No. 20-

IN THE

Supreme Court of the United States

ARTHUR TALBOT & KELLEY BEZRUTCH,

Petitioners,

v.

U.S. BANK NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN F. BRENT, ESQ.
Counsel of Record
1901 Pauline Boulevard
Ann Arbor, MI 48103
(734) 761-5222
jbrentlaw@gmail.com

Counsel for Petitioners

298776

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

In *Conlin v. Mortgage Elec. Reg. Sys.*, 714 F.3d 355 (6th Cir. 2013) the Sixth Circuit Court of Appeals provided that a court can only entertain the setting aside of a foreclosure sale after expiration of the redemption period where a mortgagor (here, Petitioners) makes "a clear showing of fraud, or irregularity," that such fraudulent conduct "must relate to the foreclosure procedure itself," and that a mortgagor must also show that they were prejudiced by a foreclosing party's failure to comply with the Michigan foreclosure by advertisement statute and that, to demonstrate such prejudice, the mortgagor must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. While the Sixth Circuit has set a high bar to setting aside a post-redemption-period foreclosure, it, nevertheless, provides a means by which mortgagors might find relief from a foreclosure that was accomplished by fraudulent means. Petitioners assert that they sufficiently pled facts to satisfy the high bar set by the Sixth Circuit in *Conlin* and have shown in their pleadings that they were induced to give up possession of their home in exchange for a promise by U.S. Bank National Association (here, Respondent) that it would negotiate with Petitioners for repurchase of their home, but have not been given the opportunity.

Therefore, the questions presented in this case are:

1. Whether the Sixth Circuit has negated the relief it otherwise affords in *Conlin* to homeowners whose homes have been foreclosed through fraudulent means.

2. If, indeed, the Sixth Circuit opinion under review negates the relief it otherwise afforded in *Conlin* to homeowners whose homes have been foreclosed through fraud, does such negation require that this Court provide guidance to the Sixth Circuit, and, by extension, to all federal circuits and state courts, as to the correct application of *res judicata* and claim preclusion laws to foreclosures obtained through fraud, especially given the expected tsunami of foreclosures in the wake of the COVID-19 pandemic?

3. Whether any party may stand in the shoes of a named defendant in a federal fraud complaint?

RELATED CASES

Arthur Talbot and Kelley Bezrutch v. US Bank National Association, Case No. 19-10214, U.S. District Court for the Eastern District of Michigan, Southern Division. Judgment entered September 3, 2019.

Arthur R. Talbot & Kelley A. Bezrutch v. US Bank, National Association, Case No. 19-2118, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 8, 2020.

US Bank National Association v. Kelley Bezrutch & Arthur Talbot, Jr., Case No. 12C-2224, 14B District Court, Washtenaw County, Michigan. Judgment entered March 17, 2014.

Arthur Talbot, Jr. & Kelley Bezrutch v. Richard A. Davis, Case No. 14-386-CH, Washtenaw County Circuit Court. Judgment entered June 11, 2014.

Arthur Talbot, Jr. and Kelley Bezrutch v. Richard A. Davis, Case No. 323240, Michigan Court of Appeals. Judgment entered December 17, 2015.

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PETITION FOR WRIT OF CERTIORARI

Petitioners (Appellants and Plaintiffs below), Arthur Talbot and Kelley Bezrutch, respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit (the "Court of Appeals" or the "Sixth Circuit").

OPINIONS BELOW

The Opinion and Order of the U.S. District Court for the Eastern District of Michigan, Southern Division, is reported at *Arthur R. Talbot and Kelley A. Bezrutch v. U.S. Bank, National Association*, Case Number 19-10214, U.S. District Court for the Eastern District of Michigan, Southern Division. Judgment entered September 3, 2019 and reproduced in Appendix B, pp. 15a - 38a (the "DC Opinion").

The Opinion of a panel of the Sixth Circuit is reported at *Arthur R. Talbot & Kelley A. Bezrutch v. U.S. Bank National Association*, Case Number 19-2118, U.S. Court of Appeals for the Sixth Circuit. Judgment entered May 8, 2020 and reproduced in Appendix A, pp. 1a - 14a (the "AC Opinion").

JURISDICTION

The Sixth Circuit issued its Opinion on May 8, 2020. Per U.S. Supreme Court Order No. 589 U.S., issued March 19, 2020, extending the deadline to file a Petition for Writ of Certiorari 150 days from the date of the lower court judgment, this Petition for Writ of Certiorari is timely filed within such 150 days after May 8, 2020, the date of

issuance of the AC Opinion. This Court's jurisdiction is based upon 28 U.S.C., subsection 1254(1).

The Sixth Circuit issued a Notice of Oral Argument, dated February 10, 2020 (scheduling oral argument for March 19, 2020), and Petitioners timely filed an Oral Argument Acknowledgement on February 19, 2020. The Sixth Circuit, by letter dated March 16, 2020, cancelled oral argument and, ultimately, decided the case on briefs only.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1 which states:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Codified as 28 U.S. Code § 1332:

Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

STATEMENT OF THE CASE

A. Background

Petitioners are husband and wife who, as of January 7, 2014, lived at their property located at 8333 S. Huron River Drive, Ypsilanti, Michigan, Washtenaw County (the "Property") with their three children.

On August 11, 2008, unbeknownst to Petitioners, and three years after they purchased the Property, a Corporate Assignment of Mortgage/Deed of Trust was entered into the county record. This assignment attempts to assign the interest in the Property held by Petitioners' original lender (Wilmington Finance) or its successor-in-interest (Merrill Lynch, a wholly owned division of Bank of America) to "US Bank National Association" ("US Bank NA" or "Respondent" herein), as the trustee for "the Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates Series 2006-BC1" ["SURF 2006-BC1"] (hereafter, the "US Bank Assignment").[1]

1. This attempted assignment is, more precisely, mediated through "MERS, as nominee for Wilmington Finance".

Beginning in calendar year 2006, Petitioners experienced a significant downturn in their health, and in 2008 their business suffered as a result, and they began to fall behind in making their mortgage payments. Petitioners were, however, able to pay, in full, any accumulated arrearage in July 2009. In 2010, Petitioners attempted to refinance their loan through the federal HARP program, and by other means, including attempts to tender full balance or partial fair market payment for their home, but these attempts were unsuccessful, both prior to and following Respondent's purported foreclosure on Petitioners' mortgage and note and subsequent eviction. These attempts by Petitioners to obtain modification/refinance or tender payment on their mortgage and note are detailed in Petitioners' Complaint in the District Court (hereafter, the "Complaint").

B. Foreclosure Actions Brought Against Petitioners

Beginning on or about August 7, 2008, Respondent initiated three foreclosure actions against Petitioners. Respondent is identified as the foreclosing party and self-appointed holder of Petitioners' mortgage and note in the foreclosure documentation.

The first such action was initiated, beginning with the Respondent's assignment to itself, followed by a December 10, 2009 notice served on Petitioners even after they made full payment of arrearages in July of 2009. It is unknown when Respondent initiated the second foreclosure action against Petitioners, but it appears that Respondent also abandoned this action.

On September 23, 2010, Respondent appears to have initiated yet another foreclosure action against Petitioners. After an adjournment of nearly a year, on September 8, 2011, the Washtenaw County Sheriff held a sale of the Property (the "Sheriff's Sale") whereby the Property was purportedly purchased by Respondent for the amount of $570,864.86, in a sale to itself. Respondent failed to provide statutory notice to Petitioners of this foreclosure and notice of the Sheriff's Sale. Because Petitioners were unaware of the Sheriff's Sale, and were being told by agents of Respondent that their account was merely delinquent during a period when Petitioners were attempting to modify/refinance their mortgage and note, Petitioners did not redeem the Property within the six-month redemption period prescribed by Michigan statute (that being, MCL 600.3240(8)). Accordingly, Respondent initiated an eviction action in the 14B District Court (the "Eviction Court")(encaptioned as, *US Bank National Association v. Kelley Bezrutch & Arthur Talbot, Jr.*, Case No. 12C-2224, 14B District Court, Washtenaw County, Michigan, J. Charles Pope) on May 1, 2012 (the "Eviction Action").

On May 30, 2012, coincident with the Eviction Action, the parties entered into a certain "Amended Judgment," wherein the parties agreed that Respondent would be granted title to and possession of the Property in exchange for the promise that Respondent would delay eviction of Petitioners for a one-month period to specifically allow the parties to negotiate repurchase of the Property (the "Consent Order"). Respondent's then counsel stated that, "the bank won't consider any offer unless the Consent Order is in place." One day after Respondent obtained the Consent Order, it claimed, "the bank isn't accepting

any offers[,]" including that of full payment of the asking price and legal fee reimbursement.

Petitioners continued, however, to fight for their home with the aid of the Eviction Court judge. Following several procedural delays, Petitioners (Defendants in the Eviction Action), through present counsel, again attempted to repurchase the Property through a mediation ordered by the Eviction Court. The mediation proved unsuccessful as Respondent indicated it had just "accidentally sold the home at auction." After granting the parties further opportunities to negotiate repurchase of the Property, it became clear to the Eviction Court that Respondent, as the putative foreclosing party, was not willing to negotiate with Petitioner **for any amount** and the Eviction Court finally ordered that a Writ of Restitution issue and that Petitioners vacate their home by January 7, 2014, which they did during the harshest winter weather in over a decade.

Respondent quickly transferred the Property to a home-flipper for $40,000 less than Petitioners' last cash offer by means of a "Covenant Deed," dated February 27, 2014, for a total price of $236,775, which included fees.

C. Petitioners' Discovery of Fraud and Subsequent Litigation

At all times, Petitioners believed that they had been dealing with the true (and sole) holder of their mortgage and note. However, in February of 2014, following Petitioners' eviction from the Property, they were led to question the validity of Respondent's interest in the Property after their most recent offer in the Eviction

Court was rejected and the judge recommended that Petitioners conduct research in the county register to determine ownership of the Property. Petitioners conducted a title search of the Property and discovered a certain "Assignment of Mortgage," dated October 9, 2013, from Bank of America, N.A. (the "BoA Assignment") that assigned Petitioners' mortgage and note to Nationstar Mortgage, LLC ("Nationstar" n/k/a "Mr. Cooper"), and still shown **to be in Petitioners' names nearly two years after Respondent's Sheriff's Sale**.

Petitioners' discovery of the BoA Assignment, more than five years after Respondent's "assignment" of interest to itself, is, to Petitioners, compelling evidence that the BoA Assignment represents a **continuing and viable interest in the property**, and it also represents a separate and distinct chain of title to that "chain of title" Respondent had created for itself and which, as alleged below, could not be extinguished at Respondent's Sheriff's Sale.

Discovery of the BoA Assignment consequently cast considerable doubt on Respondent's interest in the Property and the entire foreclosure process itself (including documents entered at the Sheriff's Sale), and compelled Petitioners and their counsel to engage in closer scrutiny.

After such scrutiny, Petitioners discovered that: (a) Respondent's Assignment, upon which their claim to title of the Property ultimately derives, is invalid because Respondent, via Power of Attorney, attempted to assign an interest in the Property to itself so as to give the appearance that Respondent obtained title

interest in the Property; (b) Respondent's attempted assignment was invalid because it violates several key provisions of the Pooling and Servicing Agreement ("PSA") governing implementation and operation of the trust over which Respondent was appointed trustee, including the salient fact that the attempted assignment of Petitioners' mortgage and note to Respondent occurs more than two years after the Trust was closed and, therefore, runs afoul of the PSA's outlined processes which confirm that the Trust was unable, **as a matter of law**, to accept late transfers into the Trust; (c) that the Trust is governed by the laws of New York and that Respondent's attempted conveyance is in contravention of the New York Estates, Powers & Trusts law, specifically Section 7-2.4, which provides that Respondent's attempted transfer of Petitioners' mortgage and note into the Trust renders such transfer "**void**" (not merely voidable)[2]; and (d), significantly, examination of the US Bank Assignment reveals that Respondent attempted to "back-date" its own instrument to "11/15/05" to, apparently, correct the late-dating issue of (b) above.

Having discovered the late BoA Assignment and the apparent defects in Respondent's title to the Property, Petitioners believed that they had a colorable claim for superior title to that held by Respondent and, therefore, as an expedient means to first remedy title, they filed a complaint in the Washtenaw County Circuit Court (the "Quiet Title Court") against Richard A. Davis on April

2. Section 7-2.4 of the New York Estates, Powers & Trusts law provides that: "If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, **is void.**" (emphasis added)

21, 2014 and encaptioned as, *Arthur Talbot, Jr. & Kelley Bezrutch v. Richard A. Davis*, Case No. 14-386-CH, June 11, 2014, J. Carol Kuhnke (the "Quiet Title Action").

In lieu of an answer to Petitioners' complaint in the Quiet Title Action, Respondent argued a "Motion for Summary Disposition" on June 11, 2014. Following oral argument in the Quiet Title Action, Judge Kuhnke dismissed, without opinion, the Quiet Title Action and signed an "Order Granting Defendant's Motion for Summary Disposition" on the same date as the hearing (June 11, 2014)("Quiet Title Order").

Petitioners appealed the Quiet Title Order to the Michigan Court of Appeals that upheld the Quiet Title Order.

On January 29, 2019, Petitioners filed their Complaint in the U.S. District Court for the Eastern District of Michigan, Eastern Division (the "District Court") against US Bank (the "District Court Action"). Opposing counsel appeared, first, on behalf of the named defendant, US Bank, but, thereafter, entered an appearance for an entity listed as "US Bank National Association, as Trustee for the Specialty Underwriting and Residential Finance Trust Mortgage Loan Asset-Backed Certificates Series 2006-BC1 (the "Trustee"), then filed a Motion and Brief to Dismiss pursuant to FRCP 12(b)(6)(the "Motion") on February 25, 2019. Petitioners filed their Response to Respondent's Motion to Dismiss on March 19, 2019 (the "Response"). The Motion was heard by the District Court on August 29, 2019, following which, on September 3, 2019, the District Court rendered an "Opinion and Order Granting Motion to Dismiss and Dismissing Case with

Prejudice" dismissing Petitioners' District Court Action on the basis that Petitioners failed to state a claim for which relief can be granted (the "DC Opinion").

Petitioners appealed the DC Opinion to the U.S. Court of Appeals for the Sixth Circuit (the "Sixth Circuit"). The Sixth Circuit opinion held, in essence, that Petitioners' District Court Action fails because: (1) *res judicata* applies to the District Court Action as the Eviction Action was "an adjudication on the merits" as to Petitioners' relinquishing possession of the Property to Respondent, even though Petitioners, in the Eviction Action, ceded the issue of possession of and title to the Property by entering into the Consent Judgment (*Relying on Ditmore v. Michalik,* 244 Mich App. 569, 572; 625 N.W.2d 462, 466 (Mich. Ct. App. 2001); *LaVoy v. Alternative Loan Trust 2007-4CB*, No. 31022, 2014 WL 783497 (Mich. Ct. App. Feb. 25, 2014); *Gayles v. Deutsche Bank National Trust Co.*, No. 292988, 2010 WL 4137508 (Mich. Ct. App. Oct. 21, 2010)); (2) even if the Eviction Action did not bar the District Court Action, the Quiet Title Action "alternatively has preclusive effect" as the Quiet Title Court held that the underlying foreclosure action had extinguished any interest Petitioners had in the Property and that the Quiet Title Court "**effectively rejected** any suggestion that the foreclosure proceeding was fraudulent" or that, "in dismissing Plaintiffs' quiet title action, the state court **had to have found**, 'on the merits,' that Plaintiffs had not made a clear showing of fraud or irregularity." AC Opinion, Appendix A, p. 10a. (emphasis added)(*Relying on Bank of New York Mellon v. Carmack*, No. 321840, 2015 WL 5568405 (Mich. Ct. App. Sept. 22, 2015)).

REASONS FOR GRANTING THE WRIT

A. The Coming Residential Mortgage Crisis

The current COVID-19 crisis has led many in the residential mortgage industry to rationally speculate that, once all moratoria on residential foreclosures have ended, a very substantial number of foreclosures will occur, some even predicting a "tsunami" or "flood" of residential foreclosures. See Rachel Bratt, *Forecasting an economic tsunami as foreclosures rise and mortgages sink underwater*, Boston Globe (April 16, 2020) https://www.bostonglobe.com/2020/04/16/opinion/forecasting-an-economic-tsunami-foreclosures-rise-mortgages-sink-underwater/ ("a new wave of mortgage default foreclosures is on the horizon,"); Beth Healy & Simon Rios, *Housing Crisis Looms As Mass. Renters And Homeowners Miss Payments*, WBUR News (August 7, 2020) https://www.wbur.org/news/2020/08/07/housing-eviction-mortgage-massachusetts-renters-homeowners-coronavirus ("there's a multi-million-dollar housing crisis brewing, researchers say."); Press Release, *The Calm Before the Coming Coronavirus Foreclosure Storm in U.S.*, World Property Journal (July 31, 2020) https://www.worldpropertyjournal.com/real-estate-news/united-states/irvine/real-estate-news-2020-foreclosure-filings-report-coronavirus-impact-on-home-foreclosures-in-2020-attom-data-solutions-foreclosure-reports-ohan-antebian-12055.php ("Distressed property volume is almost guaranteed to increase significantly once the moratorium is lifted because millions of Americans missed their mortgage payments in June and will continue to because of unemployment."). And, according to some, those most affected will be first-time, relatively less affluent, homeowners. See Chris

Arnold, *The Coronavirus Crisis: Loans for 1st-Time Homebuyers* See *Record Delinquencies*, NPR (August 18, 2020) https://www.npr.org/sections/coronavirus-live-updates/2020/08/18/903524495/a-record-number-of-homeowners-with-fha-loans-are-late-on-payments .[3]

This Court is being asked to overturn the Sixth Circuit's Opinion to provide a remedy to Petitioners for being wrested from their home through fraud by Respondent (or a party attempting to stand in the shoes of Respondent). But, importantly, given the near certainty of another wave of foreclosures, it is incumbent on this Court to also provide guidance to the other federal circuits (and, by extension, state courts across the nation) when a court receives a foreclosure case that alleges strong facts showing that a homeowner was rendered unable to challenge a foreclosure after expiration of the redemption period because the foreclosing party employed fraudulent means during, or there were significant irregularities in, the foreclosure process.

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3. On the other hand, a relative few residential mortgage experts speculate that the number of residential foreclosures following upon the coronavirus pandemic will not be as substantial as those during the so-called "financial crisis" of 2008 through 2012. See, for instance, Odeta Kushi, *This Time it's Different - Why a Wave of Foreclosures is Unlikely*,First American Title Insurance Co. Blog (August 10, 2020) https://blog.firstam.com/economics/this-time-its-different-why-a-wave-of-foreclosures-is-unlikely Regardless, most commentators believe that the number of foreclosures will substantially increase once moratoria on foreclosures have ended.

B. The Sixth Circuit's Failure to Follow its Decision in *Conlin*

As stated above, in the *Conlin* case, the Sixth Circuit provides a means by which mortgagors might find relief from a foreclosure that was accomplished by fraudulent means. Petitioners assert that they sufficiently pled facts to satisfy the high bar set by the Sixth Circuit in *Conlin* and have shown in their pleadings that they were induced to give up possession of their home in exchange for a promise by Respondent that it would negotiate with Petitioners for repurchase of their home, but had no intention to thus negotiate.

The implication of *Conlin* is that a plaintiff may defeat a lower court ruling denying relief from a post-redemption-period foreclosure if the plaintiff can make out "a clear showing of fraud, or irregularity," where such conduct "relate[s] to the foreclosure procedure itself," and that they were prejudiced by a foreclosing party's failure to comply with the Michigan foreclosure statute in that they would have been in a better position to preserve their interest in the property absent noncompliance with the statute.

As argued in the Sixth Circuit case, Petitioners fashioned their complaint in the District Court to meet these high demands of *Conlin*:

First, Petitioners sharply focus on the fact that Respondent created a void assignment from MERS (i.e. the US Bank Assignment) to itself by back-dating such assignment to make it appear as though it conformed to the strictures of the PSA and New York trust law that

governed its interest and, thereby, to avoid challenges from any number of parties, especially a challenge by Petitioners as a foreclosed party. Complaint, parags. 41-58. Petitioners were prejudiced by this conduct because, absent the fabrication, Respondent would not have been confident in initiating a foreclosure on the Property because of such flawed title. Petitioners could have continued to work with the party with whom it was working at this time (Respondent's servicer, or another agent of Respondent), or with their true lender (Bank of America or its successor-in-interest), to cure their default and, thereby, keep their property without being subjected to having their home foreclosed upon.[4]

Second, as set forth in the Complaint, Petitioners were further prejudiced by Respondent's conduct in the foreclosure proceeding itself as **they received no notice whatsoever** of the last of Respondent's foreclosure actions, and the Sheriff's Sale, which was adjourned for almost a year without notice, in violation of Michigan statute. Complaint, parag. 113. Significantly, Petitioners alleged that, when they received inklings of a foreclosure (and ultimately of a sheriff's sale), Petitioners' mortgage holder of record **would counter** their prompt inquiries about this with assurances that, indeed, their property was **not** in foreclosure, foreclosed or sold, respectively.

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4. In fact, Appellants were able to cure a previous delinquency and, following lapse of the redemption period in the latest foreclosure action, Appellants were making arrangements with a sponsor to also cure this delinquency. As Appellants can testify, this sponsor withdrew their offer to cure the delinquency, or otherwise pay the redemption amount, after Appellee reneged on its promise to negotiate repurchase of the property in accordance with the Consent Order.

Complaint, parags. 82-117, especially parags. 82, 86, 94-97, 102, 114, 117. These actions and Respondent's assertion of their interest stand as significant "irregularities" in the foreclosure process.

Third, Petitioners are able to show that they were further prejudiced in being subject to double liability in that Nationstar (n/k/a "Mr. Cooper") has a competing claim to Petitioners' property through the BoA Assignment referenced above and in their Complaint (Complaint, parag. 61ff. and parag. 168). There are a number of indications, as alleged in the Complaint, that Bank of America was a predecessor in interest to Petitioners' property (Complaint, parags. 116ff., especially parags. 142ff.) and that Respondent was aware of this and the transfer of the Property from Bank of America by its attempt to keep from Nationstar knowledge of Respondent's purported foreclosure of the Property. Complaint, parags. 171-181.

Up to the present, a query of MERS indicates that Petitioners' mortgage was **last owned** by Merrill Lynch, **a division of Bank of America, NA**. A query of Nationstar's successor, Mr. Cooper, indicates that it continues to hold Petitioners' note and mortgage and that Nationstar had set up an account in Petitioners' name showing that the debt due to Nationstar/Mr. Cooper, in the current amount of $468,384, has not been satisfied. It is quite probable that, following a review of its assets and noting Petitioners' unsatisfied debt, could bring an action for satisfaction of the debt. This is precisely the double liability to which *Conlin* refers. *Conlin* at 362.

Petitioners have, therefore, alleged sufficient facts to show at trial that they were prejudiced by Respondent's actions in that Petitioners, (a) would have been in a better position to keep their property absent flawed (indeed, **void**) title as they could continue to work with a party who was in a position to negotiate payment of the outstanding debt on their property, (b) were ready, willing, and able to cover the redemption value of the property (or a negotiated amount), but were thwarted in doing so by Respondent's failure to provide notice to Petitioners of the foreclosure action and Sheriff's Sale, (c) were told by their lender, BoA, that no foreclosure and sale of their property had occurred and, (d), maybe subjected to an action by a competing creditor for collection of their mortgage/note debt which currently stands in Petitioners' Nationstar account.

Like the District Court below, the Sixth Circuit fails altogether to address the foregoing factual allegations supporting Petitioners' **fraud claims**. Rather, the Sixth Circuit follows the District Court's rulings in holding that, first, the Eviction Action acts to bar Petitioners' District Court action because Petitioners entered into the Consent Order, giving Respondent possession of and title to the Property, thus effectively extinguishing any claim Petitioners might have to regain such possession and title.

The Sixth Circuit buttresses its ruling with three cases out of the Michigan Court of Appeals. The first of these, *Ditmore v. Michalik*, 244 Mich App. 569; 625 N.W.2d 462 (Mich. Ct. App. 2001), the Sixth Circuit uses to support its position that a settlement agreement, such as the Consent Order, is considered to be a judgment "on the merits," thus negating Petitioners' argument that, in the Consent Order, Petitioners ceded the issue of possession and title to the Property and, thus, the issue was not fully

adjudicated. Therefore, according to the Sixth Circuit, the Eviction Court, having "decided" this issue by issuing the Consent Order, precludes Petitioners from bringing a case disputing possession of and title to the Property. AC Opinion, Appendix A, p. 5a.

The Sixth Circuit further applies two recent Michigan Court of Appeals cases in its ruling, *LaVoy v. Alternative Loan Trust 2007-4CB*, No. 31022, 2014 WL 783497 (Mich. Ct. App. Feb. 25, 2014) and *Gayles v. Deutsche Bank National Trust Co.*, No. 292988, 2010 WL 4137508 (Mich. Ct. App. Oct. 21, 2010). Both cases, like *Ditmore*, *supra*, hold that a consent judgment, similar to the Consent Order here, acts as a decision "on the merits" and precludes a party from later bringing a claim that a foreclosing party acted fraudulently **in the foreclosure process**. *LaVoy* at 8; *Gayles* at 4-5. What the Sixth Circuit fails to address in its treatment of the Consent Order (as was also the case in the District Court) is Petitioners' supportable allegation that the Consent Order itself was induced by Respondent's fraud.

The *LaVoy* and *Gayles* cases above are distinguishable in that, in those cases, the plaintiffs had not alleged that the settlement agreements that they had entered into were induced by fraudulent means. Petitioners can marshall strong evidence that Respondent had promised to Petitioners that it would enter into negotiation of a repurchase of the Property on the condition that they first must sign the Consent Order relinquishing possession of and title to the Property.[5] Upon advice of counsel at the

5. The Consent Order provides a one-month period for such negotiation before Petitioners were to move out. Respondent assured Petitioners that this one-month period was placed in the Consent Order to allow for negotiation of repurchase of their home.

time, Petitioners viewed this as the most effective means to regain their home. As alleged in Petitioners' District Court Complaint, it was clear the day after entering into the Consent Order that Respondent was not going to negotiate. A settlement agreement that has been obtained through fraudulent means, such as the Consent Order here, cannot be used to bar Petitioners from bringing their claims, and having their factual allegations tested, in the District Court.

The Sixth Circuit then opines that, even if the Eviction Action does not bar Petitioners' case, the subsequent Quiet Title Action "alternatively has preclusive effect." AC Opinion, Appendix A p.9a. Petitioners argued in the Sixth Circuit that the judge in the Quiet Title Action summarily dismissed Petitioners' case ruling that, since the Property had been foreclosed in a "valid" foreclosure proceeding and that Petitioners failed to redeem the Property within the six-month redemption period, Petitioners' interest in the Property was extinguished and they, therefore, lacked standing to bring their action. As Petitioners argued in the Sixth Circuit, the failure of the judge in the Quiet Title Action to give any attention whatsoever to their fraud claims, to rule that the foreclosure process was valid, and to dismiss on the basis of a lack of standing, did not amount to a decision "on the merits" and that such a ruling could not act as a bar to Petitioners' District Court Action.

To the contrary, the Sixth Circuit opines that "the state court's opinion rejected (**albeit in shorthand**) theories that are substantially similar, if not identical, to the ones Plaintiffs raise here." Appendix A, p. 10a (emphasis added). Then, in summary fashion, the Sixth Circuit adds that,

> "In holding that **a valid foreclosure proceeding** extinguished any interest Plaintiffs had in the home, the state court **effectively rejected** any suggestion that the foreclosure proceeding was fraudulent. Put differently, in dismissing Plaintiffs' quiet title action, the state court **had to have found**, 'on the merits,' that Plaintiffs had not made a clear showing of fraud or irregularity--a claim they seek to reassert here."

Appendix A, p. 10a (emphasis added).

The Sixth Circuit here follows the line of reasoning adopted by the Michigan Court of Appeals in Petitioners' appeal of the Quiet Title Action[6] and adopted in the DC Opinion, Appendix A, pp. 26a - 36a.

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6. The Michigan Court of Appeals essentially parrots the reasoning of Judge Kuhnke in its opinion affirming her decision to dismiss the Quiet Title Action:

> Although the property in this case was foreclosed on and the redemption period expired, plaintiffs nevertheless argue that they have a continuing interest in the property, which is evidenced by a post-foreclosure assignment. However, it is undisputed that plaintiffs fell behind in their payments, US Bank initiated foreclosure, US Bank purchased the property, US Bank was issued a sheriff's deed, and plaintiffs failed to redeem the property. Accordingly, plaintiffs' interest in the property was extinguished.

Arthur Talbot, Jr. and Kelley Bezrutch v. Richard A. Davis, Case No. 323240, Michigan Court of Appeals, WL 9257863, at 1 (Dec. 17, 2015). Appendix C, pp. 40a-42a at 41a-42a.

CONCLUSION

Thus, none of the courts that Petitioners looked to as fora that they assumed would, at least, consider their claims of fraud, did so. Petitioners claims and factual allegations were NEVER considered, NEVER addressed NOR tested in any way by any of these courts, but were, instead, "swatted away" summarily by misapplication of Michigan's *res judicata* and/or claim preclusion principles.[7] Moreover, the Sixth Circuit has effectively negated the means it provides in *Conlin* by which homeowners might find relief from a foreclosure that was accomplished by fraudulent means. Such a homeowner cannot avail itself of such means if the Sixth Circuit (and courts following it) will not allow a homeowner to attempt a showing of fraud in the foreclosure process or in any actions of an unscrupulous foreclosing party.

Petitioners are asking not only for "their day in court" to present **their** claims, and the facts supporting these claims, but, importantly, Petitioners ask this Court to consider their petition with an eye toward the many foreclosure cases that will undoubtedly arise in the wake of the coronavirus pandemic that has decimated the financial stability of millions of Americans and who will be faced with, in many cases, unscrupulous entities that employ similar tactics as Respondent has in the instant case, *e.g.* back-dating of title documentation, dual-tracking

7. The Sixth Circuit's reliance on *Bank of New York Mellon v. Carmack*, No. 321840, 2015 WL 5568405 (Mich. Ct. App. Sept. 22, 2015) in its opinion (Appendix A, p. 10a,) is misplaced as, in that case, the claimant had an opportunity to have his claims and factual allegations considered in the state circuit court. See *Bank of New York Mellon*, at 3.

(initiating and continuing a foreclosure process while informing a distressed homeowner that their home is not in foreclosure), by demanding settlement agreements that wrest possession and title to a property before homeowners have an opportunity to contest a foreclosure procedure.

Therefore, Petitioners ask that this Court overturn the AC Opinion and order the Sixth Circuit to remand Petitioners' action to the District Court with instructions consistent with this Court's guidance as to proper application of *res judicata* and claim preclusion principles to fraud claims brought against foreclosing parties.

Dated this 5th day of October, 2020

Respectfully submitted,

JOHN F. BRENT, ESQ.
Counsel of Record
1901 Pauline Boulevard
Ann Arbor, MI 48103
(734) 761-5222
jbrentlaw@gmail.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED MAY 8, 2020

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 19-2118

ARTHUR R. TALBOT & KELLEY A. BEZRUTCH,

Plaintiffs-Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,

Defendant-Appellee.

May 8, 2020, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: STRANCH, READLER, and MURPHY, Circuit Judges.

CHAD A. READLER, Circuit Judge. Arthur Talbot and Kelley Bezrutch lost their home in a state eviction suit brought by their home mortgagee. They then lost a

related quiet title action against the home's new owner in which they claimed that the mortgagee fraudulently manufactured its ownership claim. Talbot and Bezrutch then brought this suit in federal court, challenging the validity of the foreclosure. The district court dismissed the action as barred by the res judicata doctrine. Seeing no error in the district court's judgment, we **AFFIRM**.

I. BACKGROUND

In 2005, Plaintiffs Arthur Talbot and Kelley Bezrutch purchased a home in Ypsilanti, Michigan, with the backing of a mortgage from Bank of America, N.A. In 2008, the mortgage was assigned to Defendant U.S. Bank National Association, the trustee for a mortgage-backed security, nicknamed SURF 2006-BC1.

Not long thereafter, Plaintiffs fell behind on their mortgage payments. U.S. Bank initiated foreclosure proceedings, and later purchased the property at a sheriff's sale in 2011. Michigan law afforded Plaintiffs a sixth-month statutory redemption right. Mich. Comp. Laws § 600.3240(8). When Plaintiffs did not exercise that right, U.S. Bank filed an eviction action. Hoping to resolve the action through a buyback, the parties agreed to an amended consent judgment, through which Plaintiffs conceded that U.S. Bank would be granted title to and possession of the home, on the condition that the bank delay eviction to attempt a negotiation through which the Plaintiffs could repurchase the property. While the parties negotiated, on October 9, 2013, Bank of America, N.A. recorded an assignment of its interest in the property

that indicated that it was Plaintiffs' lender and mortgagee. When the parties' negotiations fell through in 2014, Plaintiffs were evicted, and Defendant sold the property to a new owner, Robert Davis, for $225,500.

Plaintiffs filed a motion before the eviction court arguing that Defendant had acted in bad faith when it refused to accept Plaintiffs' buyback offers of $570,864. It is not clear what relief this motion requested given that the property had been sold. At the motion hearing, there was confusion about who currently owned the property, and the court told Plaintiffs' counsel he could look this information up in the county registry. When Plaintiffs' counsel conducted a title search, he noticed that Bank of America, N.A., a non-party, had recorded an assignment of its interest in the property on October 9, 2013, indicating that it was Plaintiffs' lender and mortgagee even though it had not been a party to the foreclosure or eviction proceedings. Based on this information, Plaintiffs filed a quiet title action against the home's subsequent purchaser. Plaintiffs claimed that the 2013 assignment of their mortgage from Bank of America to Nationstar Mortgage (U.S. Bank's mortgage servicer) proved the existence of a competing chain of title that could not be extinguished by the 2011 sheriff's sale. Additionally, Plaintiffs claimed that U.S. Bank falsely back-dated the 2008 assignment to 2005 because the Pooling Service Agreement governing SURF 2006-BC1 did not allow U.S. Bank to accept the mortgage into the trust after 2006.

The state court summarily dismissed the action. Because Plaintiffs had defaulted on their mortgage and

did not redeem the property within the statutory period, their interest in the property was extinguished. And because Plaintiffs lacked an interest in the property, the court concluded, they could not bring suit to reclaim the property. The Michigan Court of Appeals affirmed on the same reasoning. *Talbot v. Davis*, No. 323240, 2015 Mich. App. LEXIS 2406, 2015 WL 9257863, *1 (Mich. Ct. App. Dec. 17, 2015).

Plaintiffs then brought this suit in federal court. Asserting facts and claims similar to those from the underlying state court litigation, Plaintiffs asked the federal court to find that U.S. Bank fraudulently instigated the eviction. The district court, however, dismissed the lawsuit on the basis that Plaintiffs were barred by the res judicata doctrine from re-litigating issues already settled in state court. Plaintiffs timely appealed.

II. ANALYSIS

A. Res Judicata

We review *de novo* a district court's application of res judicata (also known as claim preclusion). *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519 (6th Cir. 2011). As a federal tribunal, we give prior state proceedings—here proceedings from Michigan—the same res judicata effect they would have in the Michigan courts. *Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015) (citing *Boggs*, 655 F.3d at 519). We thus look to Michigan law to assess "the preclusive effect" a Michigan court "would attach to that judgment." *Id.* To that end, res judicata bars

a second action when "(1) the 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." *Adair v. State*, 470 Mich. 105, 680 N.W.2d 386, 396 (Mich. 2004) (citation omitted). For preclusion purposes, both the underlying eviction and quiet title actions presented claims and issues like those raised here. We accordingly measure whether res judicata attached to either judgment, or both.

The Eviction Action. First up, for purposes of a res judicata analysis, is the underlying eviction action between the parties. After U.S. Bank foreclosed on Plaintiffs' home and purchased the home in the ensuing sheriff's sale, U.S. Bank initiated an eviction action in state court.

As to the first res judicata factor, we agree with the district court that the eviction action was "decided on the merits." The action concluded with a consent judgment, which, under Michigan res judicata principles, is an adjudication on the merits. *Ditmore v. Michalik*, 244 Mich. App. 569, 625 N.W.2d 462, 466 (Mich. Ct. App. 2001).

It makes no difference that Plaintiffs conceded (rather than litigated) U.S. Bank's title to and possession of the home. Instructive here are two Michigan cases, *LaVoy v. Alternative Loan Trust 2007-4CB*, No. 310322, 2014 Mich. App. LEXIS 365, 2014 WL 783497 (Mich. Ct. App. Feb. 25, 2014), and *Gayles v. Deutsche Bank Nat'l Trust Co.*, No. 292988, 2010 Mich. App. LEXIS 2040, 2010 WL 4137508 (Mich. Ct. App. Oct. 21, 2010). In *LaVoy*, a defaulting plaintiff agreed in an eviction action to a consent judgment,

through which she committed to vacating the property after a certain date. 2014 Mich. App. LEXIS 365, 2014 WL 783497, at *1. The plaintiff then filed a fraud action against the foreclosing party, asserting that the foreclosing party did not actually hold the mortgage because of defects in how that party acquired the mortgage. 2014 Mich. App. LEXIS 365, [WL] at *3. But as the consent judgment was considered to be "on the merits," the plaintiff's second suit was barred by res judicata. 2014 Mich. App. LEXIS 365, [WL] at *7 (citing *Ditmore*, 625 N.W.2d at 466).

In *Gayles*, a defaulting plaintiff, through a consent judgment, acknowledged that the foreclosing party had a right to possess the home, and thus agreed to move out. 2010 Mich. App. LEXIS 2040, 2010 WL 4137508, at *1. Later, the plaintiff filed suit alleging the same fraud theory asserted here: that the mortgage assignment to the foreclosing party post-dated the foreclosure proceedings. *Id.* That subsequent action, the court concluded, was barred by res judicata, as the consent judgment resolved the matter "on the merits." 2010 Mich. App. LEXIS 2040, [WL] at *3. As *LaVoy* and *Gayles* together reflect, the eviction action against Plaintiffs was resolved on the merits, even if the resolution was the result of a consent judgment.

The second res judicata element is also satisfied, as the parties in the eviction action are identical to those here.

With respect to the third res judicata factor, ordinarily we would ask whether the fraud claim was or could have been resolved in the eviction action. *See Sprague v.*

Buhagiar, 213 Mich. App. 310, 539 N.W.2d 587, 588 (Mich. Ct. App. 1995). But that is not so where the prior action, like the eviction action here, was pursued in the form of a summary proceeding. For in that setting, there exists a limited statutory exception to the general res judicata rule; "[a] judgment for possession [pursuant to a summary proceeding] does not merge or bar any other claim for relief." *J.A.M. Corp v. AARO Disposal, Inc.*, 461 Mich. 161, 600 N.W.2d 617, 621 (Mich. 1999) (citing Mich. Comp. Laws § 600.5750). The Michigan courts have construed this provision as preventing res judicata from attaching to claims that could have been (but were not) raised in a summary proceeding. *Sewell v. Clean Cut Mgmt., Inc.*, 463 Mich. 569, 621 N.W.2d 222, 225 (Mich. 2001).

In other words, if the eviction action against Plaintiffs actually resolved their fraud claim, then, res judicata principles would apply here. *Id.* Which takes us back to *LaVoy*. Citing *Sewell*, *LaVoy* held that a consent judgment through which the plaintiff agreed to move out in lieu of being evicted immediately resolved and thus barred a claim in a subsequent action asserting that the foreclosure was predicated on fraud. 2014 Mich. App. LEXIS 365, 2014 WL 783497, at *7-8. In the subsequent action, the plaintiff asserted "that the sheriff's sale was invalid and [the] defendant has no legal right to ownership and possession of the property." 2014 Mich. App. LEXIS 365, [WL] at *7. But by conceding the "defendant's legal right to ownership and possession" in the consent judgment, the plaintiff had "acknowledged [the] defendant's right to possession and the validity of the sheriff's sale because a valid foreclosure procedure and sheriff's sale resulting in [the] defendant's

possession of the property is a prerequisite to . . . an eviction order." 2014 Mich. App. LEXIS 365, [WL] at *8. Accordingly, the "consent judgment was conclusive" as to the "defendant's right of possession," meaning that "res judicata bar[red] relitigation of the validity of the foreclosure proceedings and the sheriff's sale." *Id.*

And, for good measure, back to *Gayles* as well. Also citing *Sewell*, *Gayles* held that a consent judgment in which the plaintiff agreed that the foreclosing party had a right to possession, with an order of eviction to issue at a later date, resolved, for res judicata purposes, a subsequent suit claiming fraud in the foreclosure procedure. 2010 Mich. App. LEXIS 2040, 2010 WL 4137508, at *4. By not raising the issue in the summary proceeding, and instead consenting to the defendant's entitlement "to possession of the property," the plaintiff "implicitly agreed that the foreclosure was valid," thereby resolving any purported fraud claim. *Id.*

As with the consent judgments in *LaVoy* and *Gayles*, Plaintiffs' consent judgment also resolved any claim that the foreclosure was premised on fraud. Plaintiffs agreed to a consent judgment that recognized U.S. Bank's right to title in and possession of the home. That argument is entirely at odds with their claim today that U.S. Bank's foreclosure was fraudulent because of defects in mortgage transfers. The *Gayles* plaintiff made virtually the same argument—that a post-foreclosure assignment of the mortgage to the foreclosing party showed that the foreclosing party had no authority to initiate the foreclosure. 2010 Mich. App. LEXIS 2040, 2010 WL

4137508, at *1. Like in *Gayles* and *LaVoy*, Plaintiffs' concession in the eviction action resolves any later claim that U.S. Bank fraudulently claimed title and possession. Res judicata thus bars Plaintiffs' claims.

The Quiet Title Action. Even if the eviction action does not bar today's case, the subsequent quiet title action alternatively has preclusive effect. We again turn to the elements of res judicata.

Most contentious is the question whether the dismissal of the quiet title action was "on the merits." The state court dismissed the quiet title action because Plaintiffs did not redeem the home in the statutory six-month period following foreclosure, meaning they had no interest in the home. That rationale was also adopted by the state appellate court in affirming the trial court. 2015 Mich. App. LEXIS 2406, 2015 WL 9257863, at *1.

Under Michigan law, an involuntary dismissal does not "operate[] as an adjudication on the merits" if the dismissal was for lack of jurisdiction. Mich. Ct. R. 2.504(B)(3). While the state court's opinion does not use the term "standing," Michigan cases, we note, have characterized this theory of dismissal as one of "standing." *See LaVoy*, 2014 Mich. App. LEXIS 365, 2014 WL 783497, at *4 (explaining that the trial court held that the plaintiff lacked standing because her interest was extinguished by the expiration of the redemption period). Plaintiffs characterize the dismissal of their quiet title action as a jurisdictional holding (and thus not "on the merits") because the dismissal was due to the absence of statutory standing as a result of their lack of interest in the property.

Digging deeper into the state court proceeding, however, it is clear the state court's opinion rejected (albeit in shorthand) theories that are substantially similar, if not identical, to the ones Plaintiffs raise here. Plaintiffs, all agree, failed to redeem their property during the statutory redemption period. Having failed to make that redemption, to set aside the foreclosure, Plaintiffs had to "make a clear showing of fraud or irregularity." *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 359 (6th Cir. 2013) (citing *Schulthies v. Barron*, 16 Mich. App. 246, 167 N.W.2d 784, 785 (Mich. Ct. App. 1969)). In holding that a valid foreclosure proceeding extinguished any interest Plaintiffs had in the home, the state court effectively rejected any suggestion that the foreclosure proceeding was fraudulent. Put differently, in dismissing Plaintiffs' quiet title action, the state court had to have found, "on the merits," that Plaintiffs had not made a clear showing of fraud or irregularity—a claim they seek to reassert here.

Treating the state court's dismissal as a resolution on the merits is consistent with *Bank of N.Y. Mellon v. Carmack*, No. 321840, 2015 Mich. App. LEXIS 1775, 2015 WL 5568405 (Mich. Ct. App. Sept. 22, 2015). *Carmack* applied Michigan res judicata law to an earlier federal court decision. In the earlier proceeding, the district court held that the plaintiff failed to redeem the property within the relevant period and did not demonstrate the fraud or irregularity necessary to allow the plaintiff to maintain standing to challenge the foreclosure. 2015 Mich. App. LEXIS 1775, [WL] at *1-3. After losing his federal case, the plaintiff initiated a summary proceeding in state court. There, he alleged that the foreclosure was fraudulent

because the wrong party acted as the foreclosing party. 2015 Mich. App. LEXIS 1775, [WL] at *2. But, the state court concluded, that matter was "already tested in the federal courts." 2015 Mich. App. LEXIS 1775, [WL] at *4 (internal quotations omitted). The federal court's dismissal of the plaintiff's challenge to the foreclosure was thus "on the merits" for res judicata purposes. We view the quiet title action here in the same light.

Next up is whether both actions involve the same parties or their privies. While the parties to the quiet title action are not identical to those here, those parties are in privity. Privity embraces "successive relationships to the same right of property," and requires "substantial identity of interests and a working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation." *Phinisee v. Rogers*, 229 Mich. App. 547, 582 N.W.2d 852, 854 (Mich. Ct. App. 1998) (internal citations and quotations omitted). By the time of the quiet title action, U.S. Bank had sold the home to Robert Davis, so Plaintiffs filed suit against Davis, not the bank. But as the successor in interest to the home, Davis had every incentive to protect the bank's interest in a valid chain of title (from which Davis derives his ownership). In that respect, Davis and U.S. Bank are in privity, satisfying the second res judicata requirement.

We thus turn to the last element of res judicata—whether the claim was resolved in the prior action. That analysis is straightforward. In the quiet title action, Plaintiffs made many of the same allegations they make here, including that the alleged assignment post-dated

foreclosure, and that U.S. Bank allegedly backdated the original assignment. Resolution of the prior action thus resolves the claims before us today, either because they were raised and rejected, or because they arose from the same transaction, and thus could have been raised. *See Sprague*, 539 N.W.2d at 589 (citations omitted).

In sum, all three elements of res judicata are satisfied. The quiet title action bars this suit.

B. Remaining Claims

Finally, we turn to a supposed dispute over whether the attorney appearing on behalf of U.S. Bank actually represents the party to this proceeding. Below, Plaintiffs claimed it was unclear whether Defendant's lawyer, David Dell, represents U.S. Bank in its role as the foreclosing entity, or in the bank's capacity as trustee for SURF 2006-BC1. During a hearing, the district court confirmed that Dell represented the named Defendant. Although Plaintiffs, in their own words, "appeared to be satisfied" with the colloquy, "upon further reflection" they now believe Dell was intentionally ambiguous as to the entity he represented.

Yet much of the "evidence" Plaintiffs identify to assert their contention—for example, that Dell acted evasively in a conference call and mediation session—has no support in the record below. Not in the district court filings, the transcripts, nor in the docket. *See* Fed. R. App. P. 10(a) (explaining that the appellate record consists of papers and exhibits filed in district court,

the transcript of proceedings, and the docket). We will not consider additional purported facts for the first time today. *United States v. Husein*, 478 F.3d 318, 335 (6th Cir. 2007) (A "party may not bypass the fact-finding process of the lower court and introduce new facts in its brief on appeal.'") (quoting *Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982)).

Only one of Plaintiffs' factual contentions has any bearing in the record: that Dell filed a Notice of Appearance representing U.S. Bank, N.A., as Trustee for SURF 2006-BC1, rather than U.S. Bank, N.A. The district court has broad discretion in managing the case and deciding the propriety of party representation in this matter. *See ACLU of Ky. v. McCreary County*, 607 F.3d 439, 451 (6th Cir. 2010) (noting the district court's broad discretion in managing cases on its docket (citing *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999))). It is not clear, as an initial matter, that U.S. Bank, as a foreclosing entity, and U.S. Bank in its role as trustee for SURF 2006-BC1, are separate entities. Consider the facts of *Gorbach v. US Bank Nat'l Ass'n*, No. 308754, 2013 Mich. App. LEXIS 158, 2013 WL 331610 (Mich. Ct. App. Jan. 29, 2013). There, U.S. Bank, as a trustee to a mortgage-backed security trust, was sued in relation to a foreclosure. 2013 Mich. App. LEXIS 158, [WL] at *1. The captioned party was U.S. Bank, without a trustee designation. Yet the court seemingly took no issue with treating U.S. Bank and U.S. Bank as trustee as the same entity. *See also US Bank Nat'l Ass'n v. Coulthard*, No. 323452, 2015 Mich. App. LEXIS 2382, 2015 WL 8964358, *1 (Mich. Ct. App. Dec. 15, 2015) (proceeding to the merits of the case, without

discussing the fact that the caption listed only U.S. Bank, when U.S. Bank was sued in its capacity as the trustee for the Washington Mutual Mortgage Pass—Through Certificate Series 2003-S4).

And in any event, the district court did not abuse its discretion in its effort to clarify any purported confusion. Dell explained to the district court that he was merely using the same naming convention as that used in the earlier foreclosure action. At bottom, what matters is whether the proper party, with proper counsel, was before the court. *See Koons v. Walker*, 76 Mich. App. 726, 257 N.W.2d 229, 231-32 (Mich. Ct. App. 1977) (holding that a defendant, in his capacity as the owner of a motorcycle shop, was properly made party to the suit, despite the complaint incorrectly naming the prior owner as the defendant). Here, the district court found Dell's representation that he was the proper counsel "sufficient." That is sufficient for us too.

III. CONCLUSION

For these reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, DATED SEPTEMBER 3, 2019

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

Case Number 19-10214
Honorable David M. Lawson

ARTHUR R. TALBOT
AND KELLEY A. BEZRUTCH,

Plaintiffs,

v.

U.S. BANK, NATIONAL ASSOCIATION,

Defendant.

OPINION AND ORDER GRANTING
MOTION TO DISMISS AND DISMISSING CASE
WITH PREJUDICE

After falling behind on their mortgage payments, and unsuccessfully pursuing several lawsuits, the plaintiffs lost their home to foreclosure. They have filed yet another lawsuit, this time alleging fraud against the foreclosing bank, based on the premise that the bank misrepresented throughout the foreclosure proceedings that it had a valid claim on the property. The plaintiffs continue to assert

that alleged defects in the chain of title rendered that claim false. But the validity of the bank's interest was an essential fact that anchored each of the judgments against the plaintiffs in the state court cases. Since that fact was determined against them, it cannot be contested here without running afoul of established preclusion doctrines. For this reason, the defendant's motion to dismiss the complaint must be granted and the case must be dismissed.

I.

Because this is a motion to dismiss, the following facts are stated as alleged in the plaintiffs' extensive (38-page, 191-paragraph) complaint, except where otherwise noted.

In August 2005, plaintiffs Arthur Talbot and Kelley Bezrutch entered into a purchase contract to buy their former home on South Huron River Drive in Ypsilanti, Michigan for $574,000. They made a down-payment of $86,100 and financed the balance of $487,900 with a loan made by Wilmington Finance. The loan was secured by a mortgage. The loan was "securitized" into a trust arrangement with defendant U.S. Bank, N.A. as Trustee. The plaintiffs allege that there were improprieties in the transfer of the mortgage via the trust, including that transfers of interest were not recorded or were back-dated so that they appeared to have occurred years before they actually happened. The plaintiffs eventually ran into problems keeping up with their payments on the mortgage, and defendant U.S. Bank initiated a foreclosure proceeding in state court on December 10, 2009.

Appendix B

The plaintiffs allege that the defendant "misrepresented" throughout the foreclosure proceedings that it had a valid claim on the property, when, because of the alleged defects in the chain of title, in fact it had none. Throughout 2010, the plaintiffs attempted to negotiate a loan modification with the defendant, but to no avail. At some point, the defendant's counsel represented that the sheriff's sale "would be adjourned" to December 9, 2010, so that the plaintiffs could further pursue a loan modification. However, when plaintiffs spoke to loan servicing agents in November 2010, they were told that the law firm plaintiffs had been "working with" was not assigned to the account, and that the plaintiffs should communicate with the defendant directly and continue to submit information to support the loan modification request. Plaintiffs communicated further with the defendant during 2011 and were given conflicting reports about the status of their account. And at one point they received a letter indicating that their monthly payment had been increased by more than $2,000 per month to cover the accrued delinquency.

On September 8, 2011, while the defendant was still telling the plaintiffs that their loan was merely "delinquent" and not "in foreclosure," a sheriff's sale was held, at which the defendant was the high bidder. In April 2012, the defendant's agents presented to the plaintiffs a "move out agreement" indicating that the defendant had obtained title to the property by the foreclosure sale and proposing that if the plaintiffs moved out by May 28, 2012, then the defendant would pay them $3,385. Plaintiffs heard nothing further until they were served with an eviction complaint on May 7, 2012. The plaintiffs initially failed to

appear at a hearing due to their misunderstanding about which court the case was filed in, and a default judgment was entered against them.

The plaintiffs retained counsel who negotiated a consent order under which plaintiffs would retain possession of the home for another month, during which the defendant represented that they could continue to negotiate a redemption of the property. However, after the consent order was issued, the defendant refused to entertain the plaintiffs' offer to make a lump sum payment to retire the delinquency on the loan. The plaintiffs continued to make offers to redeem the property, which were refused. Eventually, in July 2012, an eviction notice was posted at the property, and plaintiffs' counsel withdrew from the case, after representing that he "could not accomplish anything further."

In August 2012, the plaintiffs filed a motion to stay the eviction, which was granted by the state court. A mediation was scheduled, but the plaintiffs did not attend because a notice of the mediation date was mailed to the wrong address. Because they failed to appear, a default judgment again was entered. However, the plaintiffs managed to retain new counsel, who successfully moved to set aside the default. A new mediation date was scheduled, and the state court ordered the plaintiffs to pay $3,300 per month into an escrow account, which they did. The plaintiffs then offered to redeem the property for a cash payment of $285,000, which was above its market value but below the loan balance. The plaintiffs and their counsel appeared at a July 22, 2013 mediation hearing,

at which they were told that the property had been sold by defendant at auction.

The state court held a hearing to determine the status of the case after the "surprise" auction sale. At that hearing, defendant's counsel represented that the defendant would not consider any offer other than redemption for the full deficiency amount of more than $574,000. The state court judge ordered the parties to continue negotiating and to attempt to reach a repurchase agreement and to return to court in two months time. On September 30, 2013, another hearing was held at which defendant's counsel again refused to entertain any offer less than repurchase for the full redemption amount. The state court then entered an order vacating the stay of eviction and giving the plaintiffs 45 days to vacate the property. A writ of restitution was issued on December 12, 2013, and, after a brief stay of execution was granted, the plaintiffs moved out on January 7, 2014.

The plaintiffs allege that the defendant falsely represented throughout the foreclosure process that it was the holder of the mortgage, and that it had a right to foreclose on the property, but that it was willing to work with the plaintiffs to negotiate a repurchase agreement. However, the plaintiffs contend, throughout the process another lender (Bank of America) actually owned the loan, not the defendant, and, as a result, the defendant never had any right to possession, despite its attempts to record back-dated assignments of interest purporting to transfer the loan to it. The plaintiffs allege that "they suffered serious injury in that [they] lost their home

to foreclosure and were evicted from their home in the middle of the Winter of 2014, lost much of [the] contents of their home, and [the plaintiffs] and their children were forced to split up and live in different counties with such of their relatives who could accommodate them, the entire process of which in turn, caused serious psychological/emotional trauma to Plaintiffs and to their children and physical harm to Plaintiffs." Compl. ¶ 191, ECF No. 1, PageID.37. It appears to be undisputed that the plaintiffs never exercised their statutory right of redemption after the foreclosure sale.

Although not discussed in the complaint, it appears to be undisputed — and confirmed by state court public records — that the plaintiffs subsequently filed a quiet title action against the present owner of the home, alleging that the foreclosure was invalid based on the same improprieties discussed above. The case eventually was dismissed on a motion for summary disposition. The plaintiffs appealed, and in its order affirming the dismissal the Michigan Court of Appeals stated the following brief recap:

> Although the property in this case was foreclosed on and the redemption period expired, plaintiffs nevertheless argue that they have a continuing interest in the property, which is evidenced by a post-foreclosure assignment. However, it is undisputed that plaintiffs fell behind in their payments, U.S. Bank initiated foreclosure, U.S. Bank purchased the property, U.S. Bank was issued a sheriff's deed, and plaintiffs failed to

> redeem the property. Accordingly, plaintiffs' interest in the property was extinguished.

Talbot v. Davis, No. 323240, 2015 Mich. App. LEXIS 2406, 2015 WL 9257863, at *1 (Mich. Ct. App. Dec. 17, 2015). The plaintiffs also evidently filed suit against the defendant's law firm, Orlans Associates, P.C., alleging that it wrongfully converted funds deposited into the escrow account during the foreclosure proceedings. That case also was dismissed summarily.

The plaintiffs filed their complaint in this Court on January 29, 2019. The defendant responded with its motion to dismiss.

II.
A.

The defendant brought its motion to dismiss under both Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Rule 12(b)(1) "provides for the dismissal of an action for lack of subject matter jurisdiction." *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). The defendant argues that the plaintiffs' complaint amounts to little more than an attack on the state court judgments of eviction and denying their quiet title claim. Therefore, it says, only the Supreme Court has jurisdiction to entertain such a challenge, according to the *Rooker-Feldman* doctrine.

"The *Rooker-Feldman* doctrine bars lower federal courts from conducting appellate review of final state-court judgments because 28 U.S.C. § 1257 vests sole

jurisdiction to review such claims in the Supreme Court." *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)). "*Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), hold that only the Supreme Court may review judgments entered by state courts in civil litigation." *Fowler v. Benson*, 924 F.3d 247, 254 (6th Cir. 2019). The eponymous "doctrine, therefore, bars a lower federal appellate court from reviewing a plaintiff's claim when a state court's judgment is the source of the plaintiff's injury." *Ibid.*

Here, the plaintiffs' claim is based on common law fraud. It is true that the premises underlying that claim are inconsistent with the state court judgments, but the plaintiffs are not attacking the judgments as such. They do not seek to set aside the judgment of eviction or recover title to the property. Instead, they seek to recover damages stemming from the allegedly independent fraudulent actions of the defendant that instigated the foreclosure, which resulted inevitably thereafter in the dispossession.

It is well settled that "[t]he *Rooker-Feldman* doctrine . . . is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection

of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). The doctrine does not "stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party, then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *Id.* at 293 (quotations omitted).

In the foreclosure context, the Sixth Circuit repeatedly has held that a suit premised on independently fraudulent conduct by a defendant, not comprising a direct attack on the judgment of possession, is not barred by *Rooker-Feldman*. *See, e.g., Veasley v. Fed. Nat. Mortg. Ass'n (FNMA)*, 623 F. App'x 290, 295 (6th Cir. 2015) ("Veasley's complaint claims that the defendants engaged in independent acts, i.e. the assignment of a faulty mortgage in violation of Mich. Comp. Laws § 600.3204, which gave rise to the state court's judgment of possession. *Rooker-Feldman* does not preclude this court's jurisdiction over Veasley's case because the previous action in Michigan's 46th court, in which Fannie Mae sought to recover possession of 24669 Lafayette, was merely a continuation of the injury stemming from BAC's faulty assignment and subsequent foreclosure proceedings. Veasley does not claim that the state court judgments are unconstitutional or in violation of federal law; instead Veasley raises an independent claim which this court has jurisdiction to

review."); *Brown v. First Nationwide Mortg. Corp.*, 206 F. App'x 436, 440 (6th Cir. 2006) ("Brown's allegations of fraud in connection with the state court proceedings . . . did not constitute complaints of injuries caused by the state court judgments, because they do not claim that the source of Brown's alleged injury is the foreclosure decree itself. Instead, the claims concern the actions of defendant First Nationwide (and others) that preceded the decree. Therefore, Brown's claim that the mortgage foreclosure decree was procured by fraud is not barred by *Rooker-Feldman*."). Those cases stand in contrast with suits where the plaintiffs seek directly or by implication to overturn the state court judgment, which *Rooker-Feldman* does prohibit. *E.g., Givens v. Homecomings Fin.*, 278 F. App'x 607, 609 (6th Cir. 2008) ("Givens requests in his complaint . . . a temporary injunction that would 'enjoin Defendants from physically entering onto plaintiff's property' and that would 'dispose of any other civil or procedural action regarding the subject property.' Because the point of this suit is to obtain a federal reversal of a state court decision, dismissal on the grounds of *Rooker-Feldman* was appropriate."). That is true regardless of how "intertwined" the factual premises of the causes of action are with any dispositive facts contested in the state court action. *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d 432, 437 (6th Cir. 2006) ("This situation was explicitly addressed by the *Exxon Mobil* Court when it stated that even if the independent claim was inextricably linked to the state court decision, preclusion law was the correct solution to challenge the federal claim, not *Rooker-Feldman*.").

The defendant's jurisdictional challenge is not well taken. It does not furnish a basis to dismiss the complaint.

B.

The defendant also invokes Rule 12(b)(6), however, contending for several reasons that the complaint fails to state a viable claim. "To survive a motion to dismiss [under that rule], a complaint must contain 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A "claim is facially plausible when a plaintiff 'pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Matthew N. Fulton, DDS, P.C. v. Enclarity, Inc.*, 907 F.3d 948, 951-52 (6th Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678). When reviewing the motion, the Court "must 'construe the complaint in the light most favorable to the plaintiff[] [and] accept all well-pleaded factual allegations as true.'" *Id.* at 951 (quoting *Hill v. Snyder*, 878 F.3d 193, 203 (6th Cir. 2017)).

When deciding a motion under Rule 12(b)(6), the Court looks only to the pleadings. *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008). But the Court also may consider the documents attached to them, *Commercial Money Ctr., Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 335 (6th Cir. 2007) (citing Fed. R. Civ. P. 10(c)), documents referenced in the pleadings that are "integral to the

claims," *id.* at 335-36, documents that are not mentioned specifically but which govern the plaintiff's rights and are necessarily incorporated by reference, *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997), *abrogated on other grounds by Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002), and matters of public record, *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010); *see also Cates v. Crystal Clear Tech., LLC*, 874 F.3d 530, 536 (6th Cir. 2017) (instructing that "'[w]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.'") (quoting *Williams v. CitiMortgage, Inc.*, 498 F. App'x 532, 536 (6th Cir. 2012)). However, beyond that, assessment of the facial sufficiency of the complaint ordinarily must be undertaken without resort to matters outside the pleadings. *Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) .

The defendant contends that the plaintiffs have not stated a viable claim in their complaint because their attempt to relitigate the propriety of the foreclosure is barred by the doctrine of *res judicata*, they have no legal interest in the property and thus have no standing to challenge the assignment of the mortgage which preceded the foreclosure, the fraud claims all are time-barred, and the fraud allegations are not pleaded with sufficient particularly under Rule 9(b). Only the first of those arguments need be addressed.

Res judicata and its sister doctrine, collateral estoppel, are sometimes referred to, respectively, as claim preclusion and issue preclusion. "Claim and issue

preclusion generally prevent parties from raising an argument that they already fully litigated in an earlier legal proceeding." *Anderson v. City of Blue Ash*, 798 F.3d 338, 350 (6th Cir. 2015). "'State-court judgments are given the same preclusive effect under the doctrines of *res judicata* and collateral estoppel as they would receive in courts of the rendering state.'" *Ibid.* (quoting *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519 (6th Cir. 2011)). "In other words, if an individual is precluded from litigating a suit in state court by the traditional principles of *res judicata*, he is similarly precluded from litigating the suit in federal court." *Ibid.* (quotations omitted). The Court will "'look to the state's law to assess the preclusive effect it would attach to that judgment.'" *Ibid.*

These preclusion doctrines bar the plaintiffs from relitigating for a third time the sole substantive question on which their fraud claim turns, which is whether the defendant had the legal standing to initiate a foreclosure proceeding against their home. The plaintiffs' complaint is replete with allegations of other improprieties by the defendant, which center principally around (1) the allegedly defective, fraudulent, or invalid conveyance to the defendant of its asserted ownership interest in the mortgage, and (2) repeated broken or illusory promises to entertain overtures by the plaintiffs aimed at securing a loan modification or redemption of the property. However, the gravamen of the fraud claim is best illustrated by the plaintiffs own pleading at the outset of the complaint:

> Plaintiffs dispute the title and ownership of the Property in that the originating mortgage

> lender (Wilmington Finance), and others alleged to have ownership of Plaintiffs' mortgage and note, have unlawfully sold, assigned and/or transferred their ownership and security interest in Plaintiffs' mortgage and note, and, thus, do not have lawful ownership or a security interest in the Property sufficient to foreclose on the Property.
>
> For these reasons, the Court should find that Defendant fraudulently obtained title to the Property, as further alleged below, and award to Plaintiffs damages they have incurred as a result of Defendant's fraudulent conduct against Plaintiffs.

Compl. ¶ 12-13, ECF No. 1, PageID.4. Moreover, the plaintiffs disclaim in their response any attempt to pursue claims premised on broken promises or defective assignments; instead, they explain that those allegations were added merely as "background" to illustrate how the defendant misrepresented its legal standing. They insist that their sole substantive claim of fraudulent misconduct is based on the defendant's wrongful commencement and continuation of foreclosure and possession actions that it had no standing to bring in the first instance.

The plaintiffs, therefore, have trained their sights on the one fact essential to their fraud claim, namely, that the defendant misrepresented that it had a legal interest in the property. It is elementary that to prevail on their fraud claim the plaintiffs must plead and prove that the

defendant represented that it had standing to foreclose, and that the representation was false. *Johnson v. USA Underwriters*, 936 N.W.2d 834, No. 340323, 2019 WL 2111326, at *3 (Mich. Ct. App. May 14, 2019). But that fact necessarily has been decided against them in two state court proceedings.

1.

Under Michigan law, "[*r*]*es judicata* applies if '(1) the 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.'" *Ibid.* (quoting *Adair v. State*, 470 Mich. 105, 121, 680 N.W.2d 386, 396 (2004)). Here, the judgment of possession in the eviction proceeding has conclusive *res judicata* effect on the question whether the defendant had the right to foreclose and obtain possession of the home. First, it is undisputed that the summary proceeding was decided on the merits when, after considerable litigation, a judgment of possession and writ of restitution were issued by the state court. Second, the parties were identical in both suits.

Third, the question whether the defendant had the right to foreclose on the property and obtain possession necessarily and conclusively was settled adversely to the plaintiffs by the issuance of the judgment dispossessing them of the home. Michigan's statute governing summary proceedings for possession, Michigan Compiled Laws § 600.5714(1)(g), provides that "'[a] person entitled to possession of premises may recover possession by

summary proceedings . . . [w]hen a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises.'" *Johnston v. Sterling Mortg. & Inv. Co.*, 315 Mich. App. 724, 757, 894 N.W.2d 121, 137 (2016). The *Johnston* court confronted and squarely rejected claims identical to those raised in the present suit, where a plaintiff attempted in a subsequent quiet title action to relitigate the propriety of the defendants' title claim that was a necessary premise of the summary judgment for possession. As the court held, "[t]he statute merely provides that possession is not a landlord's only remedy [and] '[n]othing in the statute or in *JAM Corp. v. AARO Disposal, Inc.*, 461 Mich. 161, 600 N.W.2d 617 (1999), stands for the proposition that, having litigated in the district court the issue who has the right to the premises, that question can be relitigated *de novo* in a subsequent suit. Such an approach would empty Mich. Comp. Laws § 600.5701 *et seq.* of all significance.'" *Johnston*, 315 Mich. App. at 757, 894 N.W.2d at 138 (quoting *Sewell v. Clean Cut Mgmt., Inc.*, 463 Mich. 569, 575, 621 N.W.2d 222, 224 (2001)).

The plaintiffs principally cite the Michigan Supreme Court's *JAM Corporation* decision for the proposition that claims which "could have been brought" in the summary eviction proceeding but were not actually litigated are not subject to the ordinarily broad preclusion of all potential claims under Michigan's concept of claim preclusion. But as the *Sewell* court explained, the question here is settled by a straightforward application of Michigan's rule of *res judicata* because the issue of the propriety of the

defendant's title claim and right to obtain possession which the plaintiffs now seek to revisit *was actually litigated*, and comprised the precise central legal question squarely and necessarily taken up by the eviction court:

> Our decision in *JAM Corp.* said nothing about the preclusive effect of claims actually litigated in the summary proceedings. Thus, the "other claims of relief," described in *JAM Corp.* were those claims that "could have been" brought during the summary proceedings, but were not. This Court was not describing subsequent claims involving the issues actually litigated in the summary proceedings.
>
> In the present case, Ms. Sewell sought damages for personal injuries suffered on Mr. Cruse's premises and for damage to personal property. Mr. Cruse says she was a trespasser and that the circuit court should have granted a directed verdict in his favor. We need not decide in this opinion the full effect of the district court's judgment and writ, with respect to the status of Ms. Sewell as she entered the premises or the extent, if any, of Mr. Cruse's duty toward her. However, we do hold that, where the district court judgment and writ have not been reversed or vacated, they are conclusive on the narrow issue whether the eviction was proper.
>
> Unlike *JAM Corp.*, this case presents a question regarding the preclusive effect of a claim

> that was actually litigated in the summary proceeding. Therefore, the limited statutory exception to Michigan's *res judicata* rule does not apply.

Sewell, 463 Mich. at 576-77, 621 N.W.2d at 225 (quotations and citations omitted).

In summary proceedings under Michigan law, the plaintiff — in this case U.S. Bank — has the burden to prove that it has a right to possession of the property. *Rathnaw v. Hatch*, 281 Mich. 402, 404, 275 N.W. 189, 189 (1937). That essential element, therefore, must have been "actually litigated" in the eviction and quiet title proceedings.

Just as in the *Sewell* case, the plaintiffs here seek to recover purported "damages" that flowed from what they allege was a fraudulently instigated eviction. But they are barred from relitigating whether the defendant had the legal standing — that is, had an interest in the property — to obtain its judgment of possession, because that question necessarily was litigated and settled in the summary proceeding.

2.

The plaintiffs did not raise any counter-claim for "fraud" in the eviction case, and such a claim nominally would not be barred by Michigan's rule against claim preclusion (except as noted above), due to the limited application of that concept to summary proceedings for

possession. *See JAM Corp.*, 461 Mich. at 168-69, 600 N.W.2d at 621 (recognizing that "the Legislature took [summary proceedings] cases outside the realm of the normal rules concerning merger and bar in order that attorneys would not be obliged to fasten all other pending claims to the swiftly moving summary proceedings"). However, the plaintiffs are additionally barred from pursuing any such claims here by the application of collateral estoppel (a.k.a. issue preclusion) based on the later quiet title action. That is because all the claims of fraudulent conduct by the defendant expressly were pleaded by the plaintiffs in their complaint in the quiet title suit, which was against defendant's successor in interest, and those claims were dismissed on the merits by the state court and affirmed on appeal.

Under Michigan law, "'[c]ollateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding.'" *Ibid.* (quoting *Leahy v. Orion Twp.*, 269 Mich. App. 527, 530, 711 N.W.2d 438, 441 (2006)). "Unlike *res judicata*, which precludes relitigation of claims, collateral estoppel prevents relitigation of issues, which presumes the existence of an issue in the second proceeding that was present in the first proceeding." *Ibid.* (citations omitted). "'Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity

to litigate the issue; and (3) there must be mutuality of estoppel.'" *Ibid.* (quoting *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 682-84, 677 N.W.2d 843, 845-46 (2004)).

First, there is no question that the judgment in the quiet title action was a valid and final judgment, which was upheld on appeal. The plaintiffs here argue that the claims were different because the Davis "action was one to quiet title based on the existence of two competing title chains, the alleged inferior chain being held by Davis." But as to the specific issue of the propriety of U.S. Bank's institution of the foreclosure, and the validity of its ensuing deed, the factual grounds of the claims in both cases are identical. The plaintiffs thus are estopped from relitigating the merits of the same issue that already was resolved against them when their claims in the Davis case were dismissed with prejudice. Because the claim of superior title actually was raised by the plaintiffs in the quiet title action and determined adversely to them, they are barred from relitigating it here. *In re Dott Acquisition, LLC*, 520 B.R. 588, 607 (Bankr. E.D. Mich. 2014) ("[T]he ownership of the Real Property and Equipment was expressly placed in issue in the counterclaim filed by Dott Acquisition in the Oakland County Lawsuit. Paragraph 58 of the counterclaim sought a declaration that TTOD has no right to maintain any action for the return of the Real Property and Equipment. The issue of ownership was actually litigated in the Oakland County Circuit Court. [T]he issue of ownership of the Real Property and Equipment was necessarily determined, unfavorably to Dott Acquisition, by the express dismissal of Dott Acquisition's counterclaims in the Opinion and

the Judgment."); *Johnston v. Sterling Mortg. & Inv. Co.*, 315 Mich. App. 724, 756, 894 N.W.2d 121, 137 (2016) ("[T]he summary proceeding involved the same parties as the present case (or their privies), the case was decided on its merits, and Appellants raised the argument that Appellees frustrated their attempts to redeem the property; therefore, *res judicata* and collateral estoppel precluded Appellants from bringing the quiet title action."); *Bryan v. JPMorgan Chase Bank*, 304 Mich. App. 708, 716, 848 N.W.2d 482, 486 (2014) ("In this case, the prior eviction involved the same parties as the present case, the case was decided on its merits, and plaintiff raised the argument that the foreclosure was void *ab initio*; therefore, *res judicata* and collateral estoppel precluded plaintiff from bringing this quiet title action."); *Laues v. Roberts*, No. 14-12313, 2015 U.S. Dist. LEXIS 38726, 2015 WL 1412631, at *7 (E.D. Mich. Mar. 25, 2015) ("All of the requirements for issue preclusion are also satisfied in this case, with regard to the Laueses' allegations attacking the validity of the mortgages and fraud in connection with the mortgage loans. That is, those issues were raised and actually litigated in *Laues I*, the determination of those issues was necessary to the outcome of the proceeding, Judge Roberts issued a final judgment on the merits in *Laues I*, and the Laueses had a full and fair opportunity to litigate those issues. Accordingly, the Laueses' claims are barred by both claim and issue preclusion.").

Second, the plaintiffs certainly had a "full and fair opportunity" to litigate the pleaded claims of fraud, which were set out in their complaint in materially identical detail to the claims set forth in their pleadings here.

The plaintiffs counter that they "would not have had factual development sufficient to bring a full fraud claim against Defendant." But that contention is belied by the factual recitations in the quiet title complaint, which are materially identical in substance to their pleadings of U.S. Bank's improprieties described in this case. The plaintiffs alleged in their complaint in the quiet title case that the defendant, Robert Davis, was a "successor-in-interest to the Property through a 'Covenant Deed' provided by [U.S. Bank, N.A.] to Defendant dated February 27, 2014." Compl. ¶ 4, ECF No. 7-12, PageID.230, *Talbot v. Davis*, No. 14-386 (Washtenaw Cty. Cir. Ct. Apr. 21, 2014). The plaintiffs claimed that the "Defendant's Covenant Deed to the Property is invalid and unenforceable," for the verbatim reasons recited in their present complaint, including that the assignment of the mortgage was invalid and not recorded, and that it violated various other statutory and regulatory requirements. Compl. ¶ 5, PageID.230-37. The plaintiffs alleged that their title claim was superior to Davis's due to the defects in the chain of title obtained by U.S. Bank, N.A., which, according to them, invalidated Davis's title. The plaintiffs' claim of superior title was dismissed on the merits by the state court and affirmed on appeal.

Third, the estoppel is mutual because, had the suit gone otherwise, Davis would have been as bound to the result as were the plaintiffs when their claims failed. The plaintiffs point out that the Davis lawsuit involved different parties, since U.S. Bank, N.A. was not named as a defendant, and they argue that Davis was not in privity with U.S. Bank. But the argument that privity does not obtain is contrary to well settled Michigan law.

"In order to find privity between a party and a nonparty, Michigan courts require both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation." *Peterson Novelties, Inc. v. City of Berkley*, 259 Mich. App. 1, 13, 672 N.W.2d 351, 359 (2003) (quotations omitted). It is well settled under Michigan law that in a title contest privity embraces a successor in interest by purchase from a party to a prior action for possession. *Id.* at 13 n.9, 672 N.W.2d at 359 n.9 ("[E]ven if Barman was not the owner at the relevant time, a privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase.") (citing *Wildfong v. Fireman's Fund Ins. Co.*, 181 Mich. App. 110, 448 N.W.2d 722 (1989)). The element of privity is satisfied.

III.

The Court has subject matter jurisdiction over the claims pleaded and the suit is not barred by *Rooker-Feldman*. However, the plaintiffs are barred by claim- and issue-preclusion principles from relitigating the propriety of the defendant's claim to possession and title of their home, which conclusively was settled by the prior actions for eviction and quiet title. Those prior actions, including the pleadings and judgments filed in those cases, are matters of public record properly considered when adjudicating this motion to dismiss under Rule 12(b)(6). Because they are barred from prevailing on an essential

element of their fraud claim, the plaintiffs have not stated a claim for which relief can be granted.

Accordingly, it is **ORDERED** that the defendant's motion to dismiss the complaint (ECF No. 7) is **GRANTED**.

It is further **ORDERED** that the complaint is **DISMISSED WITH PREJUDICE**.

/s/ David M. Lawson
DAVID M. LAWSON
United States District Judge

Date: September 3, 2019

Appendix B

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first-class U.S. mail on September 3, 2019.

s/Susan K. Pinkowski
SUSAN K. PINKOWSKI

APPENDIX C — OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS, DATED DECEMBER 17, 2015

STATE OF MICHIGAN
COURT OF APPEALS

No. 323240

ARTHUR TALBOT, JR. AND KELLEY BEZRUTCH,

Plaintiffs-Appellants,

v

RICHARD A. DAVIS,

Defendant-Appellee.

Washtenaw Circuit Court
LC No. 14-000386-CZ

December 17, 2015

Before: SHAPIRO, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Plaintiffs Arthur Talbot, Jr., and Kelley Bezrutch brought this quiet title action against defendant Richard A. Davis, who subsequently moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court granted defendant's motion. Plaintiffs now appeal as of right. We affirm.

Appendix C

The trial court did not specify whether it granted the motion under MCR 2.116(C)(8) or (C)(10); however, the trial court relied on plaintiffs' failure to redeem the property, which was a fact outside the pleadings. Accordingly MCR 2.116(C)(10) is the appropriate basis for review. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008) ("Where a motion for summary disposi tion is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings . . . MCR 2.116(C)(10) is the appropriate basis for review. "). We review de novo the trial court's decision on a motion for summary disposition. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). "[A] motion under MCR 2.116(C) (0) tests the factual sufficiency ofthe complaint[.]" *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition under MCR 2.116(C)(10) is proper when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

"In an action to quiet title, the plaintiffs have the burden of proof and must make out a prima facie case of title." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Com'n*, 236 Mich App 546, 550; 600 NW2d 698 (1999). Although the property in this case was foreclosed on and the redemption period expired, plaintiffs nevertheless argue that they have a continuing interest in the property, which is evidenced by a post-foreclosure assignment. However, it is undisputed that plaintiffs fell behind in their payments, US Bank

initiated foreclosure, US Bank purchased the property, US Bank was issued a sheriff's deed, and plaintiffs failed to redeem the property. Accordingly, plaintiffs' interest in the property was extinguished. See *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 714; 848 NW2d 482 (2014) (explaining that once the redemption period expires, the mortgagor's "rights in and title to the property [are] extinguished"). Therefore, plaintiffs cannot make a prima facie showing of their interest, *Beulah Hoagland Appleton Qualified Personal Residence Trust*, 236 Mich App at 550, and the trial court properly granted defendant's motion for summary disposition.[1]

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

1. In reaching our conclusion, we note that even if plaintiffs' argument that the assignment was invalid had merit, because the foreclosure extinguished their rights to the property, the foreclosure would have to be set aside before plaintiffs could show that they still had an interest in the property. And, on appeal, plaintiffs adamantly argue that they are not challenging the underlying foreclosure.