IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-603

No. COA21-609

Filed 6 September 2022

Dare County, No. 16 CVS 489

JACQUELINE L. GRAY and MARY STEWART GRAY, Plaintiffs,

v.

WELLS FARGO BANK, N.A., Defendant.

Appeal by Plaintiffs from order entered 18 May 2021 by Judge Alma L. Hinton in Dare County Superior Court. Heard in the Court of Appeals 26 April 2022.

Nexsen Pruet LLC, by Norman W. Shearin and George T. Smith III, for Plaintiffs-Appellants.

Womble Bond Dickinson (US) LLP, by B. Chad Ewing, for Defendant-Appellee.

WOOD, Judge.

¶ 1 Plaintiffs once again appeal to this Court for review of a familiar summary judgment order. After Plaintiffs had an opportunity to litigate the matter with a previous interested party, has the impenetrable gate of collateral estoppel fallen upon Plaintiffs' claims? We hold that it has.

I. Factual and Procedural Background

¶ 2 This appeal arises from the same facts in *Gray v. Fannie Mae*, 264 N.C. App.

642, 830 S.E.2d 652 (2019), *discretionary review denied,* 374 N.C. 267, 839 S.E.2d 853 (2020) [hereinafter *Gray I*]. As such, we need not restate the facts. We incorporate by reference the factual and procedural background of *Gray I*.

¶ 3 Procedurally, in *Gray I*, Plaintiffs filed a complaint against the Trustee Services of Carolina, LLC ("TSC") and Federal National Mortgage Association ("Fannie Mae"). *Id.* Plaintiffs asserted six claims for relief: "(1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the North Carolina Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices." *Id.* at 644, 830 S.E.2d at 655.

¶ 4 Plaintiffs filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on 27 April 2017. "On 31 July 2017, TSC filed a motion for summary judgment . . . on the ground that the order entered by the assistant clerk of court authorizing the foreclosure had constituted a final judgment," and, thus, "Plaintiffs' claims were therefore barred pursuant to the doctrine of collateral estoppel." *Id.* On appeal, we concluded "Plaintiffs were properly notified of the proceeding" but "did not appeal the order of the Dare County assistant clerk authorizing foreclosure under the Deed of Trust despite their ability to have done so." *Id.* at 650, 830 S.E.2d at 658. As such, we held that Plaintiffs' claims were barred by the doctrine of collateral estoppel. *Id.* at 650–51, 830 S.E.2d at 659.

¶ 5 After the *Grey I* decision was filed, Plaintiffs sought discretionary review by

our Supreme Court, which was subsequently denied by order entered on April 1, 2020. *Gray v. Fannie Mae*, 374 N.C. 267, 839 S.E.2d 853 (2020) (unpublished). Thereafter, TSC moved for summary judgment. The trial court granted TSC's motion for summary judgment by order entered November 5, 2020.

¶ 6 Soon after, Fannie Mae also moved for summary judgment. Approximately one month later, Plaintiffs and Fannie Mae entered into a consent order. Therein, they consented Wells Fargo would be substituted as a party defendant in this present suit in the place of Fannie Mae because "on or about October 11, 2017, Fannie Mae sold and conveyed the property that is the subject herein to Wells Fargo." Per Defendant's substitution, the parties also agreed Defendant could adopt the previous pleading filed by Fannie Mae.

¶ 7 A few days later, Defendant filed a motion for summary judgment. Defendant requested the trial court to "grant summary judgment to Wells Fargo on all of Plaintiffs' claims because the collateral estoppel effect of the Dare County Clerk's Order Allowing Foreclosure bars them." A hearing on Plaintiffs' and Defendant's motions for summary judgment came before the trial court. The trial court granted Defendant's motion for summary judgment and denied "all other pending motions" as moot by order entered May 18, 2021. From this order, Plaintiffs appeal.

II. Standard of Review

¶ 8 Rule 56 of our Rules of Civil Procedure states summary judgment "shall be

rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, R. 56(c). The moving party bears the burden of "clearly establishing the lack of triable issue." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). A trial court is permitted to enter summary judgment in favor of the party who has the burden of proof. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47, 727 S.E.2d 866, 869 (2012) (citing *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E.2d 392, 410 (1976)).

¶ 9 Such party must show "there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury." *Id.* (quoting *Kidd*, 289 N.C. at 370, 222 S.E.2d at 410). We review an appeal from summary judgment *de novo*. *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635, 794 S.E.2d 346, 351 (2016).

III. Discussion

¶ 10 We initially determine if Plaintiffs' claims against Defendant are barred under the collateral estoppel doctrine. Plaintiffs argue the trial court erred in granting summary judgment as collateral estoppel does not bar their claims against Defendant.

