No. 102A20-3 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County

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DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The clock on a statute of limitations starts running "as soon as the injury bec[o]me[s] apparent . . . or should reasonably have become apparent." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 6 (2017). In this case, on the face of their complaint, Plaintiffs alleged injuries from "improper denial of loss mitigation relief" and "unlawful . . . foreclosures" dating back to 2011. R pp 213, 222, 228, 237, 245, 253, 260, 268, 276, 287. They make no claim these alleged harms were not "apparent" to them at the time, nor could they.

Rather, Plaintiffs contend the clock did not start running on their claims until they hired their current attorneys, who told them those allegedly "improper denial[s]" and "unlawful . . . foreclosures" were part of a "massive, fraudulent scheme." *Id.*; Pls. New Br. p 11. But consultation with counsel is not required to trigger the running of the statute of limitations in North Carolina or any other state. Rather, the statute begins to run with a plaintiff's knowledge of their alleged *injuries*, which for these Plaintiffs occurred at the latest in 2011, 2012, and January 2014. *See* Defs. New Br. p 36. Plaintiffs filed this case in May 2018, well after the statutes of limitation had run.

Their New Brief opens with a lurid account of the "scheme" their attorneys have been (unsuccessfully) accusing Bank of America of orchestrating in numerous lawsuits dating back to 2016. Plaintiffs say they could not have discovered or even suspected this scheme without their attorneys. Pls. New Br. p 11; Defs. New Br. pp 11–14. For the record, the reason Plaintiffs did not "discover" this "massive, fraudulent scheme" earlier is that it didn't happen—there was no fraud, no scheme. But none of that is at issue here. The Superior Court took the fraud allegations as true at the pleading stage, and still ruled that Plaintiffs could not clear the threshold bars imposed by the statutes of limitations and *res judicata*—as did the Court of Appeals in its initial affirmance.

The second Court of Appeals panel reversed on grounds Plaintiffs now concede are erroneous. "[T]he determination of *when* Plaintiffs became aware of the fraud will be dispositive," the majority held, without citation. *Taylor v. Bank of Am., N.A.*, No. 2022-NCCOA-912, slip op. ¶ 9 (Dec. 29, 2022) ("*Taylor III*"). Not so, Bank of America pointed out, because it is when the claim "should have been discovered in the exercise of ordinary diligence," not actual awareness, that controls. Defs. New Br. pp 31–34. Plaintiffs now agree that dismissal is proper even if they were

unaware of their claims, so long as their complaint shows they had the "opportunity to discover the[m] at an earlier date." Pls. New Br. p 22. That concession alone justifies reversing the Court of Appeals.

When Plaintiffs originally appealed the dismissal, they based their argument on the notion that the Superior Court somehow went beyond "the four corners of the [c]omplaint." Pls.-Appellants' Br., No. COA20-160, pp 9, 23 n.3, 25, 25 n.4, 27. But now, faced with the showing in Bank of America's brief that all the facts establishing the time bar are plainly alleged right on the face of the complaint, Plaintiffs jettison all their "four corners" protestations. Their New Brief is thus reduced to a series of misstatements of law, all contrary to clear precedent, and multiple attempts to dodge the consequences of their own factual allegations.

For example, Plaintiffs say "[t]he Bank is wrong" to argue that their claims accrued upon their knowledge of their alleged injury. Pls. New Br. p 10. But *Christenbury*'s holding that "the cause of action arises" with the plaintiff's "notice of its injury" confirms Bank of America is right. 370 N.C. at 6. Plaintiffs say their "relationship" and "confidence" in the bank relieved them of their duty of inquiry. Pls. New Br. p 34. But *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 366 (2014), holding no such relationship

exists in an arm's-length mortgage refinancing, and *Doe v. Roman Cath. Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015), holding that a "special relationship" does not relieve parties of their duty of inquiry anyway, both establish otherwise. Plaintiffs now say the duty of inquiry couldn't have arisen with their foreclosures because the foreclosures are not "the injury in question." Pls. New Br. p 35. But Plaintiffs' own allegations of "injury" from "unlawful . . . foreclosures" establish otherwise. R p 287.

The notion that Plaintiffs needed their current attorneys to discover their fraud narrative is not a valid basis for avoiding the time bar. Plaintiffs have never cited any legal support for that theory; Bank of America has cited multiple cases rejecting it. Defs. New Br. pp 46–52. It fails both as a matter of law and as a matter of conceded fact, given Plaintiffs' allegations that their fraud narrative is based entirely on material their attorneys found in the public domain dating to 2011, 2012, and 2013. Thus, by their own account, their late filing of this case simply reflects their late retention of counsel, not their sudden discovery of anything "covert" or "purposely hid." Pls. New Br. pp 13, 16. The Superior Court, the original Appeals panel, and Judge Dillon's dissent were all

correct in holding this insufficient to avoid the time bar.

The new majority's ruling to the contrary should be reversed.

ARGUMENT

I.

Plaintiffs' Effort to Evade North Carolina's Door-Closing Statute Is Meritless, and Comes Too Late.

The first question to be addressed in assessing whether a claim is barred by a statute of limitations is *which* statute of limitations applies. From the Superior Court, through the Court of Appeals, and through their prior briefing in this Court, Plaintiffs consistently maintained that only "North Carolina law applies" to each Plaintiff's claims, and never argued their claims were timely under their home states' laws.[1]

Bank of America has, with equal consistency, invoked North Carolina's door-closing statute, N.C.G.S. § 1-21. It provides that "no action may be maintained in the courts of this State" if it "arose outside of this State and is barred by the laws of the jurisdiction in which it arose." *See*, *e.g.*, R p 745. Under N.C.G.S. § 1-21, Bank of America established (i) that each Plaintiffs' claims "arose" in their respective

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[1] R, *passim*; Pls. Reply Br., No. COA20-160, p 6 (filed Aug. 14, 2020); Pls. New Br., No. 102A20-2, *passim* (Mar. 29, 2022).

home states (Def. New Br. p 26), and (ii) that their claims are "barred by the laws of [each] jurisdiction" by reference to their respective statutes of limitations and tolling rules (*id.* pp 34–46).

In their current New Brief, Plaintiffs concede the former point and make no effort to contest that their claims "arose" in their respective home states. *See* Pls. New Br. pp 38–39. Instead, they argue for the very first time that "none of the Plaintiffs-Appellees' claims are barred by any of the relevant states' laws." *Id.* at 39.

But Plaintiffs never took this position until reaching this Court, and therefore waived it. *See* Def. New Br. p 27; *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309 (2001) ("issues and theories of a case not raised below will not be considered on appeal"). Indeed, they waived it three times over. First, they failed to assert it in the Superior Court. Then, they failed to assert it in the Court of Appeals, even after the original panel held that "the applicable statutes of limitation" are those of Plaintiffs' home states, and Plaintiffs petitioned for rehearing without making any mention of this as a point of law the Court misapprehended or as ground for rehearing. *Taylor v. Bank of Am., N.A.*, No. COA20-160, slip op. at ¶ 5 (N.C. App. Dec 31, 2020) ("*Taylor I*");

see Pet. for Reh'g, No. COA20-160 (filed Feb. 4, 2021); Def. New Br. p 27 (citing N.C. R. APP. P. 28(b)(6) and 31(c) for the proposition that rehearing is limited to "points suggested in the petition"). Lastly, Bank of America expressly raised the waiver issue in its New Brief, but Plaintiffs conceded the point by leaving the argument unaddressed. *See* N.C. R. APP. P. 28(a).

Even if not waived, Plaintiffs' argument that their claims are timely under each "of the relevant states' laws" falls short. Plaintiffs limit their argument to asserting that "none of the Plaintiffs[]' home states have a statute of limitations shorter or more restrictive than North Carolina's," citing limitations periods between three and six years. Pls. New Br. p 39. But that's beside the point: Plaintiffs did not actually bring their claims *within* these three- to six-year periods. *See* Def. New Br. p 36. Rather, Plaintiffs seek shelter under the discovery rule or the fraudulent-concealment doctrine. And with the sole exception of a footnote conceding that Michigan law rejects the former (Pls. New Br. p 39 n.9), Plaintiffs are silent on each state's legal standards governing those doctrines.

This silence alone is conclusive. Plaintiffs have never argued that the discovery rule or fraudulent concealment applies under the laws of any state but North Carolina, and do not do so now, either. Except for

Mr. Taylor (the lone North Carolinian), this is the end of the road for Plaintiffs. They cannot ask this Court to hold their claims timely under laws they never argued. The Court need not go any further than this to reinstate the dismissals.

II.

Plaintiffs' Claims Are Time-Barred Under All Applicable Laws.

Lacking any counterargument to generations of binding precedent from this Court and others holding that a statute of limitations starts running "upon discovery of an injury," *Christenbury*, 370 N.C. at 2, Plaintiffs try to re-frame this case as a dispute about the pleading standard for fact allegations, rather than about the applicable law. Specifically, Plaintiffs excavate an archaic and incomplete statement of the Rule 12(b)(6) pleading standard to argue that their complaint should not be dismissed "unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim." Pls. New Br. p 23. That language does not capture key pleading requirements recognized in this Court's precedents. But even if it did, the question naturally implied is *what* set of facts Plaintiffs contend they can prove that would get them around the statutes of limitations. Plaintiffs never endeavor to answer

this question straightforwardly, but strands of an answer are laced throughout their brief. Each fails as a matter of law to establish any legal right to avoid the applicable statutes of limitations, even under the most generous expressions of the pleading standard.

A. Plaintiffs' arguments based on the "no set of facts" standard are unavailing.

In arguing that their complaint should not be dismissed unless it is "beyond doubt that [Plaintiffs] could prove no set of facts in support of [their] claim[s]" (Pls. New Br. at 23), Plaintiffs avail themselves of the most lenient-sounding description of the Rule 12(b)(6) pleading standard available. But it is incomplete. This Court has also established:

> A complaint is properly dismissed pursuant to Rule 12(b)(6) (1) when the complaint on its face reveals that no law supports the plaintiff's claim; (2) when the complaint reveals on its face the absence of facts sufficient to make a claim; or (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim.

United Daughters of the Confed. v. City of Winston-Salem, 383 N.C. 612, 624 (2022) (internal quotation marks and brackets omitted). This statement of the standard, dating to *Oates v. JAG, Inc.*, 314 N.C. 276, 279 (1985), and *Mozingo v. N.C. Nat'l Bank*, 31 N.C. App. 157, 162 (1976), adds important qualifications to the pleading standard not captured by the "no set of facts" language standing alone. *See Schloss Outdoor Advert.*

Co. v. City of Charlotte, 50 N.C. App. 150, 152 (1980) (quoting both). And a LEXIS search shows that North Carolina's courts employ this version of the standard more than three times as often as the "no set of facts" version.

The "no set of facts" language first appeared in this Court in *Sutton v. Duke*, 277 N.C. 94, 102–03 (1970). But it did not originate in North Carolina law. Rather, *Sutton* was referencing what "Mister Justice Black said, in *Conley v. Gibson*," 355 U.S. 41 (1957), and did so on the theory that "since the federal . . . rules are the source of NCRCP, we will look to the decisions of [those] jurisdictions for enlightenment and guidance." 277 N.C. at 101–02. Any current reference to federal guidance in that spirit, however, could not overlook that the U.S. Supreme Court repudiated *Conley*'s "no set of facts" language as something "best forgotten as an incomplete, negative gloss on an accepted pleading standard" which "has been questioned, criticized, and explained away long enough." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007); *see also Intersal, Inc. v. Hamilton*, 373 N.C. 89, 98 (2019) (calling *Conley* "abrogated" by *Twombly*).

The problem the Court identified was that "[t]his 'no set of facts'

language can be read in isolation" to permit "a wholly conclusory statement of claim [to] survive a motion to dismiss" even if the factual basis for recovery is "undisclosed." *Id.* at 561. That would offend Rule 8(a)'s requirement that the complaint contain a "statement . . . showing that the pleader is entitled to relief." *Id.* at 557. It is, however, not necessary for this Court to "adopt[] the 'plausibility standard' set forth in *Bell Atlantic*" (*Holleman v. Aiken*, 193 N.C. App. 484, 491 (2008)) to avoid this result, because it is *also* not necessary to read *Conley* "in isolation." This Court's existing precedents already hold that conclusory allegations cannot spare a complaint from dismissal when the complaint suffers from an "absence of facts sufficient to make a claim." *Oates*, *supra.*

Importantly, even when this Court has referenced the "no set of facts" language, it left no doubt that Rule 12(b)(6) allows for dismissal on limitations grounds. The very first example in *Sutton*'s collection of "cases [] illustrative of the circumstances" in which a complaint can be dismissed under Rule 12(b)(6) was a case where the "complaint revealed [the] action was barred by [the] statute of limitations." 277 N.C. at 103. And, as noted in Bank of America's New Brief, a century's worth of precedents uphold dismissals on limitations grounds at the pleading

stage, from *Latham v. Latham*, 184 N.C. 55 (1922), through *Christenbury*, 370 N.C. at 1—even when plaintiffs argue that the statute is tolled by belated discovery of alleged frauds. *E.g.*, *Latham*, 184 N.C. at 63–64 (plaintiffs' "general averment" about belated "discovery of the facts" "is entirely insufficient to repel the bar of the statute or to raise any issue concerning it"). This case is no different.

B. Plaintiffs furnish *no* "set of facts" capable of evading the time bar.

All this Court need do to reinstate the Superior Court's and the original Court of Appeals panel's dismissal of this action is, first, assess what "set of facts" Plaintiffs proffer as making their claims timely, and, second, note the "fact[s] disclosed in the complaint [which] necessarily defeat[]" the claim. *Oates*, *supra*. As discussed below, Plaintiffs allege that, by 2013, each of them had (1) been denied loan modifications for which they claim they had satisfied all requirements and (2) gone through foreclosures. These alleged harms put them on inquiry notice of their claims, and if there were any basis to blame these outcomes on fraud or any other wrongful conduct, they were obliged to investigate it then. None of their efforts to deny this principle or to excuse their failure to act are supported by the law or by the facts affirmatively pled in the

complaint.

1. Plaintiffs' professed ignorance of their claims is irrelevant.

Plaintiffs argue that their "assertion of when they discovered the bank's [alleged] fraud is sufficient to establish the date from which the statute of limitations began to run." Pls. New Br. p 29. Not so. As already shown, the relevant date for when a statute of limitations begins to run is "the time when the [alleged] fraud [] was known *or should have been discovered in the exercise of ordinary diligence*." *Peacock v. Barnes*, 142 N.C. 215, 218 (1906) (emphasis added); Def. New Br. pp 31–34 (collecting cases from each relevant jurisdiction, *e.g.*, *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 927 (Cal. 1988) ("A plaintiff is held to her actual knowledge as well as knowledge that *could reasonably be discovered through investigation of sources open to her*.") (emphasis added). Accordingly, Plaintiffs' professed ignorance of their claims at any point of time is irrelevant if they *could* have discovered them sooner.

The second Court of Appeals panel therefore erred in holding that "the determination of *when* Plaintiffs became aware of the [alleged] fraud will be dispositive," when firmly established precedent holds that the dispositive fact is *not* when Plaintiffs "became aware" but when they

"should have" become aware. Def. New Br. 31. Plaintiffs *admit* this, conceding dismissal is proper if there is "evidence on the face of the complaint that the Plaintiffs[] had the capacity and opportunity to discover the [alleged] fraud at an earlier date." Pls. New Br. p 22.

Despite this admission, Plaintiffs *elsewhere* argue that a boilerplate assertion that "the plaintiffs . . . did not discover fraud until" a later date is enough to survive a motion to dismiss. Pls. New Br. p 29 (citing *Jennings v. Lindsey*, 69 N.C. App. 710, 715 (1984)). That is contrary not just to their own admission, but to the precedents Bank of America cited in which complaints making the identical assertion did *not* survive motions to dismiss. *See* Def. New Br. pp 37–39. In *Christenbury*, for example, the plaintiff also tried to plead unawareness of a fraud, but this Court upheld the dismissal of its claims as time-barred because the "plaintiff's own allegations" established it "had notice of its injury" sooner. 370 N.C. at 5.

The *Jennings* case Plaintiffs cite is not a counter-example. *Jennings* does not specify what facts the plaintiffs there alleged to support their assertion "that they did not discover the alleged fraud until September 1981." 69 N.C. App. at 716. But there is nothing in the opinion to suggest

it was a conclusory allegation like Plaintiffs' here (much less a claim like Plaintiffs' here that the limitations period commences with the retention of counsel). To the contrary, *Jennings* recognized the very legal standard Plaintiffs seek to evade—that "where a person is aware of facts and circumstances which, in the exercise of due care, would enable her to learn of or discover the [alleged] fraud, the fraud is discovered for purposes of the statute of limitations. 'The law regards the means of knowledge as the knowledge itself.'" *Id.* at 715 (*quoting Vail v. Vail*, 233 N.C. 109, 116 (1951)). It was Plaintiffs' knowledge of their injury and *ability* to bring suit at the time of their foreclosures that bars their claims. Whether they had actual knowledge of their current fraud theories at that time is immaterial.

Plaintiffs argue that the text of North Carolina's statute of limitations says otherwise—that because the claim accrues upon "the discovery . . . of the facts constituting the fraud," N.C.G.S. § 1-52(9), any supposed "facts" their attorneys might pepper into their fraud narrative were not "discover[ed]" until their attorneys were hired. Even if there were merit to this theory, it couldn't assist the 12 out-of-state Plaintiffs whose claims did not arise under North Carolina law. But there is no

merit to it.

The flaw in Plaintiffs' argument is that they are parsing the wrong phrase. This case does not turn on parsing the phrase "facts constituting the fraud"—it turns on the meaning of the word "discovery." *Christenbury* was applying N.C.G.S. § 1-52(9) when it held that "discovery" is not limited to actual knowledge, but also encompasses inquiry notice triggered by the "discovery of an injury." 370 N.C. at 2, 7 n.4. The statutory phrase "discovery . . . of the facts constituting the fraud" just means discovery of facts that would put a party on inquiry notice. *See*, *e.g.*, *Blankenship v. English*, 222 N.C. 91, 92 (1942) ("plaintiffs had information of the facts constituting the alleged fraud" when they knew "enough to put them on inquiry," because "the rule is that such notice carries with it a presumption of knowledge of all a reasonable investigation would have disclosed").

2. Plaintiffs' professed inability to discover their claims sooner is conclusory and refuted on the face of the complaint.

Plaintiff's concession that their claims should be dismissed if there is "evidence on the face of the complaint that the Plaintiffs[] had the capacity and opportunity to discover the [alleged] fraud at an earlier

date" (Pls. New Br. p 22) can end the Court's inquiry. The face of the complaint *does* contain allegations showing that Plaintiffs were capable of discovering their claims years earlier, and an "absence of facts" necessary to support any inference they *weren't* so capable. *Oates*, *supra*.

Specifically, Plaintiffs say they "discovered" their claims "at the time they consulted with counsel." Pls. New Br. p 21. But the complaint makes *no* allegations that they were incapable of consulting with counsel years earlier. This is a fatal omission. If Plaintiffs concededly had the ability to consult with counsel in 2016 and 2017, when their current attorneys began representing them (*see* R pp 214, 222, 229, 237, 243, 249, 254, 258, 266, 275), on what basis can the Court infer that they *lacked* the ability to consult with counsel in 2011, 2012, and 2014, when they were allegedly "denied [] HAMP modification[s]" and facing foreclosure? *See* R pp 213, 220, 222, 227, 228, 235, 237, 244, 245, 252, 253, 259, 260, 267, 276. The complaint discloses none.

The complaint *also* reveals on its face *what* Plaintiffs "discovered" when they "consulted with counsel." Pls. New Br. p 21. All of it is material Plaintiffs' counsel found in the public domain, dated 2011, 2012, and 2013, consisting of the National Mortgage Settlement and the claims

made in the *HAMP MDL*. *See* Def. New Br. at 43–44; R pp 201–02, 207. The only reason Plaintiffs did not "discover[]" this material until 2016 and 2017 is because that's when they retained their current lawyers. Had they sought counsel sooner, they would have "discovered" it sooner. This is fatal. "A general allegation of ignorance at one time and of knowledge at another time are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." *Wood v. Carpenter*, 101 U.S. 135, 140–41 (1879). Plaintiffs' complaint is bereft of any explanation "why" information discoverable in 2016 was not discoverable sooner. *Id*.

Recognizing this, Plaintiffs try to deny that that their fraud theory is wholly based on matters in the "'public record' by 2013." Pls. New Br. p 35. They say they *also* base their claims on a "January 27, 2017 SIGTARP Quarterly Report." *Id*. This does not do the job Plaintiffs need it to do. It's true that the report criticizes Bank of America's HAMP "track record" (among numerous other banks), but according to Plaintiffs' own pleadings, the report bases that criticism on the "investigation" that "led to a 2012 Department of Justice agreement with Bank of America" (R p 172)—*i.e.*, the same National Mortgage Settlement that's been public

since 2012. So Plaintiffs' reliance on the 2017 report is just another example of Plaintiffs' trying "to keep the statute of limitations suspended by finding new people to repeat the same information that has been available for more than four years." *Torres v. Bank of Am., N.A.*, No. 17-1534, 2018 WL 573406, at *5 (M.D. Fla. Jan. 26, 2018).[2]

3. Allegations that Plaintiffs needed legal counsel to discover their claims carry no weight.

Plaintiffs' primary argument for avoiding the statutes of limitations is that they needed to "consult[] with counsel" to discover their claims. Pls. New Br. p 35. Bank of America has cited an array of case law rejecting this proposition as a matter of law. *See* Def. New Br. pp 46–50. This includes cases dismissing other versions of Plaintiffs' own complaint. *E.g.*, *Mandosia v. Bank of Am., N.A.*, 794 F. App'x 623, 624-25

[2] Similarly, Plaintiffs say the report accused Bank of America of denying "79% of all who applied for HAMP." Pls. New Br. p 36 (quoting R p 172). That is not a revelation of fraud. In any event, it does not entitle Plaintiffs to an inference that nobody was "aware of the results until January 2017." *Id.* The Court can take judicial notice that Bank of America's modification and denial rates have been published quarterly since HAMP's inception. *See* U.S. Dep't of Treasury, Making Home Affordable Program Performance Report, *https://home.treasury.gov/data/troubled-assets-relief-program/reports/making-home-affordable-program-performance-report*. That they were *repeated* in a 2017 report changes nothing. And Plaintiffs obviously (and concededly) didn't need to wait until 2017 to know *they* had been declined for HAMP.

(9th Cir. 2020) (rejecting argument that plaintiff's "fraud claim did not accrue until she learned about the fraud, *i.e.*, when she read a law firm advertisement posted by her attorneys"). Plaintiffs do not cite *any* case going the other way. *See* Pls. New Br., *passim*. But this theory remains the linchpin of their argument.

The argument fails because the duty to conduct a reasonably diligent investigation *includes* a duty to seek professional advice, if professional advice is needed. *See*, *e.g.*, *United States v. Kubrick*, 444 U.S. 111, 122 (1979) (once a plaintiff knows "he has been hurt," "[t]here are others who can tell him if he has been wronged, and he need only ask"); *Taylor v. Bank of Am., N.A.*, No. 2021-NCCOA-556, slip op. ¶ 17 (N.C. App. Oct. 5, 2021) ("*Taylor II*") (Dillon, J., dissenting; citing *Kubrick*); *Peacock*, 142 N.C. at 219 ("the means of knowledge is equivalent to knowledge").

It also fails given Plaintiffs' affirmative allegations about exactly *what* they needed their counsel to tell them. By Plaintiffs' own account, they were fully aware, long before retaining counsel, of various "frustr[ations]" with the application process, such as requests to "resubmit" documents they had already submitted, requests to keep

making trial payments for months beyond the point they thought they should have been offered permanent modifications, and alleged "wrongful[] deni[als]" of their HAMP applications even though they "qualified for HAMP." *See*, *e.g.*, R pp 199, 211–13; Def. New Br. pp 16–17. They were also, of course, aware of their subsequent foreclosures.

Their counsel's contribution was to take these known facts, tell Plaintiffs they were victims of intentional fraud and that "BOA never intended to approve Plaintiffs for HAMP" (R p 288), and advise them to join their lawsuits. But fitting already-known facts into a particular legal theory, or putting the most sinister new spin on those facts, does not constitute a "discovery" for limitations purposes. The limitations clock starts running when the plaintiff has cause to "at least suspect[] a factual basis, as opposed to a legal theory," "even if he lacks knowledge thereof," and "need not know the specific facts necessary to establish the cause of action." *Norgart v. Upjohn Co.*, 981 P.2d 79, 88 (Cal. 1999). Thus, Plaintiffs' counsel's contribution of a "legal theory" or even "specific facts" on top of the ones already known to Plaintiffs is irrelevant. All these "facts" and "theor[ies]" are things Plaintiffs could have been advised of sooner, had they discharged their duty of inquiry sooner.

4. Speculation that Plaintiffs lacked access to the public realm is also irrelevant.

Plaintiffs further contend that the Court should give them the benefit of an inference that they had no "capacity or opportunity" to discover their claims sooner because "[t]he Amended Complaint does not reveal whether Plaintiffs[] have access to a television, computer, or internet nor does it reveal whether Plaintiffs[] were aware of any news reports or previously filed litigation about HAMP." Pls. New Br. pp 28–29. As already discussed, Plaintiffs' reference to what they were actually "aware of" is irrelevant—what matters is what they "could" have discovered, if they inquired. *Jolly*, *supra*.

So all Plaintiffs are left with is speculation that *unalleged* facts might establish some diminished capacity to inquire. At bottom, this is simply a variation of their advice-of-counsel argument—now saying they not only needed to rely on counsel to plead the specifics of a fraud claim, but *also* needed to rely on counsel to do any investigation at all. And it fails for the same reason—if Plaintiffs needed investigative help, they were obligated to seek it before the statutes of limitations lapsed.

The duty of inquiry is "an objective test" that "looks . . . to what a reasonable inquiry would have revealed," "independently of a particular

plaintiff's subjective knowledge." *Mills v. Forestex Co.*, 108 Cal. App. 4th 625, 648–49 (Cal. Ct. App. 2003); *accord*, *e.g.*, *Doe v. Archdiocese of Milwaukee*, 686 N.W.2d 455 (Wis. Ct. App. 2004) ("the reasonable-diligence test is objective"), *aff'd*, 700 N.W.2d 180 (Wis. 2005). The whole point of embedding a "duty to inquire" into "the duty to exercise reasonable diligence" (*Doe*, *supra*) is to make subjective matters like Plaintiffs' news-reading or web-surfing habits irrelevant. If they do not know what was in the news, they are obliged to "ma[k]e the necessary effort to learn," and are "chargeable with all the knowledge" they would have picked up. *Blankenship*, 222 N.C. at 92; *accord*, *e.g.*, *Thorpe v. DeMent*, 69 N.C. App. 355, 361 (1984), *aff'd*, 312 N.C. 488 (1984).

5. Plaintiffs' efforts to evade their duty of inquiry are unavailing.

Nowhere in their brief do Plaintiffs dispute that they had a duty to inquire. Bank of America's brief identified multiple events alleged in the complaint that put Plaintiffs under a duty of inquiry, beginning with Plaintiffs' complaints about the handling of their HAMP applications, continuing through what they allege (without foundation) to be "wrongful[] deni[als]" of those applications, and culminating in the alleged foreclosures or short sales. *See* Def. New Br. pp 35–43. Even

Plaintiffs make such admissions, claiming they "repeatedly raised questions about why they were not granted a HAMP modification" *during* the application process. Pls. New Br. p 20. Plaintiffs cannot say they "repeatedly rais[ed] questions" while simultaneously *denying* anything happened that would make a reasonable person raise questions. The notion is self-contradictory.

Judge Dillon's dissenting opinions correctly identified the foreclosures as the *latest* possible moment at which "Plaintiffs became aware that Defendant would not be modifying their respective loans." *Taylor II*, slip op. ¶ 17 (Dillon, J., dissenting). At that point, Plaintiffs were "aware of [their alleged] injury," and thus had a duty to inquire into their legal rights. *Id.*

Plaintiffs base their entire brief on an argument that Bank of America is "wrong" to argue that the clock starts running upon "a plaintiff's knowledge of their injury." Pls. New Br. p 10; *see also*, *e.g.*, p 26 (contending it is "not the law" that "the statute would run from the date of injury"). Clear precedents of this Court and courts in the other relevant jurisdictions establish that Bank of America and Judge Dillon are correct, and Plaintiffs are wrong. This court has "long recognized that

a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal." *Christenbury*, 370 N.C. at 5 (citing, *e.g.*, *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493 (1985), for the proposition that "the statutes of limitation . . . began to run as soon as the injury became apparent to the claimant or should reasonably have become apparent"; internal quotation marks and brackets omitted).

Plaintiffs' efforts to distinguish *Christenbury* and other, similar precedents are unavailing. As to *Christenbury*, Plaintiffs say the case "centered on whether the contract at issue should be interpreted as an installment contract" and that it has no pertinence to a case like this one that "does not involve an installment contract." Pls. New Br. p 25. The case did not "center" on this at all. Dozens of citing references to *Christenbury* in cases that do not involve installment contracts undermine this claim.[3] And in fact, *Christenbury* did "not involve an installment contract," either.

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[3] *E.g.*, *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 469–70 (2018) (following *Christenbury* to hold medical-malpractice claim untimely as not brought within the "statutorily prescribed period after discovering [the] injury").

Christenbury held that "[p]laintiff's complaint reveals that plaintiff had notice of its injury over fourteen years ago," when it was owed a payment the defendant didn't make. 370 N.C. at 6, 9. "Because plaintiff had notice of its injury yet failed to assert its rights," this Court held, "all of plaintiff's claims are time barred." *Id*. at 6–7. The issue of the installment contract only came up because the plaintiff argued that each *new* failure to make a monthly payment should be treated as giving rise to a "separate" claim, "thus allowing plaintiff to pursue any claims arising within three years before filing suit" even if the older ones are barred. *Id*. at 7. The Court rejected that argument because the agreement was "not an installment contract." *Id*. at 8. But the Court's determination that the clock started running on "notice of [the plaintiff's] injury" stands either way. *Id*. at 9.

Just as the *Christenbury* plaintiff's claim that it was defrauded out of its royalty payments arose when it failed to procure the first royalty payment, Plaintiffs' claims that they were defrauded out of HAMP modifications arose when "Plaintiffs became aware that Defendant would not be modifying their respective loans." *Taylor II*, slip op. ¶ 17 (Dillon, J., dissenting). This was, at the *latest*, the date "the foreclosures took

place." *Id.*

Plaintiffs only counter-argument to this is to state that because the clock might have started running even *sooner*, "[t]he mere fact that the Bank alleges two different points at which Plaintiffs[] should have had notice of their claims proves that a dispute of fact exists outside the complaint as to when the statute of limitations should have started to run." Pls. New Br. p. 28. This "proves" no such thing. There is no *material* factual issue when the only question is whether a claim was brought three years too late (based on a foreclosure) or five years too late (based on a HAMP denial). Plaintiffs cannot benefit from any fact questions whose resolution would establish only that their claims became time-barred even *earlier*.

Nowhere do Plaintiffs point to any fact allegation that would justify pegging their duty of inquiry to any *later* date. Instead, they merely insist it is a "factual determination that ordinarily must be resolved by a jury." Pls. New Br. p 32. But the Court of Appeals got it right the first time when it remarked that whether this is "ordinarily" true says nothing about whether it is true here:

> [T]hat truism comes with a caveat. This Court has held that "[w]hether the plaintiff in the exercise of due diligence should have

> discovered the facts more than three years prior to the institution of the action is ordinarily for the jury *when the evidence is not conclusive or is conflicting*." When the evidence is not in dispute, our Courts have been able to address this issue as a matter of law.

Taylor I, slip op. at 6 (quoting *Huss v. Huss*, 31 N.C. App. 463, 468 (1976); citation omitted).[4] And that remains the situation here. None of the events that put Plaintiffs on notice of their alleged injuries (and thus under a duty to inquire into their legal rights) are "in dispute" here. They are all alleged on the face of the complaint, and the only dispute is over their legal significance. That is a question for the Court, not for a jury.

Plaintiffs' reliance on *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239 (2015), does not support any contrary conclusion. Its factual context is not remotely analogous, and its outcome turned on case law unique to that context. Misleadingly, Plaintiffs twice characterize *Wells Fargo* as a "fraud" case (Pls. New Br. pp 31–32), but it wasn't. The case involved a mistake in a deed of trust's description of the property pledged as collateral—it contained the "correct street address" but the wrong "tax parcel ID"—which the bank discovered when it sought to foreclose. 239

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[4] *Accord*, *e.g.*, *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 548 (2003) (statute of limitations "may either be a matter of fact or a matter of law depending on the circumstances of the underlying case").

N.C. App. at 240–41. The homeowners raised a limitations defense on the ground that the bank could have discovered the mistake sooner by cross-referencing the loan documents with the title deeds in the county recording office. *Id.* at 245. The trial court granted summary judgment to the homeowners, but the Court of Appeals reversed based on precedent holding that "the mere registration of a deed, containing an accurate description of the locus in quo . . . will not, standing alone, be imputed for constructive notice . . . so as to set in motion the statute of limitations." *Id.* at 245 (quoting *Vail*, 233 N.C. at 117). But that precedent doesn't have anything to say about the laws around constructive notice *outside* the context of registered deeds in county recording offices.

Feibus & Co. v. Godley Constr. Co., 301 N.C. 294 (1980), is even further afield. *Feibus* involved a "collapse[d] . . . warehouse . . . caused by the subterranean erosion of soil around and above an improperly installed drainage pipe . . . buried deep in the ground." *Id.* at 296, 305. The plaintiff sued the builder for fraud, and the court held that the claim accrued with the building collapse, when the "damage" became "apparent." Plaintiffs do not even try to explain how this fact pattern pertains to this case.

Presumably, they consider the alleged mishandling of their HAMP applications the equivalent of the drainage-pipe installation. But they don't bother identifying the equivalent of the building collapse. The building collapse was the "injury" in *Feibus*, and the plaintiff sued promptly thereafter. The "injury" alleged here consists of the HAMP denials and foreclosures, but Plaintiffs waited years thereafter to sue. The version of *Feibus* that would be analogous to Plaintiffs' allegations is one in which Feibus waited six years after the building collapse to sue, claiming to have believed the builder's "assurances that it was well constructed" (*id.* at 305), until seeing their lawyer's ad on a billboard six years later promising big recoveries for building-collapse victims. But under *that* pattern, the claims in *Feibus* would have been untimely and the result would have been different. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 494 (1985) (where plaintiff knew of a "defective roof," "[t]he fact that defendants claimed that nothing was wrong . . . did not prevent the statute from running").

Finally, Plaintiffs try to avoid their duty of inquiry by re-defining their alleged injury altogether:

> [T]he Bank's Brief tries to reframe the issues so that the injury in question is the foreclosure. Not so. Plaintiffs[] have made clear all

> along that their injury was the fraudulent concealment of the Bank's deceptive HAMP practices.

Pls. New Br. p 35 (citation omitted). It is actually Plaintiffs who try to "reframe" their own pleadings here. The notion "that the injury in question is the foreclosure" comes from Plaintiffs' own complaint. *See* R p 287 (alleging "injury to the Plaintiffs" in the form of "unlawful . . . foreclosures").[5] Further, "fraudulent concealment" and "deceptive [] practices" are not *injuries*. They are claims of wrongful conduct. Neither is actionable on its own without an injury *resulting* from that conduct. *See Ghormley v. Hyatt*, 208 N.C. 478, 481 (1935).

6. Plaintiffs' conclusory assertions of "due diligence" are unavailing.

Recognizing that the law placed them under a duty of inquiry, Plaintiffs try to argue that they fulfilled it and that their complaint "specifically pleaded due diligence." Pls. New Br. p 32. But all they plead is a conclusory assertion that they "acted diligently." R p 280. The Court need not credit such bare conclusions. *See*, *e.g.*, *Jackson v. Bumgardner*, 318 N.C. 172, 174–75 (1986) ("allegations of fact are taken as true but conclusions of law are not").

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[5] *Accord* R p 286 ("Plaintiffs suffered damages including . . . the loss of their homes"), pp 213, 222, 228–29, 260, 268–69, 276 (same).

Plaintiffs insinuate they discharged their duty of inquiry because they "repeatedly raised questions about why they were not granted a HAMP modification, but instead of getting answers, they were repeatedly deceived." Pls. New Br. p 26. They further argue that they "trusted the Bank" and "[s]uch a relationship caused Plaintiffs[] to have sufficient confidence in the Bank to believe the representations made by its officers" instead of investigating whether they might have a claim for relief. *Id*. p. 34.

Such assertions fail twice over. First, there is no such "relationship" in an "arm's length . . . borrower-lender" loan refinancing. *Dallaire*, 367 N.C. at 366, 368–389 (reinstating summary judgment to the defendant on claims based on statements by "a Bank of America loan officer"). Second, even if there *were*, it would not suspend the statute of limitations. "[U]nder North Carolina law, even when there is a special relationship between the plaintiff and the defendant, the duty of inquiry begins 'when an event occurs to excite the aggrieved party's suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the [alleged] fraud.'" *Doe*, 242 N.C. App. at 543–44.

C. Plaintiffs mischaracterize the precedent cases.

This lawsuit is part of a larger universe of cases, all based on the same template complaint. *See* Def. New Br. p 11–14. Plaintiffs say Bank of America presents a "misleading" history of these cases, but it is Plaintiffs who offer the misleading account. Pls. New Br. p 19.

First, Plaintiffs protest that not *all* of the prior lawsuits were dismissed on limitations grounds, because some of them were dismissed on *other* grounds. *Id*. Bank of America's opening brief was perfectly clear about that (*see* Def. New Br. p 13), but it does not help Plaintiffs. The cases dismissed on limitations grounds rejected the same tolling and concealment arguments Plaintiffs make here.[6] The cases dismissed for "lack of federal jurisdiction" (Pls. New Br. p 19) reached that result because the plaintiffs were trying to re-litigate issues already decided against them in their foreclosure proceedings—which was the Superior

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[6] *E.g.*, *Mandosia*, *supra*; *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 WL 1246356, at *3 (W.D. Ark. Apr. 3, 2017); *Torres*, 2018 WL 573406, at *5; *Jones v. Bank of Am., N.A.*, No. 18-0012, 2018 WL 4095687, at *8 n.5 (N.D. Ala. Aug. 28, 2018); *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789, at *2 (M.D. Fla. Sept. 13, 2018); *Salazar v. Bank of Am., N.A.*, No. 18-CA-010252, 2020 Fla. Cir. LEXIS 2275 (Fla. Cir. Ct. Oct. 21, 2020); *Acosta v. Bank of Am., N.A.*, No. 18-CA-010491, slip op. (Fla. Cir. Ct. Aug. 10, 2022).

Court's alternative basis for dismissing Plaintiffs' claims here. R p 655; *see*, *e.g.*, *Acosta v. Bank of Am., N.A.*, No. 17-2592, 2018 WL 3548725, at *3 n.8 (M.D. Fla. Jul. 24, 2018) ("the fraud claim is barred by *res judicata*" because plaintiff "fail[ed] to assert the defense in the [] foreclosure action"); *Captain v. Bank of Am., N.A.*, No. 18-60130, 2018 WL 5298538, at *3–7 (S.D. Fla. Oct 25, 2018) (claims "barred" as an "attempt to impugn the validity of the foreclosure judgment"). Dismissal was proper either way.

Plaintiffs then mischaracterize the *Torres* dismissal, where a Florida federal court dismissed identical claims as "barred by the statute of limitations," rejected plaintiffs' "attempt to raise the discovery rule in order to circumvent the statute of limitations," and "reject[ed] plaintiffs' attempt to argue fraudulent concealment." 2018 WL 573406, *passim*. Despite these clear holdings, Plaintiffs insinuate that none of these things were at issue in *Torres*. They say "the *Torres* operative complaint failed to allege tolling of the statute of limitations and did not even mention the application of the discovery rule" or "plead any tolling by fraudulent concealment." Pls. New Br. p 20. It is technically true that the *Torres* plaintiffs failed to plead these things *in their complaint*, but

Plaintiffs omit that the *Torres* plaintiffs raised them *in the briefing*. The court chastised the plaintiffs for raising these claims "belated[ly]," but still ruled on them and rejected them. 2018 WL 573406, at *3–5. Plaintiffs' attempt to leave a contrary impression is misleading.

III.

Nothing Precludes This Court from Affirming the *Res Judicata* Dismissal.

A. Both grounds for dismissal are properly before this Court.

Plaintiffs conclude their brief by arguing that "the issues of *res judicata* and collateral estoppel . . . are not before this Court" because "neither the Court of Appeals majority opinion nor Judge Dillon's dissent" addressed them. Pls. New Br. p. 40. That is incorrect. While Judge Dillon's discussion focused on the limitations issue, he broadly opined "that Judge Bell got it right" and stated, "My vote continues to be to affirm the order of the trial court." *Taylor II*, slip op. ¶ 12.[7] Since "the order of the trial court" included the *res judicata* dismissal (R p 655), that issue is properly before this Court. *See* N.C.G.S. § 7A-30(2); N.C. R. APP. P. 16(b). Judge Dillon also specifically referenced "the original opinion in

[7] The operative dissent from the opinion this appeal was taken from incorporated this prior dissent. *See Taylor III*, slip op. ¶ 12 ("I dissent for the reasoning stated in my dissent in *Taylor* [*II*].").

this appeal" in which the original Court of Appeals majority affirmed both the limitations dismissal and the *res judicata* ruling. *Taylor II*, *supra*. The dissent thus embraces the full *Taylor I* panel opinion as well as the Superior Court's dismissal.

Plaintiffs' citation of *State v. Rankin*, 371 N.C. 885, 895 (2018), for the proposition that review is "limited to those questions on which there was division in the intermediate appellate court" does not undermine this conclusion; it reinforces it. Obviously there was a "division" of opinion in the Court of Appeals, because Judge Dillon would have affirmed the Superior Court order, and the majority did not. But it is irrelevant that the new panel neglected to address the *res judicata* issue specifically. The scope of the appeal here is established by the dissenting opinion and cannot be constrained or impeded by the majority. The new panel's failure to address *res judicata* merely highlights that the original panel's *res judicata* ruling has never been held to be error at any stage of this case, and should therefore be reinstated.

B. Plaintiffs' attack on the *res judicata* dismissal is without merit.

Plaintiffs do not contest that every claim asserted in this lawsuit "could have been presented" as defenses or counterclaims in their

foreclosure proceedings, which is enough to establish the bar. *See* Def. New Br. pp 54–56; *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93 (1988). Plaintiffs' only counter-argument is the same protestation they make on the time bar—they claim they were "unaware" of their fraud claims "at the time they faced foreclosure." Pls. New Br. p 41. That is just as unavailing when it comes to *res judicata*. *See Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986) ("[K]knowledge of a potential claim is not a requirement for application of the [] bar. . . . [I]t is the existence of the present claim, not party awareness of it, that controls." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986). Dicta Plaintiffs cite from *Gaither Corp. v. Skinner*, 241 N.C. 532, 536 (1955), suggesting that a party with "no knowledge or means of knowledge" of an "item" of damages might avoid *res judicata*, does not help them. As already shown, Plaintiffs did not lack "means of knowledge," and are thus "charged" with the knowledge they seek to disclaim. *Blankenship*, *Thorpe*; *supra*.

Indeed, the Court of Appeals has repudiated Plaintiffs' argument in the *identical* context involving HAMP claims and the allegations of fraud made in the *HAMP MDL* declarations. *See Traber v. Bank of Am.*, No. COA 14-1028, 2015 WL 4620203, at *5 (N.C. App. Aug. 4, 2015) (rejecting

argument plaintiffs could relitigate fraud claims against Bank of America because they were previously "unaware" of the HAMP MDL declarations); *accord King v. U.S. Bank, N.A.*, No. 325927, 2016 WL 2731118, at *4 (Mich. Ct. App. May 10, 2016) (rejecting attempt to raise new claims alleging "fraud with regard to plaintiff's HAMP application" because plaintiff claimed to have been unaware of a "fraudulent scheme" until hearing about the HAMP MDL declarations). The same result is warranted here. Plaintiffs' protestation that "the Bank has not pointed to a single case in North Carolina where a fraud action is barred by *res judicata* when the plaintiff was unaware of the fraud during the pendency of the foreclosure" is incorrect. Pls. New Br. p 42.

Plaintiffs then raise for the first time the possibility that some might have been "non-judicial foreclosures" with no "judgment" owed *res judicata* effect. Pls. New Br. p 42. The Court can ignore this argument as something never raised in the Superior Court and brought up for the first time on appeal. *See* N.C. R. APP. P. 10(a)(1); *Westminster Homes, supra.*

It would not make any difference anyway. Non-judicial foreclosures were given *res judicata* effect in *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415 (2015), and *Phil Mech. Constr. Co. v. Haywood*,

72 N.C. App. 318 (1985). Plaintiffs' citation to *In re Lucks*, 369 N.C. 222, 224 (2016), for the proposition that "foreclosure by power of sale . . . is not a judicial proceeding" is irrelevant. Non-judicial foreclosures still involve an "order" authorizing "the mortgagee or trustee to proceed," which "is a judicial act." N.C.G.S. § 45-21.16(d), (d1); *Funderburk*, 241 N.C. App. at 423. It has preclusive effect because the mortgagor can assert "defenses to foreclosure . . . in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed." *Id*.

As for the jurisdictions *other* than North Carolina, where North Carolina is obliged to follow the *res judicata* rules of the rendering state (*see* Def. New Br. pp 55–56), Plaintiffs cite no statutes or cases suggesting any different result is warranted. And non-judicial determinations are owed the same "Full Faith and Credit" as court rulings. U.S. CONST. Art. IV, § 1; Def. New Br. p 55.

Plaintiffs lastly argue that "res judicata is inapplicable where the performance of an act was sought in one action and a money judgment in the other." Pls. New Br. p 43. This argument is meritless. Foreclosures have preclusive effect even if the plaintiff's new action "seek[s] a different remedy." *Traber*, 2015 WL 4620203, at *4 (quoting *Bockweg v. Anderson*,

333 N.C. 486, 494 (1993)). But there is no "different remedy" at issue here at all. Plaintiffs' notion that "[i]n a foreclosure, specific performance is sought" by the mortgagee, while they are seeking money, erroneously conflates *their* present claims with the claims asserted *against them* in their foreclosure cases. Pls. New Br. p 43. But in assessing the "identity" of the claims for *res judicata* purposes, the point of comparison is the claims Plaintiffs raise here compared to the claims *they* could have raised as foreclosure defenses, not the claims raised on the *other* side of the "v." And by that test, "identity of the matters" is present.

CONCLUSION

For the reasons set forth above, in Defendant-Appellant's New Brief, and in the record, Bank of America respectfully urges this Court to reverse the legally erroneous Court of Appeals decision for the reasons stated by the Superior Court and in the dissenting opinion of Judge Dillon, and to reaffirm the ruling of the Superior Court and the analysis of the original Court of Appeals panel.

Respectfully submitted this 15th day of June, 2023,

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CERTIFICATE OF SERVICE

I hereby certify that on 15 June 2023 the foregoing **Defendant-Appellant's Reply Brief** was electronically filed and served upon each of the parties in this action by email addressed as follows:

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v.
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|
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ORDER

STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE

***1** A decade ago, the Treasury Department introduced the Home Affordable Modification Program, which allegedly requires a participating bank to use "reasonable efforts" to modify the mortgage of a person in default or reasonably likely to default. [1] After an eligible mortgagor applies for a modification, the program requires several "trial payments" before the bank approves the modification.

THE PROCEDURAL HISTORY

In December 2016, Juan Acosta and several dozen other plaintiffs sued Bank of America in the Circuit Court for Hillsborough County, and Bank of America removed the action and invoked diversity jurisdiction. *Case no.* 8:17-cv-238-VMC (M.D. Fla. Jan. 1, 2017). Moving to dismiss the complaint, Bank of America argued misjoinder of the plaintiffs' claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program. Acosta and the other plaintiffs voluntarily dismissed the action before the presiding judge decided the motion.

Four months after the dismissal, Acosta and more than a hundred other plaintiffs sued Bank of America again in a single action. *Case no.* 8:17-cv-1534-RAL (M.D. Fla. June 27, 2017). The 292-page "shotgun" complaint, which copied swaths from a *qui tam* complaint in the Eastern District of New York, [2] alleged fraud and the violation of Florida's Deceptive and Unfair Trade Practices Act. In the part of the complaint specific to him, Acosta alleged that in May 2010 a Bank of America employee, Roberto Rosado, told Acosta that a modification requires a default. (Doc. 1 at ¶ 748 in case no. 17-cv-1534) Bank of America allegedly omitted to mention that a reasonably foreseeable likelihood of default might qualify a mortgagor for a modification. Bank of America moved to dismiss and repeated the arguments from the previous case.

Before resolving the motion to dismiss, the presiding judge observed that the complaint, which alleged neither each plaintiff's citizenship nor the amount in controversy between each plaintiff and Bank of America, failed to invoke diversity jurisdiction. (Doc. 15 in case no. 17-cv-1534) Ordered to amend the complaint to invoke diversity jurisdiction, Acosta and the other plaintiffs submitted a 403-page complaint. (Doc. 16 in case no. 17-cv-1534) For the third time, Bank of America moved to dismiss the complaint and repeated the arguments from the earlier motions. The presiding judge in that action found misjoinder, severed the plaintiffs' claims, and ordered the plaintiffs to sue separately.

The plaintiffs heeded the presiding judge's command. Between October 30, 2017, and November 3, 2017, more than a hundred plaintiffs sued Bank of America in the Middle District of Florida in eighty actions and alleged fraud under Florida common law. Excepting names, dates, addresses, and the like, the complaints are identical. The actions are distributed among eight district judges in the Middle District of Florida. In two actions, the presiding judges found the claims barred by the four-year limitation. [3]

***2** In Acosta's fourth complaint (but the first complaint in this case), Acosta alleged (Doc. 1) four misrepresentations by Bank of America. First, Bank of America allegedly failed to mention that a reasonably foreseeable danger of default might qualify a mortgagor for a modification; second, Bank of America stated that the mortgagor failed

to provide Bank of America with the documents necessary to complete the modification; third, Bank of America orally notified the mortgagor that the bank approved the requested modification; and fourth, Bank of America charged a "fraudulent" inspection fee. For the fourth time, Bank of America moved (Doc. 13) to dismiss the complaint. Acosta has not moved at any moment in this action for leave to amend the complaint.

A February 1, 2018 order (Doc. 16) dismisses each fraud claim except the claim that Bank of America omitted to mention that a reasonably foreseeable likelihood of default might qualify a mortgagor for a modification. In this claim, Acosta alleges that Bank of America instructed him on May 4, 2010, to "refrain from making his regular mortgage payments" in order to qualify for a modification. (Doc. 1 at ¶ 37) Bank of America allegedly omitted to mention that a reasonably foreseeable likelihood of default can qualify a mortgagor for a modification. (Doc. 1 at ¶ 37) Unaware of his option not to default, Acosta allegedly "refrained from" paying his mortgage and, as a result, "fell into default status." (Doc. 1 at ¶ 39) As a "direct result" of Bank of America's alleged omission, Acosta allegedly suffered the loss of both his home and the equity in his home. (Doc. 1 at ¶ 39)

Moving (Doc. 34) for summary judgment, Bank of America observed that Acosta defaulted in November 2007, two and a half years before Bank of America's alleged omission. In response to the motion for summary judgment, Acosta tacitly conceded defaulting before the alleged misrepresentation, affirmed that Bank of America advised him not to cure the default, and argued that he suffered a foreclosure after relying on Bank of America's advice. Objecting to Acosta's maintaining two putatively irreconcilable sets of factual assertions (that is, "I was not in default" and "I was in default"), Bank of America replied (Doc. 39) that Acosta cannot in effect amend the complaint by responding to a motion for summary judgment with facts that conflict with the allegations in the complaint.

Identifying the discrepancy between the allegations in the complaint and the argument in the response, a June 8, 2018 order (Doc. 41) permits Acosta a final opportunity to amend the complaint to clarify the facts that substantiate the fraud claim.

THE OPERATIVE COMPLAINT

In the fourth amended complaint (Doc. 42), Acosta tacitly concedes that he defaulted before the misrepresentation. For the fifth time, Bank of America moves (Doc. 43) to dismiss the complaint. This order will not repeat or resolve all of the arguments in the motion to dismiss, but several arguments merit discussion.

First, Bank of America argues persuasively that *Rooker-Feldman* bars the fraud claim.[4] Responding that Bank of America "gross[ly] misappl[ies]" *Rooker-Feldman*, the plaintiff argues that the fraud claim "do[es] not require a determination that the state court erroneously entered the foreclosure judgment." (Doc. 51 at 4) According to the plaintiff, the fraud claim amounts not to an indirect attack on the foreclosure judgment but rather a claim that Bank of America's "fraudulent actions resulted in a wrongful denial of a HAMP modification."[5] The plaintiff concludes, "It is because of this denial that Plaintiff faced foreclosure."

***3** The weight of authority strongly supports Bank of America's argument that *Rooker-Feldman* bars the fraud claim. In *Figueroa v. Merscorp, Inc.*, 766 F.Supp.2d 1305 (S.D. Fla. 2011) (Altonaga, J.), *aff'd*, 477 Fed.Appx. 558 (11th Cir. May 11, 2012), a bank sued in state court to foreclose a mortgagor's property, and the state court entered judgment for the bank and ordered a foreclosure sale. Moving in state court to vacate the judgment, the mortgagor argued that the bank secured the foreclosure judgment through fraud. After the state court denied the motion, the mortgagor sued the bank in federal court under RICO and "[sought] damages arising out of the loss of his home." After thoroughly surveying the authority, Judge Altonaga found the claim "inextricably intertwined" with the foreclosure judgment. 766 F.Supp.2d at 1315-25. Affirming the dismissal under *Rooker-Feldman*, the Eleventh Circuit concluded, "The state court judgment formed the basis of or was intertwined with the injury complained of in Figueroa's instant complaint: that [Figureroa] lost his one half-interest in his property and home because of an improper foreclosure proceeding." 477 Fed.Appx. at 560.

Similarly, *Nivia v. Nation Star Mortg., LLC*, 620 Fed.Appx. 822 (11th Cir. Aug. 19, 2015), strongly suggests a bar by *Rooker-Feldman*. In *Nivia*, a bank won a foreclosure

judgment in December 2011. Nine months after the judgment and a month before the foreclosure sale, the mortgagor requested a HAMP modification, which the bank denied. After the sale, the mortgagor sued in federal court for violations of HAMP and Florida's Deceptive and Unfair Trade Practices Act.

Finding the HAMP claim not barred by *Rooker-Feldman*, *Nivia* explains, "The homeowners alleged only that the lenders failed to respond adequately to their September 2012 request for a loan modification, which could not have been at issue in the foreclosure proceeding that concluded in December 2011." [6] 620 Fed.Appx. at 824. In contrast, *Nivia* finds the FDUTPA claim barred by *Rooker-Feldman*: "We construe the homeowners' allegation to extend beyond the lenders' denial of the September 2012 loan modification request and to include conduct before the foreclosure judgment. In effect, the homeowners' claim amounts to an equitable defense to foreclosure that [the homeowners] failed to raise before the state court." 620 Fed.Appx. at 825. Because success on the FDUTPA claim suggested error in the foreclosure judgment, *Nivia* finds the FDUTPA claim barred by *Rooker-Feldman*.

Little or nothing appears to distinguish the fraud claim in this action from the RICO claim in *Figueroa* or the FDUTPA claim in *Nivia*. The plaintiff alleges that Bank of America misrepresented the eligibility requirement for a modification and that this purported misrepresentation was "specifically designed by BOA to set Plaintiff up for foreclosure." (Doc. 42 at ¶ 42) The majority of the complaint chronicles a scheme in which Bank of America allegedly tricked the plaintiff into not paying the mortgage so that Bank of America could foreclose. [7] The plaintiff complains exclusively about a misrepresentation that preceded − and ultimately caused − the foreclosure. And the plaintiff alleges principally that the misrepresentation resulted in the "loss of home equity," a loss occasioned by the state-court action, which foreclosed the plaintiff's right of redemption and resulted in a deficiency judgment that included not just principal and interest owing but also the inspection fees owing under the lending agreement. Several times in the response, the plaintiff identifies the foreclosure as the injury over which the plaintiff sues. (Doc. 51 at 2, 3-4, 10-11) In sum, the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment. [8]

***4** Second, even if not barred by *Rooker-Feldman*, the fraud claim warrants dismissal for failure to state a claim. As explained elsewhere in this order, the November 1, 2017 complaint stated a claim based on Bank of America's alleged misrepresentation of the eligibility requirement for a modification. The plaintiff allegedly defaulted after Bank of America both instructed him to default and stated that a modification requires a default. Bank of America moved for summary judgment and observed that the plaintiff defaulted in November 2007, nearly three years before the alleged misrepresentation. Of course, a mortgagor cannot reasonably rely in 2007 on a 2010 misrepresentation.

Perhaps recognizing the merit in Bank of America's motion for summary judgment, the plaintiff asserted a new and different fraud theory in response to the motion for summary judgment. In the most recent complaint (Doc. 42), the plaintiff persists in alleging that Bank of America omitted to mention that a "reasonably foreseeable/imminent" default might qualify a mortgagor for a modification. Rather than assert that the misrepresentation induced the default, the plaintiff tacitly concedes a prior default and alleges that the misrepresentation caused the plaintiff to "remain in default." (Doc. 42 at 11) As Bank of America correctly argues (Doc. 43 at 18-19), the bank's omitting to mention a circumstance not pertinent to the defaulted mortgagor is immaterial.

In the penultimate paragraph of the response to the motion to dismiss, the plaintiff requests leave to submit a fifth amended complaint. (Doc. 51 at 11) The request warrants denial for at least three reasons. First, Rule 7(b), Federal Rules of Civil Procedure, requires a party to move for relief, and a request buried in a response is not a motion. *Long v. Satz*, 181 F.3d 1275, 1279–80 (11th Cir. 1999). The plaintiff submits no proposed amendment and fails to explain what the prospective amendment might accomplish. *See* *Long*, 181 F.3d at 1280 (affirming the denial of leave to amend where the plaintiff failed to explain the substance of a prospective amendment). Second, a fifth amended complaint unduly prejudices Bank of America. *See* *Foman v. Davis*, 371 U.S. 178, 182 (1962). Five complaints and five motions to dismiss in two years of litigation are enough. Third, the plaintiff's conduct in this litigation reveals a "dilatory" intent. *See* *Foman*, 371 U.S. at 182. As described in this order and in the June 8 order, the plaintiff has repeatedly and tactically attempted to prolong this litigation.

CONCLUSION

Bank of America allegedly told the plaintiff that a mortgage modification requires a default but omitted to mention that a "reasonably foreseeable/imminent" default might qualify a mortgagor for a modification. The complaint alleges that Bank of America intentionally misrepresented the requirement in an effort to trick the plaintiff into a foreclosure, which Bank of America successfully secured after suing in state court. Because the fraud claim is "inextricably intertwined" with the state-court foreclosure, *Rooker-Feldman* bars the claim. In any event, the fraud claim fails to state a claim. The bank's omitting to mention a circumstance not pertinent to the defaulted mortgagor (that is, that a "reasonably foreseeable/imminent" default might qualify for a modification) is immaterial. The motion (Doc. 43) to dismiss is **GRANTED**, and the action is **DISMISSED**.[9] The clerk is directed to terminate the pending motions and to close the case.

ORDERED in Tampa, Florida, on July 24, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 3548725

Footnotes

1 Bank of America disputes that a "reasonably foreseeable" likelihood of default qualifies a mortgagor for a modification and contends that a modification requires either delinquency or an "imminent default."

2 *United States ex rel. Gregory Mackler v. Bank of America, N.A.*, Case no. 1:11-cv-3270-SLT (E.D.N.Y. July 7, 2011).

3 *Torres v. Bank of America, N.A.*, 2018 WL 573406 (M.D. Fla. Jan. 26, 2018) (Lazzara, J.), *appeal filed* (Case no. 18-10698); *Paredes v. Bank of America, N.A.*, 2018 WL 1071922 (M.D. Fla. Feb. 27, 2018) (Chappell, J), *appeal filed* (Case no. 18-11337). Additionally, a district judge in California found an identical claim barred by a limitation. *Mandiosa v. Bank of America, N.A.*, 2:17-cv-8153 (C.D. Cal. Mar. 15, 2018) (Walter, J.).

4 Also, Bank of America contends that the four-year limitation bars the claim. The plaintiff incorrectly states that "[t]his court previously ruled that [ ] Plaintiff's claims are not barred by the applicable statute of limitations." (Doc. 51 at 4) On the contrary, the February 1 order (which observes that the circumstances of this action suggest tardiness in suing) holds only that the expiration of the limitation is not apparent from the face of the complaint.

5 As explained in the February 1, 2018 order, HAMP confers no private right of action on a borrower denied (rightfully or wrongfully) a mortgage modification. *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012).

6 Although finding the HAMP claim not barred by *Rooker-Feldman*, *Nivia* affirms the dismissal of the HAMP claim because HAMP confers no private right of action. 620 Fed.Appx. at 825 (citing *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012)).

7 As Bank of America correctly recognizes in the motion (Doc. 48) in limine, the remainder of the complaint appears copied from complaints and affidavits in unrelated civil actions.

8 If not barred by *Rooker-Feldman*, the fraud claim is barred by *res judicata* (which some decisions occasionally describe in this circumstance as "merger-and-bar"). Under Florida law, a compulsory counterclaim includes a counterclaim "logically related" to the claim. *Neil v. South Fla. Auto Painters, Inc.*, 397 So. 2d 1160

(Fla. 3d DCA 1981). The Florida decisions construe this "logical-relation" test broadly. *Montgomery Ward Dev. Corp. v. Juster*, 932 F.2d 1378, 1381 & n.1 (11th Cir. 1991). The fraud claim in this action relates logically to Bank of America's claims in the foreclosure action: Bank of America alleged in state court that the plaintiff defaulted on the mortgage, and the plaintiff alleges in this action that the default resulted from Bank of America's misrepresentation of the eligibility requirement for a modification. Because the plaintiff must have counterclaimed but failed to counterclaim in state court, *res judicata* prevents the plaintiff's litigating the claim now. (Viewed somewhat differently, the fraud claim constitutes an affirmative and equitable defense that the plaintiff waived by failing to assert the defense in the state-court foreclosure action. Whatever the label, the same result obtains.)

9 Because of the disposition of the *Rooker-Feldman* argument (a subject-matter jurisdiction defect), the dismissal is without prejudice.

End of Document

2016 WL 2731118
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Olivia KING, Plaintiff–Appellant,
v.
U.S. BANK NATIONAL ASSOCIATION, Defendant–Appellee.

Docket No. 325927.
|
May 10, 2016.

Kalamazoo Circuit Court; LC No.2014–000470–CH.

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals by right the trial court's order granting defendant U.S. Bank National Association's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff executed a mortgage on September 23, 2005, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), with regard to residential real property located in Portage, Michigan. In April 2008, Countrywide Home Loans, the loan servicer, notified plaintiff that the loan was in "serious default." In July 2009, plaintiff attempted to modify her loan through the Home Affordable Mortgage Program (HAMP). On January 25, 2010, MERS assigned its interest in the mortgage to defendant. In February and March 2010, notice was published in the local newspaper and posted on the real property at issue that plaintiff defaulted on the mortgage and that a foreclosure sale would occur on April 1, 2010. On March 8, 2010, plaintiff received a letter from Bank of America (BOA), who apparently replaced Countrywide as the servicer of the loan. The March 8, 2010 letter stated that plaintiff might be eligible for a loan modification through the HAMP and that the foreclosure sale would not occur while plaintiff's HAMP eligibility was being determined. Plaintiff received letters from BOA in May and June 2011 stating that she failed to submit certain documents that were required to process her HAMP application. She received letters in July and September 29, 2011, stating that she was ineligible for a modification under the HAMP because she failed to submit required documents. On November 3, 2011, the property was foreclosed and sold to defendant.

Defendant commenced summary proceedings on May 15, 2012, in case no. 12–01233–LT to evict plaintiff from the property. Plaintiff filed a counterclaim against defendant. In count one of plaintiff's counterclaim, plaintiff alleged that, contrary to BOA's letters, she did in fact submit all of the required documents with regard to her HAMP application; consequently, defendant violated statutory provisions with regard to the foreclosure sale, and the foreclosure sale should be set aside. Defendant moved for summary disposition with regard to plaintiff's counterclaim. The district court granted defendant's motion, concluding that plaintiff provided no evidence that she submitted the required documents. The district court ordered that defendant was entitled to possess the property. Plaintiff appealed to the circuit court on June 24, 2013. The circuit court affirmed the district court's grant of summary disposition to defendant regarding plaintiff's counterclaim. We denied plaintiff's application for leave to appeal that decision. *US Bank Nat'l. Ass'n. v. King,* unpublished order of the Court of Appeals, entered June 25, 2014 (Docket No. 320436).

On September 2, 2014, plaintiff filed a complaint against defendant alleging that defendant misrepresented to plaintiff that she failed to submit required documents for her HAMP application when, in fact, she had submitted the documents. [1] Plaintiff alleged that this misrepresentation violated various statutory provisions and constituted grounds to set aside the foreclosure sale and bar defendant's taking title to the property. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that because plaintiff's claims were argued in case No. 12–01233–LT, res judicata and collateral estoppel barred her current action. The trial court agreed that plaintiff's claims were barred by res judicata and collateral estoppel and granted defendant's motion for summary disposition. Plaintiff now appeals by right.

***2** "The applicability of legal doctrines such as res judicata and collateral estoppel are questions of law to be reviewed de novo." *Husted v. Auto–Owners Ins. Co.,* 213 Mich.App 547, 555; 540 NW2d 743 (1995). Summary disposition is proper under MCR 2.116(C)(7) if entry of judgment is appropriate because of a prior judgment. "We review

summary dispositions de novo." *Nuculovic v. Hill,* 287 Mich.App 58, 61; 783 NW2d 124 (2010).

Res judicata "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." *Adair v. Michigan,* 470 Mich. 105, 121; 680 NW2d 386 (2004). With regard to the first element, we note that unless otherwise specified in the order, a dismissal "operates as an adjudication on the merits." MCR 2.504(B)(3); see also *Washington v. Sinai Hosp. of Greater Detroit,* 478 Mich. 412, 419; 733 NW2d 755 (2007). With regard to the second element, it is sufficient that both actions involved the same parties regardless whether one party was a plaintiff in the first action and that same party was a defendant in the second action. See *Bd. of Co. Road Comm'rs. for Co. of Eaton v. Schultz,* 205 Mich.App 371, 376; 521 NW2d 847 (1994). With regard to the third element and summary proceedings, MCL 600.5750 states in relevant part: "The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except" with regard to enumerated exceptions inapplicable in this case. Our Supreme Court has stated that "in light of the first sentence of" MCL 600.5750 "it is evident that judgment in these summary proceedings, no matter who prevails, does not bar other claims for relief." *JAM Corp. v. AARO Disposal, Inc.,* 461 Mich. 161, 170; 600 NW2d 617 (1999) (footnote omitted). Claims "actually litigated in the summary proceedings" are barred by res judicata in subsequent proceedings, MCL 600.5750 notwithstanding. *Sewell v. Clean Cut Mgt., Inc.,* 463 Mich. 569, 576–577; 621 NW2d 222 (2001).

Similar to res judicata, "[t]he doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action 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." *Dearborn Hts. Sch. Dist. No. 7 v. Wayne Co. MEA/NEA,* 233 Mich.App 120, 124; 592 NW2d 408 (1998). For collateral estoppel to apply, the following 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.' " *Monat v. State Farm Ins. Co.,* 469 Mich. 679, 682–684; 677 NW2d 843 (2004), quoting *Storey v. Meijer, Inc.,* 431 Mich. 368, 373 n. 3; 429 NW2d 169 (1988) (footnote omitted).

***3** With regard to the first requirement, "[a] final judgment or order in a civil case means 'the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order.' " *Baitinger v. Brisson,* 230 Mich.App 112, 116; 583 NW2d 481 (1998), quoting MCR 7.202(8)(a)(i). With regard to the second requirement, our Supreme Court has held that collateral estoppel does not preclude relitigation in circumstances such as where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...." *Monat,* 469 Mich. at 683 n. 2, quoting 1 Restatement Judgments, 2d, ch 3, § 29, p 273. With regard to the third requirement, "[m]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Id.* at 684 (citations and quotation marks omitted).

Here, the first element of res judicata—the prior action was decided on the merits—was satisfied because the district court in case No. 12–01233–LT granted defendant's motion for summary disposition with regard to count one in plaintiff's counterclaim. See MCR 2.504(B)(3); *Washington,* 478 Mich. at 419. There is no dispute that the second element of res judicata was satisfied because the action in case No. 12–01233–LT and this action "involve the same parties"—plaintiff and defendant. *Adair,* 470 Mich. at 121. And, the third element was satisfied because plaintiff's claims in this case were in fact litigated and disposed of in case No. 12–01233–LT. In this case, plaintiff alleged in count one that defendant violated numerous statutory provisions regarding the foreclosure sale because defendant's internal documents showed that plaintiff complied with the document requests in connection with plaintiff's HAMP application, yet defendant misrepresented that plaintiff did not submit the required documents and foreclosed on the property. In count two, plaintiff again alleged violations of various statutory provisions, presumably relying on defendant's allegedly

fraudulently misleading plaintiff with regard to the HAMP application process.[2] Plaintiff alleged that this was grounds to set aside the foreclosure sale. This is precisely what was litigated in count one of plaintiff's counterclaim in case No. 12–01233–LT. Specifically, in count one of plaintiff's counterclaim in case No. 12–01233–LT, plaintiff argued that defendant engaged in statutory violations because plaintiff submitted the documents required as part of her HAMP application, contrary to the numerous letters from BOA stating otherwise. Plaintiff argued that this was grounds for setting aside the foreclosure sale. Therefore, the matter asserted in this action was resolved in the first case, and the third element of res judicata was satisfied. *Id.* Because plaintiff's claims were "actually litigated in the summary proceedings" in case No. 12–01233–LT, MCL 600.5750 does not bar the application of res judicata. *Sewell,* 463 Mich. at 576. Therefore, the trial court properly concluded that res judicata barred plaintiff's action. *Adair,* 470 Mich. at 121.

***4** With regard to collateral estoppel, we find that the first requirement was satisfied because, as discussed above, plaintiff alleged in case No. 12–01233–LT that defendant violated statutory provisions because despite the fact that plaintiff submitted the required HAMP documents, defendant stated that she did not. Plaintiff asserted the same allegations in this case. The question of whether defendant actually engaged in such conduct was determined in case No. 12–01233–LT when the district court concluded that plaintiff submitted no evidence of such conduct and granted summary disposition in favor of defendant. Therefore, the question of whether defendant engaged in fraudulent misconduct with regard to plaintiff's HAMP application was litigated and determined by a valid and final judgment. *Monat,* 469 Mich. at 682. The second element of collateral estoppel was satisfied because there is no indication that plaintiff was denied a full and fair opportunity to litigate the issue of defendant's alleged fraudulent misconduct in case No. 12–01233–LT. *Id.* at 682–683. And, because the parties in case No. 12–01233–LT and in this case were the same, the third requirement for collateral estoppel—mutuality—is satisfied. *Id.* at 683–684.

Plaintiff nevertheless argues that neither res judicata nor collateral estoppel applies because in case No. 12–01233–LT she alleged misrepresentations with regard to the assignment of the mortgage and defendant's alleged incapacity to accept assets into the trust, whereas in this case she alleged fraud with regard to plaintiff's HAMP application. Although it is true that plaintiff alleged misrepresentation with regard to the mortgage assignment and defendant's alleged incapacity in counts four and five of her counterclaim in case No. 12–01233–LT, count one of that counterclaim alleged that defendant engaged in statutory violations with regard to plaintiff's HAMP application, as discussed above.

Plaintiff also argues in this appeal that in case No. 12–01233–LT, she was unable to obtain evidence of defendant's fraudulent scheme because seven affidavits which she submitted to the trial court in this case after the trial court granted defendant's motion for summary disposition were unavailable in case No. 12–01233–LT, even through the exercise of reasonable diligence. Because these affidavits were submitted to the trial court after the trial court granted defendant's motion, we will not consider them. *Wormsbacher v. Seaver Title Co.,* 284 Mich.App 1, 4–5; 772 NW2d 827 (2009). Moreover, this argument misapprehends the doctrine of res judicata. "Res judicata bars every *claim* arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair,* 470 Mich. 123 (emphasis added). As discussed above, plaintiff raised the claim in case No. 12–01233–LT that defendant engaged in fraud with regard to plaintiff's HAMP application, which was grounds to set aside the foreclosure sale. On appeal, plaintiff appears to argue that because she lacked evidence to support her claim in case No. 12–01233–LT, res judicata and collateral estoppel did not apply. Plaintiff cites no authority to support her argument, thus abandoning it. *Spires v. Bergman,* 276 Mich.App 432, 444; 741 NW2d 523 (2007).

