NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 17-2230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID G. MORTON Plaintiff-Appellant v. BANK OF AMERICA HOME LOAN, LOANS, L.P., successor in interest to Countrywide Home Loans, Inc.; et al. Defendant-Appellees	)	**FILLED** Mar. 19. 2018 DEBORAH S HUNT, CLERK ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ORDER

Before: STRANCH and DONALD, Circuit Judges; ECONOMUS, District Judge[1]

David Morton, a pro se Michigan litigant, appeals a district court judgment dismissing his complaint on res judicata grounds in this action involving claims for violation of the Truth In Lending Act ("TILA"), UNLAWFUL FORECLOSURE, AND FRAUD. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. Ap. P. 34(a).

The following facts are taken from the allegations in Morton's complaint and the various loan documents contained in the record. In March 2003, Morton obtained a loan from Country wide Home Loans, Inc., defendant Bank of America, N.A.'s predecessor in interest, to purchase residential property located in Grand Rapids, Michigan. To secure the loan, Morton executed a

[1] The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation

promissory note and a mortgage in favor of Mortgage Electronic Registration Systems, Inc. ("MERS").

Morton alleges that, on November 3, 2009, he asked Countrywide and other entities for certain information and documentation "relative to the accounting and servicing" of his loan. Upon receiving no response to this request, Morton alleges that he "cancelled" the loan, effective December 10, 2009. According to Morton, the purported cancellation obligated Countrywide to (1) "cancel the entire 'loan' transaction"; (2) "return the original promissory note or its monetary equivalent; (3) "return all payments made by [Morton]"; (4) "file a Cancellation of Mortgage lien with the Kent County Recorder of Deeds" and (5) "forward all funds generated by the securitization of [Morton's] promissory note." Alternatively, Morton alleges that, in lieu of the foregoing actions, Countrywide could have challenged his purported cancellation by filing a complaint for declaratory relief. Countrywide did not perform any of these actions.

On June 13, 2011, MERS assigned Morton's mortgage to BAC Home Loans Servicing, LP, which merged with Bank of America on July 1, 2011. In April 2012, Moron filed a state-court complaint against Bank of America, among other defendants, seeking to quiet title and alleging that Bank of America had violated TIlA, the Real Estate Settlement Procedures Act, and state law. After the action was removed to federal court, the district court granted summary judgment in favor of the defendants. We affirmed.

Morton then defaulted on his loan, causing Bank of America to commence foreclosure proceedings. The sheriff's sale took place on October 21, 2015, and the redemption period expired on April 21, 2016.

In October 2016, Morton filed the present action against Bank of America and two of its employees. Morton alleges that the defendants violated TILA, engaged in unlawful foreclosure of his property, and committed fraud. These claims stem from Morton's assertion that, because he "cancelled" his loan in December 2009, Bank of America had no authority foreclose on his property.

The defendants moved to dismiss Morton's complaint, and a magistrate judge recommended that the motion be granted on the ground that Morton failed to state a claim upon which relief may be granted because his complaint is barred by the doctrine of res judicata. In particular, the magistrate judge reasoned that Morton's claims in the present action are identical to the claims asserted in the previous action, filed in 2012, because they arise from the same transaction. The district court overruled Morton's objections, adopted the magistrate judge's recommendation, and dismissed the action based on res judicata, reasoning the issues in the present action were asserted or should have been asserted in the previous action.

In this timely appeal, Morton argues that: (1) the defendants' "violations of TILA and their agreement not to protest enforcement denied them standing" to enforce the loan, to raise any defenses in this action, and to seek dismissal of his complaint; (2) the district court's decision is based on "frivolous opinions"; and (3) the district court's decision was "procured by fraud and misprision".

We review a dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) de novo. *City of Columbus v. Hotels.com L.P.*, 693 F.3d 642, 648 (6th Cir. 2012). A complaint survives a motion to dismiss only if it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. V. Twombly,* 550 U.S. 544, 570 (2007). We also review res judicata determinations de novo. *Browning v. Levy*, 283 F.3d 761, 771-72 (6th Cir. 2002).

Under the doctrine of res judicata "[a] final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." *Rivet v. Regions Bank of La,*. 522 U.S. 470, 476 (1998). (alterations in the original) (quoting *Federated Dept. Stores, Inc. ,v Moitie,* 452 U.S. 394, 398 (1981). Res judicata bars a subsequent action when the following four elements are met: (1) there was a final decision on the merits in the first action; (2) the subsequent action is between the same parties or their privies, (3) issues exist in the subsequent action that were litigated, or should have been litigated, in the prior action; and (4) there is an identity of the causes of action. *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995).

Res judicata bars review of Morton's claims. First, the previous action was decided on the merits when the district court, in granting summary judgment in favor of the defendants, rejected Morton's assertion that the defendants violated TILA and other lending laws after he purportedly cancelled his loan in December 2009. The district court's decision was final, and it was affirmed by this court. Second, both the previous action and the present action were asserted against Bank of America. Although the present action is also asserted against two Bank of America employees, they are in privity with their employer, Bank of America, for res judicata purposes. *See Evans v. Pearson Enters.,* 434 F.3d 839, 850 n,5 (6th Cir. 2006) (noting that an employee is in privity with his employer). Third, the issues raised in the present action-namely, the allegedly wrongful acts

committed by the defendants after Morton purportedly cancelled his loan in December 2009- were litigated, or could have been litigated, in the prior action. Fourth, there is an "identity of causes of action" when "the claims ar[i]se out of the same transaction or series of transactions, or if the claims arise out of the same core of operative facts" (quoting *Browning,* 283 F.3d at 773-74). The district court therefore properly determined that Morton's claims are barred by res judicata.

Non of the arguments that Morton raises on appeal alters this conclusion or shows that he is entitled to relief. Morton's reassertion of the allegations underlying his TILA claim is unavailing because the claim is barred by res judicata, as set forth above. Morton's argument that the district court erroneously rejected the significance of the Supreme Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015), is misplaced. *Jesinoski* held that the right to rescind a loan transaction expires three years after consummation of the loan, 135 S.Ct. At 792. Morton purports to have "cancelled" his loan in December 2009 - over six years after the loan was consummated - thereby rendering *Jesinoski* inapplicable. Finally, Morton's argument that the district court's order must be vacated because the district court "turned a blind eye to [the defendants'] fraud and committed "misprision of fraud" lacks any factual or legal basis.

Accordingly, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 17-2230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID G. MORTON, Plaintiff-Appellant v. BANK OF AMERICA, HOME LOANS, L.P., successor in interest to Countrywide Home Loans, Inc.; et al. Defendant-Appellees	)	**FILLED** May 14. 2018 DEBORAH S HUNT, CLERK O R D E R

Before: GILMAN and DONALD, Circuit Judges HOOD, District Judge[1]

The court received a petition for a rehearing en banc and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition was then circulated to the full court. No judge has requested a vote on the suggestion for a rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

[1] The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID G. MORTON,

Plaintiff, File No. 1:16-cv-1270

v. HON. JANET T. NEFF

BANK OF AMERICA HOME LOANS SERVICING, LP, et al.

Defendants.
_____/

JUDGMENT

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that Plaintiff's complaint is DISMISSED with prejudice.

Dated: September __, 2017

_____
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID G. MORTON,

Plaintiff, File No. 1:16-cv-1270

v. HON. JANET T. NEFF

BANK OF AMERICA HOME LOANS SERVICING, LP, et al.

Defendants.
_____/

OPINION AND ORDER

Plaintiff filed this *pro se* action alleging Defendants violated the Truth in Lending Act (TILA) engaged in unlawful foreclosure, and committed fraud. Defendants Bank of America Home Loans Servicing, LP and Brian T. Moynihan, and Defendant Barbara J. Desoer, separately filed motions to dismiss (ECF Nos. 12 and 17 respectively). Plaintiff filed a motion to strike and motion for summary judgment (ECF No. 14). The matter was referred to the Magistrate Judge, who issued a Report and Recommendation (R&R) recommending that Defendants' motions to dismiss be granted based on res judicata. Plaintiff's motion be denied and this action be terminated. The matter is presently before the Court on Plaintiff's objections to the Report and Recommendation. Defendants have file a Response (ECF No, 22). In accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(3), the Court has performed de novo consideration of those portions fo the Report and Recommendation to which objection has been made. The Court denies the objections and issues this Opinion and Order.

Plaintiff objects to the Magistrate Judge's determination on multiple grounds[1] Plaintiff's first objection is to the determination that he failed to state a sufficient basis to strike Defendants' motions. Plaintiff states his dissatisfaction with the Report and recommendation by reiterating his prior argument that Defendants have defaulted in regard to their TILA obligations (ECF NO. 20 at Page I.D. 331) and have therefore "relinquished any right to object or defend" (*id.* at Page I.D.332). As Defendants note, Plaintiff confuses the merits of his case with Defendants; procedural right to move for dismissal (ECF NO. 22 at Page I.D.641). The Magistrate Judge applied the correct procedural standards for a motion to dismiss and properly concluded that Plaintiff's motion to strike should be denied. Plaintiff fails to demonstrate any error in Magistrate Judge's analysis or conclusion.