¶ 11 "Under the collateral estoppel doctrine, 'parties and parties in privity with them . . . are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.' " *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). Collateral Estoppel "prevent[s] repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." *Commissioner v. Sunnen*, 333 U.S. 591, 599, 68 S. Ct. 715, 720, 92 L. Ed. 898, 907 (1948); *accord King*, 284 N.C. at 356, 200 S.E.2d at 805. In order to successfully assert collateral estoppel against Plaintiffs, Defendant must illustrate 1) "the earlier suit resulted in a final judgment on the merits," 2) "the issue in question was identical to an issue actually litigated and necessary to the judgment, and" 3) "both [defendant] and [plaintiffs] were either parties to the earlier suit or were in privity with parties." *Turner*, 363 N.C. at 558–59, 681 S.E.2d at 773–74 (quoting *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552, 557 (1986)); s*ee also Gray I*, 264 N.C. App. at 645, 830 S.E.2d at 656.

¶ 12 A final determination on the merits as to Plaintiffs' possession of the Property was determined when the Dare County assistant clerk of court entered an order on July 16, 2015, authorizing the foreclosure of the property. *Gray I*, 264 N.C. App. at 643, 830 S.E.2d at 654. Thus, we begin our examination of whether Plaintiffs' claims

are barred by collateral estoppel by determining whether their claims against Defendant are similar to the issues in *Gray I*.

¶ 13 In *Gray I*, Plaintiffs' complaint against TSC and Fannie Mae alleged "the description of the property contained in the Deed of Trust erroneously included the land on which Peele's residence was situated," and sought six claims for relief: "(1) a declaration that the foreclosure sale was a nullity; (2) mutual mistake; (3) unjust enrichment; (4) a violation of the North Carolina Reverse Mortgage Act; (5) breach of fiduciary duty; and (6) unfair and deceptive trade practices." *Id.* at 644, 830 S.E.2d at 655. On appeal, we held Plaintiffs were collaterally estopped from asserting their claims. *Id.* at 650–51, 830 S.E.2d at 659. Plaintiffs " 'enjoyed a full and fair opportunity to litigate' the threshold issue of whether TSC was authorized to foreclose pursuant to the Deed of Trust" as they could have appealed "the order of the Dare County assistant clerk authorizing foreclosure under the Deed of Trust." *Id.* at 650, 830 S.E.2d at 657.

¶ 14 Plaintiffs' claims against Defendant in this case mirror those in *Grey I*. Plaintiffs claim Defendant violated the North Carolina Reverse Mortgage Act and such violation was an unfair and deceptive trade practice. As we stated in *Grey I*,

> Plaintiffs' claims for breach of fiduciary duty and unfair and deceptive trade practices are . . . barred under principles of collateral estoppel because the conduct upon which these causes of action are based is the foreclosure itself. . . . [Moreover] the damages Plaintiffs seek to recover

> on . . . [their claim under the Reverse Mortgage Act] with their other causes of action — flow directly from the foreclosure itself. For this reason, Plaintiffs are collaterally estopped from asserting this claim.

Id. at 650–51, 830 S.E.2d at 659. Accordingly, we conclude the issues in question in this case are identical to those litigated in *Gray I*.

¶ 15 The final element of collateral estoppel we must consider is whether Plaintiffs and Defendant were parties to the earlier suit or in privity with a party. *Turner*, 363 N.C. at 558–59, 681 S.E.2d at 773–74. It is undisputed that Plaintiffs were parties to *Gray I* and the July 2015 order. Plaintiffs assert, however, that Defendant was not a party to the July 2015 order and therefore lacks the privity requirement under the doctrine of collateral estoppel. We disagree.

¶ 16 Our appellate courts have repeatedly recognized the use of non-mutual, defensive collateral estoppel. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997). "[N]on-mutual, defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against a different party." *Id.* at 268–69, 488 S.E.2d at 840. Here, non-mutual, defensive use of collateral estoppel is applicable. Although the record is devoid of any evidence showing Defendant was a party to the July 2015 order, Plaintiffs are seeking to relitigate issues against Defendant which were unsuccessfully litigated in *Grey I*. As such, they are barred by non-mutual, defensive use of collateral estoppel. *See Feldman v. Am. Asset Fin., LLC*, 534 B.R. 627, 638 (2015) ("Non-mutual collateral estoppel applies when there is a substitute party in the subsequent action that did not participate in the litigation that produced the judgment.").

¶ 17 Because we conclude that Plaintiffs' claims are barred by the doctrine of collateral estoppel, we need not address their remaining issues on appeal.

IV. Conclusion

¶ 18 Plaintiffs' claims against Defendant are barred by collateral estoppel. The order of the trial court is affirmed.

AFFIRMED.

Judges TYSON and INMAN concur.

Report per Rule 30(e).