notice to terminate a tenancy because "[t]he summary process proceedings made it res judicata that the tenancy was ended."

Those cases concern the collateral estoppel effect of summary process judgments regarding tenancies; they do not discuss specifically whether a determination of title made in a

[12] In Miller v. Campello Co-op. Bank, 344 Mass. 76, 79 (1962), although the court tracked the plain language of G. L. c. 239, § 7, in stating that a summary process judgment for a defendant was "not a bar to any action thereafter brought by either party to recover the land," the court did not expressly discuss what issue-preclusive effect that judgment might have had. We recognize that, in Santos, 89 Mass. App. Ct. at 692-696, this court concluded, without discussing either G. L. c. 239, § 7, or Miller (neither of which the parties had cited), that a summary process judgment was entitled to claim-preclusive effect. To the extent that Santos is in tension with Miller, or other cited authorities, we leave resolution of that issue for another day.

summary process action is also preclusive. In Sheehan Constr. Co., 299 Mass. at 54, however, the Supreme Judicial Court squarely addressed that issue. There, a summary process decision establishing a postforeclosure owner's title was held determinative on the same issue in a later case brought in Land Court for a writ of entry. See id. (title question "ha[d] been settled against the tenant" in summary process action). The court explained that, since adoption of the summary process statute, "summary process has been available to the original purchaser at a foreclosure sale. In proceedings to that end it is incumbent upon such purchaser to establish his right to possession. The legal title in those circumstances plainly may be put in issue." Id. at 53. The court acknowledged that a trial court's jurisdiction under the summary process statute is limited -- "[t]here are cases where expressions are found to the effect that summary process cannot be used to take the place of a writ of entry to try title." Id. All that means, however, is that "if facts do not fall within the narrow classes of cases for which summary process may be used, there must be resort to the writ of entry." Id. Sheehan therefore stands for the proposition that, if the title to certain premises is actually litigated in a summary process action, the outcome on that issue will be preclusive -- notwithstanding the availability of other actions concerning title in other courts. In short, nothing in

our jurisprudence suggests that G. L. c. 239, § 7, operates to bar the application of issue preclusion based on summary process judgments where title actually has been determined.

Conclusion. Accordingly, the judgment dismissing count 17 against Kearney individually is affirmed, as is so much of the judgment dismissing counts 1 through 6, 8, and 14 through 17 against Scudder Bay. The remainder of the judgment in favor of Scudder Bay, dismissing counts 7, 9 through 11, and 13, is reversed to the extent that those counts seek relief based on acts or omissions of Scudder Bay separate from the foreclosure process. In all other respects, the judgment is affirmed.[13]

So ordered.

[13] Scudder Bay argues alternative bases for dismissal as to certain counts. To the extent that the Superior Court did not reach these arguments, it may do so in any further proceedings.