Plaintiff next objects to the Magistrate Judge's determination that res judicata bars the present action. Plaintiff argues res judicata is not applicable because his prior claim was "dismissed without prejudice" ECF No. 20 at Page I.D.332). Contrary to Plaintiff's assertion, his prior claim was not dismissed without prejudice. It was decided on the merits (ECF No. 13-6), and affirmed by the United States Court of Appeals for the Sixth Circuit (ECF No. 13-7). The Magistrate Judge properly applied the doctrine of res judicata.

Additionally, Plaintiff objects to the Magistrate Judge's determination that this action is barred by res judicata, arguing that a U.S. Supreme Court decision "has now empowered Plaintiff to raise issues not honored by the majority of federal courts prior to the *Jesinoski* [2] ruling (ECF No. 20

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[1] To the extent Plaintiff challenges the Magistrate Judge's statements of underlying facts, these allegations of error are encompassed by his objections on merits.

[2] *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015)

at Page I.D.333). Plaintiff fails to cite any portion of the *Jesinoski* opinion that would alter the analysis of res judicata in this case. Plaintiff's arguments to not undermine the determination by the Magistrate Judge that his present claim is barred by res judicata.

To the extent that Plaintiff argues he has raised different issues, the Magistrate Judge properly determined res judicata bars "an issue in the subsequent action which *was* litigated or *should have been* litigated in the prior action" (ECF No. 19 at Page I.D.326, emphasis added). Plaintiff's claim in the present action stems from his assertion that he cancelled his mortgage loan in December 2009 under TILA. This is the same issue adjudicated in his prior action. The Magistrate Judge properly concluded that the issues in the present action were asserted or should have been asserted in Plaintiff's prior suit.

Finally, Plaintiff objects to the Report and Recommendation on the basis of fraud. Again, Plaintiff merely restates a prior argument, failing to object to any findings of the Magistrate Judge in the Report and Recommendation. The restatement of his argument fails to alter the analysis. The Magistrate Judge's reasoning and conclusions were sound.

The Magistrate Judge properly determined the present claim is barred by the doctrine of res judicata (ECF No. 19 at Page I.D.327). Accordingly, this Court adopts the Magistrate Judge's Report and Recommendation as the Opinion of this Court. A Judgment will be entered consistent with this Opinion and Order. *See* Fed. R. Civ. P. 58. Therefore:

IT IS HEREBY ORDERED that the Objection (ECF No. 20) is DENIED and the Report and Recommendation of the Magistrate Judge (ECF No. 19) is APPROVED and ADOPTED as the Opinion of the Court.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss (ECF No. 12) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (ECF No. 17) is GRANTED.

IT IS FURTHER ORDERED that "Plaintiff's Motion to Strike Defendants' Motion to Dismiss and Motion for Summary Judgment" (ECF No. 14) is DENIED.

Dated: September 22, 2017

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID GLENN MORTON

Plaintiff,

v.

BANK OF AMERICA HOME LOANS SERVICING, LP, et al,

Defendants.
_____/

Case No. 1:16-cv-1270

Hon. Janet T. Neff

REPORT AND RECOMMENDATION

This matter is before the Court on Defendants' Motion to Dismiss (ECF No. 12), Plaintiff's Motion to Stirke, (EDF No. 14), and Defendant's Motion to Dismiss(ECF No. 17). Pursuant to 28 U.S.C. § 636(b)(1)(B), the undersigned recommends that Defendants' motions be **granted,** Plaintiff's motion **denied** and this action **terminated,**

BACKGROUND

The following allegations are contained in Plaintiff's complaint (ECF No.1). On March 15, 2003, Plaintiff executed a promissory not and mortgage in the amount of two hundred thousand dollars ($200,000.00) in favor of Countrywide Loans, to facilitate the purchase of property located at 2261 Forest Hill Avenue, SE, Grand Rapids, Michigan. More than six (6) years later, on November 3, 2009, Plaintiff requested from Countrywide, and other entities, certain information and documentation "relative to the accounting and servicing" of his mortgage loan.

After receiving no response to this request, Plaintiff cancelled the aforementioned loan,

effective December 1, 2009. Pursuant to his purported cancellation, Countrywide was obligated to perform the following actions: (1) cancel the loan transaction; (2) "return the original promissory note or its monetary equivalent"; (3) return all payments made by Plaintiff on the loan; (4) file a cancellation of mortgage with the Kent County Register of Deeds; and (5) "forward all funds generated by the securitization of Plaintiff's promissory note." Countrywide failed to perform these actions or otherwise challenge Plaintiff's purported loan cancellation.

Plaintiff initiated the present action on October 26, 2016, against Bank of America, the successor entity to Countywide, and two Bank of America employees. Plaintiff alleges that Defendants violated the Truth in Lending Act (TILA) engaged in unlawful foreclosure, and committed fraud. Plaintiff seeks injunctive and monetary relief. Defendants now move to dismiss Plaintiff's action of various grounds, including res judicata. Plaintiff has responded by moving to strike Defendants' motions. Plaintiff also moves for summary judgment.

ANALYSIS

1. Plaintiff's Motion to Strike and Motion for Summary Judgment

Plaintiff seeks to strike Defendant's motions to dismiss on the ground that Defendants' arguments have no legal merit. Such is not a basis, however, to strike a party's pleading. Accordingly, the undersigned recommends that Plaintiff's motion to strike be **denied**. The Court will instead consider Plaintiff's motion as his opposition to Defendants' motions. To the extent Plaintiff requests that summary judgment be entered in his favor, the undersigned recommends that such be **denied** for the reasons articulated below.

II. Defendants' Motions to Dismiss

The doctrine of res judicata, also known as claim preclusion, provides that "a final

judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in [a prior] action." *Allied Erecting and Dismantling Co. V Genesis Equipment,* 805 F.3d 701 (6th Cir. 2015) (quoting *Federated Dept. Stores, Inc. V. Moitie,* 452 U.S. 394, 398 (1981)). Res judicata applies fi the following elements are satisfied: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should be been litigated in the prior action; and (4) an identity of the causes of action. *Allied Erecting,* 805 F.3d at 708-709. All the elements of res judicata are satisfied in this instance.

In the very first sentence of his complaint, Plaintiff concedes that the present action is not the first time he has litigated this matter. In 2012, Plaintiff initiated an action in state court against Bank of America and other alleging wrongful conduct concerning the aforementioned loan and subsequent foreclosure of the property in question. (ECF No. 13, Exhibit E). The matter was subsequently removed to federal district court. *Morton v. Bank of America,* 1:12-cv-511, ECF No. 63, 67, 70 (W.D. Mich.)

The present action is asserted against Bank of America and two employees of Bank of America. Plaintiff 's previous action was also asserted against, among others, Bank of America. While the two individuals sued in the present action were not defendants in the previous action, privity exists between these individuals ad the employer, Bank of America, which was named as a defendant in both of Plaintiff's lawsuits. See, *e.g. Easterling v. Cassano's Inc.,* 2017 WL 1546484 at *3 (S.D. Ohio, May 1, 2017) (for res judicata purposes, privity exists between an employer and its employees); *Dumas v. Baldwin House Management*, 2015 630820 at *3 (E.D.

Mich., Feb. 12, 2015) (same).

The issues asserted in the present action were asserted, or could have been asserted, in the previous action. Finally, the claims asserted in the present action are, for res judicata purposes, identical to the claims asserted in the previous action as they arise from the same transaction. *See, e.g., Butler v. FCA US, LLC* 119 F.Supp. 3d 699, (E.D. Mich 2015) (claims arising from te same transaction satisfy the res judicata identity element). In sum, all four elements of the res judicata analysis are satified. The present action , therefore, fails to state a claim on which relief may be granted. *SEE Ashroft v. Iqbal,* 553 U.S. 662, 677-79 (2009); *Bell Atlantic Corp, v. Twombly*, 550 U.S. 544, 545 (2007). Accordingly, the undersigned recommends that Defendants' motion to dismiss be **granted**.

CONCLUSION

For all the reasons articulated herein, the undersigned recommends that Defendants' Motion to Dismiss (ECF No. 17) be **granted**; and this action **terminated**.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of this notice. 28 U.S.C. § 636(b)(1)(C). Failure to file objections within the specified time waives the right to appeal the District Court's order. *See Thoms v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 f.2d 947 (6th Cir. 1981).

Date: May 22, 2017

Respectfully submitted,

/s/ Ellen S. Carmody
ELLEN S. CARMODY
United States Magistrate Judge