***5** Plaintiff further argues that in case No. 12–01233–LT, defendant prevented her from obtaining evidence with regard to the alleged scheme concerning HAMP applications. As with plaintiff's argument regarding the seven affidavits discussed *supra,* we find this argument lacks merit because a lack of evidence supporting plaintiff's allegations was not at issue when the trial court dismissed plaintiff's claims in this case under MCR 2.116(C)(7). Rather, as discussed, the trial court granted defendant's motion for summary disposition because plaintiff's claim that defendant engaged in misconduct regarding the HAMP application had already been litigated.

Next, plaintiff argues that the trial court prematurely granted defendant's motion for summary disposition. This argument

lacks merit because there was not a fair likelihood that further factual development would have supported plaintiff's position that her claims were not previously litigated, which was the basis of granting defendant summary disposition. See *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.*, 284 Mich.App 25, 33–34; 772 NW2d 801 (2009).

Finally, plaintiff makes the unpreserved argument that the trial court improperly granted defendant's motion for summary disposition because plaintiff alleged extrinsic rather than intrinsic fraud. Indeed, extrinsic fraud is an exception to res judicata. *Sprague v. Buhagiar*, 213 Mich.App 310, 313; 539 NW2d 587 (1995). "Extrinsic fraud is fraud outside the facts of the case: 'fraud which actually prevents the losing party from having an adversarial trial on a significant issue.' " *Id.*, quoting *Rogoski v. Muskegon*, 107 Mich.App 730, 736; 309 NW2d 718 (1981). There is absolutely no indication that the fraud that plaintiff alleged in this case falls "outside the facts of the case." *Id.* at 313. Plaintiff's attempt to characterize the fraud alleged in this case as extrinsic fails, and plaintiff has not established plain error in that regard. *Richard v. Schneiderman & Sherman, PC (On Remand)*, 297 Mich.App 271, 273; 824 NW2d 573 (2012).

We affirm.

All Citations

Not Reported in N.W.2d, 2016 WL 2731118

Footnotes

1 We note that plaintiff never attempted to explain how defendant could be responsible for alleged misrepresentations that—if such misrepresentations existed—were apparently perpetrated by BOA, not defendant. This matter was never addressed in the trial court, and the parties do not address it on appeal.

2 Plaintiff also brought a third count, which was essentially a motion to stay the district court's eviction order. This count is not at issue on appeal.

794 Fed.Appx. 623
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Gwendolyn E. MANDOSIA, Plaintiff-Appellant,

v.

BANK OF AMERICA, NA, Defendant-Appellee.

No. 18-55484

Submitted January 6, 2020 * San Francisco, California

FILED January 9, 2020

Synopsis

Background: Plaintiff brought California common law fraud claim against bank. The United States District Court for the Central District of California, No. 2:17-cv-08153-JFW-JPR, John F. Walter, J., dismissed claim as time-barred, without leave to amend. Plaintiff appealed.

Holdings: The Court of Appeals held that:

[1] plaintiff could not rely on either delayed discovery or estoppel by fraudulent concealment defenses, and

[2] class action in which class members brought claims of promissory estoppel and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) did not place bank on notice of plaintiff's California common law fraud claim.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Amend the Complaint; Motion to Dismiss.

West Headnotes (2)

[1] Limitation of Actions What constitutes discovery of fraud

Limitation of Actions Concealment of Cause of Action

Plaintiff could not rely on either delayed discovery or estoppel by fraudulent concealment defenses, for purposes of asserting delayed accrual on appeal of her California common law fraud claim against bank, which was dismissed without leave to amend as time-barred, although plaintiff asserted that her fraud claim did not accrue until she learned about alleged fraud via advertisement posted by her attorneys; plaintiff knew or should have known of alleged fraud by at latest the date of foreclosure sale of her home, based on missing or allegedly incomplete applications for loan modification plan, numerous home inspections charged to plaintiff's account, and plaintiff's receipt of notice of foreclosure less than a week after allegedly being approved for a loan modification plan.

[2] Limitation of Actions Class actions, matters peculiar to

Class action in which class members brought claims of promissory estoppel and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) did not place bank on notice of plaintiff's California common law fraud claim against bank, and thus class action did not equitably toll statute of limitations for plaintiff's claim, as plaintiff asserted on appeal following dismissal of her claim as time-barred without leave to amend. 18 U.S.C.A. § 1961.

Attorneys and Law Firms

***624** Sin-Ting Mary Liu, Attorney, Aylstock, Witkin, Kreis & Overhotlz, Alameda, CA, Chelsie Warner, Esquire, Attorney, Aylstock, Witkin, Kreis & Overhotlz, Pensacola, FL, for Plaintiff-Appellant

Adam F. Summerfield, Esquire, Attorney, Leslie M. Werlin, Esquire, McGuireWoods LLP, Los Angeles, CA, for Defendant-Appellee

Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding, D.C. No. 2:17-cv-08153-JFW-JPR

Before: WALLACE and FRIEDLAND, Circuit Judges, and HILLMAN, ** District Judge.

MEMORANDUM ***

Plaintiff-Appellant Gwendolyn E. Mandosia ("Ms. Mandosia") appeals from the dismissal, without leave to amend, of her California common-law fraud claim against Defendant-Appellee Bank of America, NA ("Bank of America"). Ms. Mandosia argues that the district court erred in concluding that her claim was time-barred because ***625** under either the delayed discovery or estoppel by fraudulent concealment defenses, her fraud claim did not accrue until she learned about the fraud, *i.e.*, when she read a law firm advertisement posted by her attorneys. We disagree.

[1] These defenses only delay accrual until a plaintiff "has, or should have, inquiry notice of the cause of action." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal.4th 797, 27 Cal.Rptr.3d 661, 110 P.3d 914, 920 (2005); *see also* *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1057 (9th Cir. 2008). Given the sheer volume of missing or allegedly incomplete applications (10), the number of home inspections charged to her account (39), and her receipt of a notice of foreclosure less than a week after allegedly being approved for a loan modification plan, Ms. Mandosia had or should have had inquiry notice of fraud by, at the latest, the September 2014 foreclosure sale of her home. She thus cannot benefit from either defense.

[2] Ms. Mandosia alternatively argues that the class action, *George v. Urban Settlement Services*, Civ. Act. No. 13-v-01819-PAB-KLM (D. Colo.), equitably tolled the statute of limitations under *American Pipe & Construction Company v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). We reject this contention. *American Pipe* does not toll Mandosia's common-law fraud claim because the plaintiffs in *George* brought claims of promissory estoppel and violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968, which would not have placed Bank of America on notice of Ms. Mandosia's California common-law fraud claim. *See* *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 467, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (tolling in *American Pipe* "depended heavily on the fact that [the prior] filings involved exactly the same cause of action subsequently asserted"); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1246 (10th Cir. 2016).

Finally, Ms. Mandosia challenges the district court's denial of leave to amend her Amended Complaint. However, the district court did not err because any amendment would have been futile. *See* *Deutsch v. Turner Corp.*, 324 F.3d 692, 717–18 (9th Cir. 2003).

For these reasons, the district court's dismissal of Ms. Mandosia's claim is

AFFIRMED.

All Citations

794 Fed.Appx. 623

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Timothy Hillman, United States District Judge for the District of Massachusetts, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

End of Document

242 N.C.App. 523
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Lawrence J. TRABER and Elge L. Traber, Plaintiffs,
v.
BANK OF AMERICA and Bank of America Home Loans, Defendants.

No. COA14–1028
|
Aug. 4, 2015.

Synopsis

Background: After dismissal of their first action alleging violations of federal Home Affordable Modification Program (HAMP) rules, mortgagors brought a second action against mortgage servicer, alleging HAMP violations resulting in wrongful denial of a HAMP loan modification package. The Superior Court, Polk County, Marvin P. Pope, J., dismissed. Mortgagors appealed.

[Holding:] The Court of Appeals, Geer, J., held that identity of causes of action existed between first and second actions, as required for application of the res judicata bar.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

West Headnotes (7)

[1] **Res Judicata** Matters Actually Litigated or Determined

Res Judicata Matters Which Could Have Been Litigated or Determined

Res judicata bars matters actually litigated and determined, or matters which could properly have been litigated and determined in the former action.

[2] **Res Judicata** Theories or grounds of recovery in general

Res Judicata Demands, remedies, and relief

Where, in a subsequent action, a party attempts to proceed by asserting a new legal theory or by seeking a different remedy than in a prior action, yet does not seek a remedy for a separate and distinct act leading to a separate and distinct injury, then the subsequent action is barred by res judicata.

[3] **Res Judicata** Mortgages and deeds of trust

Identity of causes of action existed between mortgagors' first and second actions against mortgage servicer, and therefore res judicata barred the second action, where mortgagors alleged precisely the same violations of federal Home Affordable Modification Program (HAMP) rules in their first action as they did in the second action and that they suffered the same injury, that being a denial of a HAMP loan modification package as a result of the alleged HAMP violations, even if mortgagors uncovered additional evidence in support of existing claims after dismissal of first action.

[4] **Res Judicata** Evidentiary issues

The uncovering of additional evidence is not sufficient to avoid the res judicata doctrine.

[5] **Res Judicata** Mortgages and deeds of trust

Mortgagors' claim of violation of duty of good faith and fair dealing, and any claim for unfair and deceptive trade practices, both of which mortgagors did not assert in their first action against mortgage servicer, amounted to mere changes of legal theory, and therefore res judicata barred those claims, where claims were based on servicer's alleged violation of federal Home Affordable Modification Program (HAMP) rules, which was the subject of

mortgagors' first and second actions. West's N.C.G.S.A. § 75–1.1.

[6] Res Judicata Mortgages and deeds of trust

Res judicata barred mortgagors' claim concerning proof of ownership of mortgage in their second action against mortgage servicer alleging violations of federal Home Affordable Modification Program (HAMP) rules, where mortgagors raised the issue of ownership of mortgage in their first action.

[7] Appeal and Error De novo review

Where a motion for new trial involves a question of law or legal inference, the Court of Appeals' standard of review is de novo. Rules Civ.Proc., Rule 59, West's N.C.G.S.A. § 1A–1.

Attorneys and Law Firms

Lawrence J. Traber and Elge L. Traber, pro se, plaintiffs-appellants.

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***1** Appeal by plaintiffs from order entered 9 July 2014 by Judge Marvin P. Pope in Polk County Superior Court. Heard in the Court of Appeals 22 January 2015.

GEER, Judge.

Plaintiffs Lawrence J. Traber and Elge L. Traber appeal from an order granting judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure and from an order denying their motion for rehearing pursuant to Rule 59 of the Rules of Civil Procedure. Because the trial court considered exhibits in addition to the pleadings, the motion filed by defendants Bank of America ("BANA") and Bank of America Home Loans ("BAHL") was converted into a motion for summary judgment. We agree with defendants that the trial court properly entered judgment on plaintiffs' claims based on the doctrine of res judicata. Plaintiffs' claims in this case allege violations of the federal Home Affordable Modification Program ("HAMP") rules. However, plaintiffs had, in a prior lawsuit, similarly alleged that defendants committed HAMP violations, and those claims were dismissed with prejudice. We hold that res judicata applies, and the trial court properly entered judgment dismissing this action.

Facts

In 2006, plaintiffs took out a $417,000.00 mortgage with Mid–Atlantic Financial Services, Inc. that was secured by property at 3521 Howard Gap Road in Saluda, North Carolina. Plaintiffs stopped making payments on their mortgage in 2009 and received a letter of default from BANA. On 17 December 2010, plaintiffs filed a complaint ("the 2010 complaint") in Polk County Superior Court, alleging claims against the following defendants: Bank of America Corporation Home Loans Servicing LP, BANA, BAC/Countrywide Home Loans ("BACHLS"), Mortgage Electronic Registration Services ("MERS"), and Fannie Mae.

In the 2010 complaint as amended, plaintiffs made the following allegations. Plaintiffs asserted that they signed the loan documents in 2006 under duress, and sometime thereafter the defendants denied plaintiffs a rescission of their loan. According to the complaint, the defendants did not properly register the mortgage in accordance with federal laws and also did not pay real property transfer taxes on the property. Plaintiffs acknowledged that they stopped making payments on their mortgage after 3 August 2009 and that they received a letter from the defendants notifying them of their default under the terms of the mortgage. Plaintiffs claimed that they assumed from the default letter that foreclosure was impending. After receiving the default letter, plaintiffs "submitted at least four loan modification packages with no satisfaction (a violation of HAMP guidelines)." They alleged further that they requested, but never received, documentation regarding the ownership of their mortgage from the defendants. The complaint asserted that plaintiffs filed the 2010 complaint because of the HAMP violations and the refusal to provide them with the requested documentation. The complaint also alleged violations of other federal and state law.

***2** Finally, plaintiffs claimed that the defendants had presented no evidence of ownership of the loan and, therefore, had no standing to foreclose on the property. Based on that allegation, plaintiffs asserted a claim to quiet title and

requested that the trial court prohibit the defendants from demanding mortgage payments from plaintiffs.

The defendants named in the 2010 complaint filed a motion to dismiss. At the hearing on the motion to dismiss, counsel for the defendants pointed out that plaintiffs were not actually in foreclosure and that any claim for alleged HAMP violations should, therefore, be dismissed. On 18 April 2011, the trial court ordered that "Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' Complaint and Amended Complaint and that this action is hereby DISMISSED pursuant to Rule 12(b)(6)."

On 23 May 2011, plaintiffs filed a second lawsuit, although this time in federal court ("the 2011 complaint"). The 2011 complaint again included BACHLS as a defendant, as well as other defendants. In that complaint, plaintiffs asserted causes of action against the defendants based on their allegations that plaintiffs had "made numerous inquiries [to the defendants] but were stonewalled when they asked who now owned the[ir] note." Plaintiffs alleged, based on this behavior, that the holder of their mortgage had "bifurcated the loan by retaining the security interest while the note was sold, and ... caused the mortgage to become unsecured." Plaintiffs sought a declaration that their note had become unsecured "because it was bifurcated."

In order to establish diversity jurisdiction, plaintiffs amended their complaint to drop their claims against BACHLS. Ultimately, the federal district court dismissed the lawsuit as barred by res judicata. *Traber v. Mortg. Elec. Registration Sys., Inc.*, 2012 WL 4089282, 2012 U.S. Dist. LEXIS 131907 (W.D.N.C., Sept. 17, 2012), *aff'd,* 510 Fed.Appx. 307 (4th Cir.), *cert. denied,* —— U.S. ——, 134 S.Ct. 518, 187 L.Ed.2d 366 (2013).

On 23 May 2013, plaintiffs filed suit again in Polk County Superior Court ("the 2013 complaint") against BANA and BAHL.[1] Plaintiffs alleged that when they applied for a HAMP home loan modification in 2009, pursuant to 12 U.S.C. § 1701(c)(5), defendants placed them on a "merry-go-round in which [plaintiffs] repeatedly provided documentation to Bank of America and were told that their submission had not been received, or that forms were wrong or incomplete, and making them wait months for a response only to be told that because of the delay, the window for them to apply for a HAMP modification had closed, and finally that they were ineligible for a HAMP loan modified [sic] because they were not 'actually in foreclosure.' " Plaintiffs alleged that this drawn out process led to the denial of their loan modification application and that, but for defendants' actions, they would be entitled to receive a HAMP loan modification. Plaintiffs further alleged that defendants' actions were part of a broader scheme to engage in HAMP violations for a profit. Based on defendants' alleged HAMP violations, plaintiffs asserted claims for "Breach of Warranty of Good Faith," "Failure to Comply with 12 USC 1701," fraud, and conversion.

***3** In support of their contention that they were wrongly denied a loan modification package due to defendants' HAMP violations, plaintiffs alleged they received a check from a company called Rust Consulting, Inc. ("Rust Consulting check") that was accompanied by a letter informing them that they were part of a class of homeowners who were being compensated as part of a settlement between BANA and multiple state attorneys general over BANA's alleged " 'deficient mortgage servicing and foreclosure process.' " Plaintiffs also referred to a whistleblower lawsuit brought by a former BANA employee, Gregory Mackler, *United States ex rel. Gregory Mackler v. Bank of Am., N.A. & BAC Home Loan Servicing, L.P.,* No. 1:11–CV–113270 (E.D.N.Y., June 1, 2012), alleging that BANA committed HAMP violations. Plaintiffs noted that this lawsuit ultimately settled. Although plaintiffs did not make the *Mackler* complaint part of the record, they asserted that the complaint contained allegations that BANA violated HAMP guidelines by subjecting mortgage customers to tactics similar to those that plaintiffs contend caused them to be denied a HAMP loan modification.

BANA gave notice of removal to federal court. Plaintiffs moved to remand the case back to Polk County Superior Court. On 7 March 2014, the district court entered an order dismissing plaintiffs' claim of "Failure to Comply with 12 USC 1701," declining to exercise jurisdiction over the remaining state law claims, and remanding the 2013 action to state court.

On or about 3 April 2014, BANA filed an answer and affirmative defenses. BANA also filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure, arguing that the 2013 complaint was "barred by the doctrine of res judicata" and that plaintiffs had failed to state a claim for relief. BANA filed a memorandum in support of this motion, to which was attached several exhibits, including copies of plaintiffs' deed of trust, the 2010 complaint, the order dismissing the 2010 complaint,

the amended 2011 complaint, the order dismissing the 2011 complaint, and the Fourth Circuit's decision affirming that dismissal.

On 25 April 2014, plaintiffs sought a 30–day extension of their time to answer the motion for judgment on the pleadings. On or about 3 May 2014, the trial court denied plaintiffs' motion and granted BANA's motion for judgment on the pleadings, dismissing plaintiffs' 2013 complaint "in its entirety with prejudice." On 9 May 2014, plaintiffs filed a motion for reconsideration of the dismissal of the 2013 complaint pursuant to Rule 59(a)(1), (3), and (8) of the Rules of Civil Procedure. The trial court denied the Rule 59 motion on 9 July 2014.

Plaintiffs gave timely notice of appeal from the order denying reconsideration on 10 July 2014. On 15 July 2014, plaintiffs amended their notice of appeal to also timely appeal the order entering judgment dismissing the 2013 complaint.

Discussion

***4** Plaintiffs first argue that the trial court should not have granted defendants' motion for judgment on the pleadings regarding the 2013 complaint because the alleged HAMP violations in the 2013 complaint were not barred by the doctrine of res judicata. We note that after BANA submitted its memorandum in support of its Rule 12(c) motion with attached exhibits, plaintiffs did not object to consideration of the exhibits. Thus, "matters outside the pleadings [were] received and not excluded by the trial court," and therefore the "motion for judgment on the pleadings should be treated as a motion for summary judgment and disposed of in the manner and under the conditions set forth in Rule 56 of the North Carolina Rules of Civil Procedure." *Helms v. Holland,* 124 N.C.App. 629, 633, 478 S.E.2d 513, 516 (1996) (holding that motion for judgment on pleadings under Rule 12(c) had been converted to motion for summary judgment because trial court considered materials outside pleadings).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones,* 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal,* 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Summary judgment is appropriate

> when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.

Stafford v. Cnty. of Bladen, 163 N.C.App. 149, 151, 592 S.E.2d 711, 713 (2004).

This Court has explained with respect to the doctrine of res judicata:

> The party seeking to assert *res judicata* has the burden of establishing its elements. A party must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits in order to prevail on a theory of *res judicata.*

Auto. Grp., LLC v. A–1 Auto Charlotte, LLC, —— N.C.App. ——, ——, 750 S.E.2d 562, 565 (2013) (internal citations and quotation marks omitted).

[1] **[2]** **[3]** There is no dispute that the first and third elements of the res judicata doctrine have been satisfied. Plaintiffs, however, dispute whether there is an identity in causes of action between the 2010 and 2013 complaints. Res judicata bars " 'matters actually litigated and determined, [or] matters which could properly have been litigated and determined in the former action....' " *Moody v. Able Outdoor, Inc.,* 169 N.C.App. 80, 87, 609 S.E.2d 259, 263 (2005) (quoting *Fickley v. Greystone Enters.,* 140 N.C.App. 258, 260, 536 S.E.2d 331, 333 (2000)). Where, in a subsequent action, a party "attempt[s] to proceed by asserting a new legal theory or by seeking a different remedy" than in a prior action, yet does not "seek[ ] a remedy for a separate and distinct ... act leading to a separate and distinct injury [,]" then

the subsequent action is barred by res judicata. *Bockweg v. Anderson,* 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993).

***5** Because plaintiffs alleged precisely the same HAMP violations in the 2010 complaint as they did in the 2013 complaint and that they suffered the same injury (that they were denied a HAMP loan modification package as a result of the alleged violations), we hold that defendants have met their burden of showing that the claims asserted in the 2013 complaint are barred by res judicata. *See In re Raynor,* ——N.C.App. ——, ——, 748 S.E.2d 579, 584 (2013) (holding homeowners estopped from raising issue of HAMP violations as defense against bank in foreclosure proceeding when homeowners' separate suit against bank asserting HAMP violations was previously dismissed with prejudice).

Plaintiffs nonetheless cite *Gaither Corp. v. Skinner,* 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955), for the proposition that "where the omission of an item from a single cause of action is caused by fraud or deception of the opposing party, or where the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item." Plaintiffs do not, however, argue that they were fraudulently misled or deceived as to the existence of the alleged HAMP violations. Instead, plaintiffs merely assert that they lacked knowledge of the *Mackler* complaint and settlement, as well as the Rust Consulting check, which provided evidence in support of their eligibility for a HAMP modification and defendants' alleged HAMP violations.

[4] In contrast to *Gaither,* plaintiffs do not contend they were unaware of any claim, but rather that *Mackler* and the Rust Consulting check provided evidence in support of their existing claims of which they were unaware at the time of the 2010 complaint. The uncovering of additional evidence is not sufficient to avoid the res judicata doctrine. *See Scarvey v. First Fed. Sav. & Loan Ass'n of Charlotte,* 146 N.C.App. 33, 40, 552 S.E.2d 655, 659 (2001) (holding appellants could not avoid collateral estoppel bar by asserting "additional evidence about the original facts").

[5] Plaintiffs further argue that in the 2013 complaint, they pled a claim not previously asserted for violation of the duty of good faith and fair dealing. In addition, they argue that their allegations amounted to a claim for unfair or deceptive trade practices in violation of N.C. Gen.Stat. § 75–1.1 (2013), even though the complaint did not specifically assert such a claim. Because, however, these claims are still based on the HAMP violations that were the subject of the 2010 complaint and amount to a "mere[ ] change [in] legal theory" with respect to the same injury that was the subject of the 2010 complaint, these claims are likewise barred by res judicata. *Bockweg,* 333 N.C. at 494, 428 S.E.2d at 163.

[6] Additionally, for the first time in their reply brief, plaintiffs contend *First Fed. Bank v. Aldridge,* —— N.C.App. ——, 749 S.E.2d 289 (2013), supports their contention that defendants failed to properly demonstrate ownership of their mortgage. Since plaintiffs raised the issue of the ownership of their mortgage in the 2010 complaint, their arguments based on *First Federal Bank* are also barred by res judicata. Consequently, we hold that the trial court did not err in granting judgment in favor of defendants. *See Stafford,* 163 N.C.App. at 155, 592 S.E.2d at 715 (affirming grant of summary judgment in favor of defendant because plaintiffs' claims barred by res judicata).

***6 [7]** Finally, plaintiffs argue that the trial court erred in denying their motion for reconsideration made pursuant to Rule 59(a)(1), (3), and (8) of the Rules of Civil Procedure. " '[W]here [a] [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo.*' " *Bodie Island Beach Club Ass'n v. Wray,* 215 N.C.App. 283, 294, 716 S.E.2d 67, 77 (2011) (quoting *Batlle v. Sabates,* 198 N.C.App. 407, 423, 681 S.E.2d 788, 799 (2009)). Because we have determined that the trial court did not err in dismissing the 2013 complaint based on res judicata, the trial court likewise did not err in denying plaintiffs' Rule 59 motion.

AFFIRMED.

Judges STEPHENS and DILLON concur.

Opinion

Report per Rule 30(e).

All Citations

242 N.C.App. 523, 776 S.E.2d 898 (Table), 2015 WL 4620203

Footnotes

1 Plaintiffs have named BAHL as a defendant in this action, although this entity does not appear to actually exist. To the extent plaintiffs intended to name BACHLS as a party, BANA asserts that BACHLS merged with BANA prior to the filing of the 2013 complaint.