IN THE UNITED STATES SUPREME COURT

LINDA S. ELAM and FREDERICK J. ELAM, in his individual capacity and his capacity as Trustee for the L&F IRREVOCABLE TRUST,

Plaintiffs-Appellants,

v.

AURORA COMMERCIAL CORPORATION; ET AL
Defendants-Appelles

MOTION DIRECTING CLERK TO FILE PETITION OUT OF TIME

Plaintiff, LINDA S. ELAM and FREDERICK J. ELAM, in his individual capacity and his capacity as Trustee for the L&F IRREVOCABLE TRUST, objects to her ruling and is requesting the court grant Plaintiff's request to resubmit petition.

Beverly, the clerk at the United States Court of Appeals advised us that we had 90 days from the date of the enclosed Order which reflects the date of October 4, 2019.

Respectfully submitted;

Fred Elam,
Plaintiff

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5743

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDA S. ELAM; FREDERICK J. ELAM, in his individual capacity, Plaintiffs-Appellants, v. AURORA LOAN SERVICES, LLC, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: GUY, COOK, and GRIFFIN, Circuit Judges.

Linda S. Elam and Frederick J. Elam ("the Elams"), Tennessee residents proceeding pro se, appeal the district court's judgment dismissing their complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. 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. App. P. 34(a).

On December 2, 2002, Linda Elam acquired title by warranty deed to real property located on Brierwood Circle in Piperton, Tennessee ("the Property"). The Elams subsequently created the "L & F Irrevocable Trust dated December 12, 2002" ("the Trust"), naming Frederick Elam as the trustee. Linda Elam then conveyed the Property, owned by her individually, to the Trust by quitclaim deed. On December 23, 2002, Frederick Elam, in his capacity as trustee, executed a deed of trust pledging the Property as collateral to secure a construction loan from Merchants & Farmers Bank in the amount of $386,669.63.

In March 2004, the Elams, in their individual capacities, received a loan from Realty Mortgage Corporation in the amount of $540,000. The Elams, purportedly in their individual capacities, secured the loan by executing a deed of trust pledging the Property as collateral. The Elams used the $540,000 loan to repay their loan to Merchants & Farmers Bank, as well as to make improvements to the house situated on the Property. Aurora Loan Services, LLC ("Aurora") eventually obtained ownership of the Elams' note and loan held by Realty Mortgage Corporation. In December 2007, the Elams executed a "Workout Agreement" with Aurora regarding late payments on the $540,000 loan. In May 2008, the Elams executed a "Loan Modification Agreement" with Aurora, also regarding their ability to repay the loan. In the years following these agreements, the Elams filed several bankruptcy actions, which helped them avoid multiple foreclosure attempts on the Property.

In April 2012, Aurora filed suit in the Chancery Court for Fayette County (Tennessee) against the Elams, the Trust, and several other defendants for notice purposes, in which it sought a declaratory judgment that the December 12, 2002, deed conveying the Property from Linda Elam to the Trust was void. Aurora alternatively sought to "assume the priority position of the Merchants & Farmers Bank mortgage." Aurora additionally asked the chancery court to find that the Property was pledged as collateral for the $540,000 loan, or, in the alternative, that it held an equitable lien on the Property. FirstBank, one of the defendants named for notice purposes, filed a cross-claim against the Elams, also seeking a declaratory judgment that the quitclaim deed conveying the Property from Linda Elam to the Trust was void.

During that state court proceeding, Nationstar Mortgage, LLC ("Nationstar") became the servicer of the Elams' loan and, on May 16, 2013, the chancery court entered a consent order substituting Nationstar for Aurora as the plaintiff. Nationstar thereafter filed a motion for summary judgment, in which it asked the chancery court to declare that the Elams had pledged the Property as collateral to secure the $540,000 loan from Realty Mortgage Corporation. Nationstar alternatively sought a declaration that it held either a priority position "of the Merchants & Farmers Bank mortgage" or a "first priority equitable lien" on the Property. In May 2015, the chancery court granted Nationstar's motion for summary judgment. In doing so, it found that the Elams,

the Trust, and Realty Mortgage Corporation intended that the Property would be collateral for the loan. The chancery court thus ordered that the March 2004 deed of trust securing the Property as collateral for the $540,000 loan "be reformed to reflect that the interest of the [L & F Irrevocable Trust] was effectively conveyed in said deed of trust through its Trustee, Fred Elam." Frederick Elam appealed the chancery court's judgment, but the Tennessee Court of Appeals dismissed the attempted appeal for lack of jurisdiction. *Aurora Loan Servs. LLC v. Elam*, No. W2015-01097-COA-R3-CV, 2016 WL 659821, at *3-4 (Tenn. Ct. App. Feb. 18, 2016), *perm. app. denied* (Tenn. June 24, 2016) (per curiam).

In March 2017, the Elams filed this federal lawsuit against the following defendants: Aurora; Aurora Commercial Corporation; HSBC Bank, N.A.; Lehman Brothers; FirstBank; Nationstar; Mortgage Electronic Registration Services ("MERS"); and others. The Elams alleged that the defendants violated the Truth in Lending Act ("TILA"), *see* 15 U.S.C. §§ 1601-1667f, unlawfully attempted to foreclose on the Property, and attempted to collect on "an illegal judgment." They sought monetary damages and the removal of all liens and mortgages.

FirstBank, Nationstar, Aurora Commercial Corporation, Aurora, MERS, and HSBC Bank moved to dismiss the Elams' claims under Rule 12(b)(6), arguing, in part, that they were either time-barred or barred by the doctrine of res judicata. The Elams opposed the defendants' motions to dismiss and moved for leave to amend their complaint. The Elams' proposed amended complaint clarified the nature of their TILA claims, argued that the defendants' alleged TILA violations amounted to fraudulent concealment, introduced a Racketeer Influenced and Corrupt Organizations ("RICO") claim, *see* 18 U.S.C. § 1961, *et seq.*, and sought remedies beyond what they requested in their initial complaint. The defendants argued in opposition that any amendment to the Elams' complaint would be futile. The magistrate judge agreed with the defendants, determining that: (1) the Elams failed to assert a plausible TILA claim; (2) the TILA, RICO, fraudulent concealment, and illegal foreclosure claims were barred by the doctrine of res judicata; (3) the TILA and RICO claims were barred by the applicable statutes of limitations; (4) the Elams' proposed amended complaint contained insufficient factual allegations to support a civil RICO cause of action; and (5) the Elams' allegation that FirstBank possessed an "illegal judgment" was

conclusory and failed to make the requisite showing of entitlement to relief. The magistrate judge therefore recommended that the district court deny the Elams' motion for leave to amend their complaint and grant the defendants' motions to dismiss. The district court adopted the magistrate judge's report and recommendation over the Elams' objections, denied the Elams' motion for leave to amend their complaint, and granted the defendants' Rule 12(b)(6) motions. The district court further denied the Elams' subsequent motion for reconsideration.

On appeal, the Elams challenge the district court's conclusions that their claims are barred by the doctrine of res judicata and the applicable statutes of limitations.

In scrutinizing a complaint under Rule 12(b)(6), we are required to "accept all well-pleaded factual allegations of the complaint as true and construe the complaint in the light most favorable to the plaintiff." *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007). Although a complaint need not contain "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, a complaint survives a motion to dismiss 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 *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

We review de novo a district court's application of res judicata. *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 572 (6th Cir. 2008). "Federal courts look to the rendering state's law to determine the preclusive effect that attaches to the rendering state's judgments." *Smith v. Lerner, Sampson & Rothfuss, L.P.A.*, 658 F. App'x 268, 275 (6th Cir. 2016). Here, the asserted basis for res judicata is the May 2015 judgment from the Fayette County Chancery Court, so Tennessee law provides the appropriate res judicata standard. *See id.*

Under Tennessee law, res judicata "bars a second suit between the same parties or their privies on the same claim with respect to all issues which were, or could have been, litigated in the

former suit." *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012). A party asserting res judicata must establish:

> (1) that the underlying judgment was rendered by a court of competent jurisdiction, (2) that the same parties or their privies were involved in both suits, (3) that the same claim or cause of action was asserted in both suits, and (4) that the underlying judgment was final and on the merits.

Id. The Elams' appellate brief challenges only the applicability of the second and third elements. By failing to develop any argumentation regarding the applicability of either the first or fourth element of res judicata, the Elams have forfeited any argument concerning those points. *See Langley v. DaimlerChrysler Corp.*, 502 F.3d 475, 483 (6th Cir. 2007).

The second element of res judicata is satisfied because the parties in the present lawsuit are the same parties as in the first lawsuit or their privies. It is undisputed that the Elams were parties in the first lawsuit. The Elams argue, however, that res judicata does not bar their claims because the first lawsuit "was filed by Nationstar in the Chancery Court of Fayette County," whereas the present federal lawsuit concerns alleged TILA "violations and other fraudulent activities against Aurora." But "the concept of privity relates to the subject matter of the litigation, not to the relationship between the parties themselves. Privity connotes an identify of interest, that is, a mutual or successive interest in the same rights." *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 180 (Tenn. Ct. App. 2000) (citations omitted). Aurora and its successor in interest, Nationstar, have aligned interests and are therefore in privity with one another. *See Chapman v. JPMorgan Chase Bank, N.A.*, 651 F. App'x 508, 510 (6th Cir. 2016) (holding that subsequent loan servicers, as successors in interest, are in privity with the prior loan servicer) (citing *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 481 (6th Cir. 1992)); *see also Harris v. Ocwen Loan Servicing, LLC*, No. 17-5399, 2017 WL 8791308, at *3 (6th Cir. Nov. 22, 2017).

The third element of res judicata is also satisfied because the first lawsuit and the current lawsuit share an identity of causes of action. Causes of action are the same for res judicata purposes "where they arise out of the same transaction or a series of connected transactions." *Creech v. Addington*, 281 S.W.3d 363, 381 (Tenn. 2009) (quoting Restatement (Second) of

Judgments § 24(1) (Am. Law Inst. 1982)). The parties in the first lawsuit litigated the validity of the Elams' mortgage, whereas the Elams' claims in the present suit are aimed at quieting title in their favor due to the defendants' alleged illicit conduct. The issues raised in both lawsuits thus stem from the same transaction—the creation and enforcement of the $540,000 mortgage loan. An identity of causes of action therefore exists between the first and current lawsuits. *See Chapman*, 651 F. App'x at 510-13 (holding that res judicata barred plaintiff's TILA claim on a mortgage because a prior lawsuit "directly attacked the validity of the loan agreement" at issue in the second case (citing *Sanders Confectionery Prods., Inc.*, 973 F.2d at 484-85)). Moreover, the Elams raised several affirmative defenses in the first lawsuit. Res judicata applies "with respect to all issues which were, or could have been, litigated in the former suit." *Jackson*, 387 S.W.3d at 491. The Elams do not explain why they were unable to raise their TILA and their proposed RICO and fraudulent concealment claims in the first lawsuit, and it is not evident from the record that they were unable to do so.

Based on the foregoing, the district court correctly determined that the Elams' claims and proposed claims are barred by the doctrine of res judicata. It was therefore proper for the district court to deny the Elams' motion for leave to amend their complaint. *See Winget*, 537 F.3d at 572-73.

The Elams also challenge the district court's conclusion that their claims are barred by the applicable statutes of limitations. We need not address this argument because application of the doctrine of res judicata is dispositive. *See, e.g., Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan*, 711 F.3d 675, 685 n.3 (6th Cir. 2013).

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 18-5743

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LINDA S. ELAM; FREDERICK J. ELAM, in his individual capacity, Plaintiffs-Appellants, v. AURORA LOAN SERVICES, LLC, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ORDER

Before: GUY, COOK, and GRIFFIN, Circuit Judges.

Plaintiffs appealed the district court's dismissal of their complaint and we affirmed in an order dated August 9, 2019. The mandate issued on September 13, 2019. Plaintiffs subsequently filed two motions. One motion asks us to recall the mandate while the other seeks an extension of time to petition for rehearing en banc. We deny them both.

The deadline to petition for rehearing was August 23, 2019. *See* Fed. R. App. P. 35(c), 40(a)(1). After that date, but before the mandate issued, plaintiff Fred Elam called the court to explain that he was hospitalized and therefore intended to file a motion to extend the deadline for a rehearing petition. Weeks passed, yet Elam filed nothing. Elam finally mailed the court his motion for an extension on September 27. In a single sentence, the motion explains only that Elam is hospitalized and it does not suggest a length of time needed. We decline to grant the motion. And because plaintiffs have not suggested the type of extraordinary circumstances that would

justify recalling the mandate, we decline to exercise that power as well. *See United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005).

The motions for an extension of time and to recall the mandate are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Additional material from this filing is available in the Clerk's Office.