

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-152

DECEMBER TERM, 2007

Vito J. Russo	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
John McKay	}	DOCKET NO. 577-12-06 Wmcv

Trial Judge: John P. Wesley

In the above-entitled cause, the Clerk will enter:

Plaintiff appeals pro se from a superior court judgment dismissing his complaint against defendant for damages allegedly incurred from a real estate lease and purchase-option agreement and subsequent foreclosure. The court dismissed plaintiff's multi-count complaint as barred by the statute of limitations and the doctrine of res judicata. We affirm.

Plaintiff entered into a one year lease and purchase-option agreement with defendant, effective August 15, 1999, for a combined residential and commercial property in Brattleboro. Plaintiff claims that defendant improperly prevented his exercise of the purchase option after one year, which led to a monthly leasing arrangement until his purchase of the property in June 2001, on terms allegedly contrary to the original agreement. Defendant financed the purchase by taking a note and mortgage, and thereafter allegedly induced plaintiff to default on his obligation, refused settlement offers, and ultimately filed a complaint for foreclosure on the note and mortgage. Plaintiff, represented by counsel, answered the complaint but did not challenge the validity of the note and mortgage and raised no affirmative defenses or counterclaims. The court granted defendant's motion for judgment and subsequent motion to shorten the redemption period, and issued a judgment order and decree of foreclosure in June 2002. The court approved a subsequent stipulation to extend the redemption period, but later granted a second motion to shorten the period based on defendant's concern that plaintiff had allowed the property insurance to lapse. A writ of possession issued on October 8, 2002.

Several months later, plaintiff filed a pro se appeal from the foreclosure judgment with this Court, which we dismissed for failure to file a timely motion for permission to appeal under V.R.C.P. 80.1(m). A subsequent request for reconsideration was denied, as was a later

motion for permission to appeal in the superior court. In September 2005, the court denied a request for relief from judgment based on fraud and newly discovered evidence, under V.R.C.P. 60(b)(2) and (3), and in late 2006 denied a motion to reopen.

In December 2006, plaintiff filed a pro se complaint against defendant alleging fraud, deceit, breach of contract, misrepresentation and other claims relating to the lease and purchase-option agreement and foreclosure, and sought damages and the return of the foreclosed property. Defendant moved to dismiss. The court granted the motion, without hearing, in a written decision in April 2007. The court found that plaintiff's claims fell into two categories. The first related to defendant's conduct in allegedly preventing plaintiff from exercising the one-year purchase option. Applying the general six-year statute of limitations, 12 V.S.A. § 511, the court ruled that the claims accrued at the end of the one-year option period, on August 15, 2000, that the limitations period expired in August 2006, and that plaintiff's complaint, filed in December 2006, was therefore untimely.

The second category related to plaintiff's various claims that defendant engaged in fraud, misrepresentation and related misconduct in connection with plaintiff's subsequent purchase of the property in June 2001. The court ruled that these claims should have been raised as affirmative defenses or counterclaims in the earlier foreclosure proceeding between the parties, and therefore were barred by the doctrine of res judicata. Accordingly, the court dismissed the complaint and entered judgment for defendant. This appeal followed.

Plaintiff lists twenty-two separate issues or questions for consideration on appeal, but none are clearly and separately briefed and argued in conformance with the requisites of V.R.A.P. 28(a). Liberally construed, however, plaintiff's narration appears to argue, in the main, that the trial court erred in ruling the statute of limitations had run on his interference complaint and that his fraud complaints were precluded for failure to raise the same issues in the earlier foreclosure action. Otherwise, plaintiff variously complains that the trial court was responsible for numerous procedural or unconstitutional injustices.

First, plaintiff contends the claims relating to defendant's improper interference with his exercise of the one-year purchase option were not time-barred because the option was extended for an additional year. Even if this were the case, however, the trial court correctly concluded that the alleged interference to plaintiff's exercise of the original option occurred no later than August 2000, when the initial option expired, and that the claims therefore accrued at that time; and that the six-year period had therefore run before plaintiff brought his complaint in December, 2006.¹ Accordingly, we find no error.

Plaintiff also challenges the court's application of the doctrine of res judicata, or claim preclusion, to bar the balance of his fraud and deceit claims. Res judicata bars the litigation of

¹ Neither defendant's concession at oral argument, nor plaintiff's several assertions that extension of the option extended the running of the statute of limitation, overcome the trial court's finding that defendant's interference with plaintiff's exercise of the option allegedly occurred and was known to plaintiff on or before the August 2000 end date of the original option so that the interference was not actionable after August 2006.

a claim or defense if there exists a final judgment in a former litigation in which the “parties, subject matter and causes of action are identical or substantially identical.” In re Tariff Filing of Central Vermont Public Service Corp., 172 Vt. 14, 20 (2001). “The doctrine applies both to affirmative defenses that could have been raised before, and to compulsory claims that should have been raised.” Pomfret Farms Ltd. Partnership v. Pomfret Assocs., 174 Vt. 280, 284 (2002). The trial court here correctly applied the doctrine, observing that the parties to this suit were the same as those in the earlier foreclosure action, that the subject matter involved the same property, and that the claims and relief sought here all logically related to the validity of the underlying mortgage and note, and therefore should have been raised in the earlier proceeding. See id. at 284 (holding that claim of intentional misrepresentation in inducement of sales transaction was compulsory counterclaim which should have been raised in earlier foreclosure action on note and mortgage relating to the same underlying property, and therefore was barred by res judicata). Plaintiff appears to argue that some of his claims—such as those concerning an altercation with defendant which led to plaintiff’s incarceration—are unrelated to the property, but all such claims seem to be asserted in support of his complaint that the underlying purchase and sale was fraudulent and the subsequent foreclosure proceeding was procedurally flawed and invalid, due at least in part to plaintiff’s incarceration as a result of defendant’s falsity, and all therefore should have been raised in the earlier proceeding.²

Plaintiff additionally appears to contend that he should have been allowed to amend his complaint, but plaintiff fails to show that he was denied that opportunity or what viable claims such an amendment would have alleged. Plaintiff also advances a number of arguments related to his failure to timely appeal from the foreclosure judgment, but the relevance of these arguments to the instant appeal is not apparent. Several assertions are also made concerning the competence of plaintiff’s counsel in the foreclosure proceeding, but such unsupported claims do not mitigate the failure to raise any viable defenses or counterclaims in the earlier proceeding, and the claims cannot be considered in this context in any event.

Plaintiff raises a variety of additional arguments in summary fashion, including assertions that the trial court improperly failed to recuse itself; failed or declined to resolve an alleged conflict of interest involving defendant’s attorney; violated his fundamental rights under the Vermont and United States Constitutions; denied plaintiff a hearing; and committed a variety of statutory and procedural errors. Plaintiff has not shown that the claims were adequately preserved for review below, and has not adequately briefed them for review on appeal even under the most lenient standard. See Wilkins v. Lamoille County Mental Health Services, Inc., 2005 VT 121, ¶ 15, 179 Vt. 107 (this Court will not consider claims so

² Plaintiff further maintains, in this regard, that his attempt to raise related issues in the foreclosure proceedings was denied by that court in an order excluding such matters as collateral and properly the subject of future litigation. No written order or transcript to that effect appears in the supporting materials filed with this appeal. Nor does plaintiff establish that this claim of error was preserved for our review by raising it with the trial court in response to defendant’s motion to dismiss on grounds of res judicata.

inadequately briefed as to fail to meet standards of V.R.A.P. 28(a)(4)). Accordingly, we discern no basis to disturb the judgment.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice