NOT RECOMMENDED FOR PUBLICATION

No. 22-1917

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 22, 2023
DEBORAH S. HUNT, Clerk

MALKA LEEAL,

Plaintiff-Appellant,

v.

NEWREZ LLC, dba Shellpoint Mortgage Servicing; FEDERAL NATIONAL MORTGAGE ASSOCIATION; DITECH FINANCIAL LLC, fka Green Tree Servicing, LLC,

Defendants-Appellees.

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

ORDER

Before: NORRIS, SILER, and MURPHY, Circuit Judges.

In this civil action, Malka Leeal, proceeding pro se, appeals the district court's grant of the defendants' motion for summary judgment based on res judicata. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because the elements of res judicata are met, we affirm.

This case is another attempt by Mrs. Leeal to prevent the foreclosure of the home previously owned by her and her late husband, Mati Leeal, who was a party to the case before being dismissed upon Mrs. Leeal's motion after his death. In 2007, to purchase the property, the Leeals took out a $301,000 loan, which was memorialized by a Note (signed by Mr. Leeal only) that was secured by a Mortgage (signed by both Mr. and Mrs. Leeal), from CitiMortgage, Inc. ("CMI"). CMI, at that time, went by the name of ABN AMRO Mortgage Group, Inc. (ABN AMRO). Defendant Federal National Mortgage Association (Fannie Mae) then purchased the

Note from CMI. For several years, CMI remained the loan's servicer. In April 2014, though, CMI assigned both the servicing rights and the Mortgage to Green Tree Servicing, LLC (Green Tree).

On May 7, 2015, the Leeals filed a declaratory judgment action in state court against CMI and ABN AMRO to determine whether, among other things, the Note was void and whether they were obligated to make payments to CMI or ABN AMRO under the Note or Mortgage. But at that time, neither CMI nor ABN AMRO had any connection to the Mortgage or Note. As detailed above, the Note was owned by Fannie Mae and the Mortgage had been assigned to Green Tree, which continued to service the loan and accept loan payments from the Leeals. While the state court action was pending, Green Tree merged into defendant Ditech Financial, LLC (Ditech), which then began accepting loan payments from the Leeals.

On September 16, 2015, the state trial court entered default judgment against CMI and ABN AMRO because they failed to appear. The Leeals then, despite receiving notices of default from Ditech, stopped making payments on their loan. Consequently, on January 26, 2017, Ditech commenced foreclosure proceedings. While foreclosure proceedings were pending, the Leeals sued Ditech in state court, claiming that it could not foreclose on their Mortgage in view of the judgment entered in the state court action that, according to the Leeals, voided the Note that was secured by the Mortgage. In March 2020, after the case had been removed to the district court, summary judgment was entered in favor of Ditech. *Leeal v. Ditech Financial, LLC*, No. 2:17-cv-10645, 2020 WL 1066100, at *1 (E.D. Mich. Mar. 5, 2020). The district court reasoned that the default judgment entered against CMI and ABN AMRO—two uninterested parties—in the state court action "does not extinguish the actual note owner's valid ownership interest in the note, does not bar the note owner from enforcing the note, and does not bar Ditech from foreclosing on the mortgage that secures the note." *Id.* We affirmed. *Leeal v. Ditech Fin., LLC*, 849 F. App'x 144 (6th Cir. 2021).

Meanwhile, Ditech filed for Chapter 11 bankruptcy. New Residential Investment Group purchased some of Ditech's mortgage assets, including the Leeals' Mortgage; as a result, the Mortgage was assigned to defendant NewRez, LLC d/b/a/ Shellpoint Mortgage Servicing (Shellpoint). Shellpoint pursued foreclosure proceedings by publishing notices of sales and

scheduled the foreclosure sale for November 30, 2021. However, the day before the scheduled sale, the Leeals filed this action against Shellpoint, Fannie Mae, and Ditech in state court, alleging, on the whole, that there is a lack of documentation as to who owns their Note and Mortgage and that Fannie Mae has no "permission to foreclose." The complaint brought claims for "illegal foreclosure by advertisement" and violations of Michigan Compiled Laws § 600.3204 and sought injunctive relief to halt the foreclosure sale. After the state court entered an order maintaining the status quo of the foreclosure proceedings, the case was removed to the district court on the basis of diversity jurisdiction.

The Leeals and the defendants filed cross-motions for summary judgment. Over Mrs. Leeal's objections, the district court adopted a magistrate judge's recommendation to grant the defendants' motion based on res judicata. Thereafter, the district court denied Mrs. Leeal's motion for reconsideration.

We review de novo both a grant of summary judgment, *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014), and the application of res judicata, *Prod. Sols. Int'l, Inc. v. Aldez Containers, LLC*, 46 F.4th 454, 457 (6th Cir. 2022). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

In diversity cases, we apply the res judicata rules of the state in which the federal diversity court sits. *See Prod. Sols. Int'l*, 46 F.4th at 457-58. Here, that is Michigan, which takes a "broad approach to the doctrine of res judicata." *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004). The doctrine "bars a second, subsequent 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." *Id.*

Res judicata bars review of Mrs. Leeal's claims. First, the prior federal action—which, contrary to Mrs. Leeal's argument, was filed by both her and Mr. Leeal—was decided on the merits when the district court granted summary judgment in favor of Ditech. That decision was final and was affirmed by this court.

Second, both the prior federal action and the present action were asserted against Ditech. Although the present action is also asserted against Shellpoint and Fannie Mae, Mrs. Leeal does not dispute that those entities are in privity with Ditech. The Mortgage was purchased from Ditech and assigned to Shellpoint, making Shellpoint a successor in interest for res judicata purposes. And in the prior federal action, a Fannie Mae employee attested that Fannie Mae was the current owner of the loan and that Ditech was the loan's servicer at that time, making Fannie Mae a nonparty who was "adequately represented" by a party (Ditech) to the original suit. *Adair*, 680 N.W.2d at 397.

Third, the issues raised in the present action were resolved, or could have been resolved, in the prior federal action. In the prior federal action, the district court determined—and we affirmed—that Ditech, then the loan servicer and holder of the Mortgage, could lawfully foreclose on the Mortgage notwithstanding the prior state-court default judgment, which rendered the Mortgage void between only the Leeals and CMI and ABN AMRO, not the Leeals and Ditech. *Leeal*, 2020 WL 1066100, at *1, *4-7; *see Leeal*, 849 F. App'x at 145-46. In the present action, the Leeals sought relief barring the defendants from continuing with foreclosure proceedings because the documents allegedly do not specify that the defendants have the authority to do so. In other words, in both cases, the Leeals maintained that the defendants could not lawfully foreclose on their Mortgage and residential property and attempted to prevent them from doing so. Inasmuch as the present complaint challenges the same conduct—i.e., alleged unlawful foreclosure proceedings—that the Leeals challenged in the prior federal action, the claims raised in their present complaint could have been raised in that action. The district court therefore properly determined that Mrs. Leeal's claims are barred by res judicata.

None of the arguments that Mrs. Leeal raises on appeal alters this conclusion. Her arguments all hinge on the premise that res judicata does not apply because (1) she did not sign the Note and signed the Mortgage only as a "dower, a non-borrower" and (2) Mr. Leeal—not she—is liable for the loan's debt, which she claims was "extinguish[ed] upon [his] death." We disagree. While Mrs. Leeal repeatedly argues that she did not sign, is not a borrower to, and is not liable on the Note, she could have—and should have—raised that argument in the prior federal action. *See*

Adair, 680 N.W.2d at 398. In any event, Mrs. Leeal is bound by the terms of the Mortgage that she signed—i.e., the instrument that creates a security interest in the residential property and gives Shellpoint the authority to foreclose. True, Mrs. Leeal is not liable for the loan's indebtedness, but, as aptly stated by the district court, "the fact that Mrs. Leeal was not herself obligated to repay the *Note* has no bearing on Shellpoint's right or ability to foreclose on the *Mortgage*." So even if the loan's debt was "extinguish[ed] upon [Mr. Leeal's] death"—an assertion for which Mrs. Leeal provides no legal authority in support—Mrs. Leeal was bound by the terms of the Mortgage, including its terms that give Shellpoint the right to foreclose.

Finally, Mrs. Leeal argues that she has a "new claim" that arose after Mr. Leeal's death and that is not barred by res judicata because it was not "ripe" at the time of the prior federal action. But if so, then she should have sought leave to amend her *complaint*—which she filed with Mr. Leeal while he was alive—as opposed to leave to amend the *case caption*. *See* Fed. R. Civ. P. 15(a)(2). She did not and cannot do so now. *See Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994) (concluding that the plaintiffs' argument that they should have been allowed to amend their complaint was not properly before this court because they "never requested leave to amend their complaint" in the district court).

Because Mrs. Leeal's claims are barred by res judicata, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-1917

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 14, 2023
DEBORAH S. HUNT, Clerk

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NEWREZ LLC, dba Shellpoint Mortgage Servicing; FEDERAL NATIONAL MORTGAGE ASSOCIATION; DITECH FINANCIAL LLC, fka Green Tree Servicing, LLC,)
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Defendants-Appellees.)
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Before: NORRIS, SILER, and MURPHY, Circuit Judges.

Malka Leeal, proceeding pro se, petitions for rehearing of this court's order that affirmed the district court's grant of the defendants' motion for summary judgment based on res judicata. She also moves to expand the record.

Upon consideration, this court concludes that it did not misapprehend or overlook any point of law or fact when it affirmed the district court's judgment. *See* Fed. R. App. P. 40(a). Therefore, the motion to expand the record and the petition for rehearing are **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk