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NO. COA12-562
NORTH CAROLINA COURT OF APPEALS

Filed: 15 January 2013

EDGAR JOHNSON,
Plaintiff,

v.

Durham County
No. 11 CVS 5453

BANK OF AMERICA, N.A., BAC HOME
LOANS SERVICING, LP, BROCK &
SCOTT, PLLC,
Defendants.

Appeal by plaintiff from orders entered 11 January 2012 and 19 January 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 October 2012.

Sandra J. Polin for plaintiff-appellant.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr. and James R. White, for defendant-appellees Bank of America, N.A. and BAC Home Loan Servicing, LP.

Roberson Haworth & Reese, P.L.L.C., by Christopher C. Finan, for defendant-appellee Brock & Scott, PLLC.

HUNTER, Robert C., Judge.

Edgar Johnson ("plaintiff") appeals from the trial court's orders dismissing his complaint for failure to state a claim for

relief and imposing sanctions on plaintiff and his attorney.¹ After careful review, we affirm the trial court's orders.

Background

This appeal stems from foreclosure proceedings initiated against plaintiff for his default on a \$240,000.00 promissory note held by defendant BAC Home Loans Servicing, LP ("BAC")². The promissory note was secured by a deed of trust on plaintiff's property located at 122 Red Mountain Road in Rougemont, North Carolina (the "Rougemont property"). Defendant Brock & Scott, LLP ("Brock & Scott") served as the substitute trustee in the foreclosure proceedings.

A. Foreclosure Proceedings

On 9 July 2010, the Clerk of Superior Court of Durham County entered an order in No. 10 SP 1077 allowing Brock & Scott

¹ Before addressing the substance of plaintiff's appeal, we note plaintiff's brief was filed in violation of Rule 28 of our Rules of Appellate Procedure. Rule 28 provides that a principal brief using proportional type "may contain no more than 8,750 words" and must include a certification that the brief contains no more than the number of words allowed by the rule. N.C. R. App. P. 28(j)(2)(B) (2012). Plaintiff's brief was submitted to this Court in proportional type and contains a certification signed by plaintiff's counsel that the brief contains 11,484 words. We admonish plaintiff's counsel for her violation of our appellate rules, which hampered our review of the evidence and arguments before us.

² BAC subsequently merged with Bank of America, N.A. ("BOA") its successor corporation.

to proceed with a foreclosure sale on plaintiff's Rougemont property. Plaintiff did not appeal from this order of foreclosure.

On 3 September 2010, plaintiff filed a document in the same foreclosure proceeding purporting to be a complaint seeking a temporary restraining order, preliminary injunction, and permanent injunction to enjoin BAC, Brock & Scott, and two of its employees from evicting plaintiff from the property. The motion for a temporary restraining order was heard in Durham County Superior Court on 7 September 2010, Judge Michael R. Morgan presiding. Judge Morgan concluded the trial court did not have subject matter jurisdiction over plaintiff's motion as it was filed as part of the foreclosure proceedings under N.C. Gen. Stat. § 45-21.6 and that plaintiff was required to seek relief in a separate action pursuant to N.C. Gen. Stat. § 45-21.34. Additionally, Judge Morgan concluded the trial court lacked personal jurisdiction over defendants in that matter because plaintiff failed to serve them with summonses. Plaintiff was evicted from the Rougemont property, and the property was sold in a foreclosure sale on 7 September 2010. Plaintiff's motion for a temporary restraining order was denied in an order entered 13 September 2010, but the order did not

address plaintiff's request for a preliminary injunction or permanent injunction against defendants.

Defendants subsequently filed motions to dismiss plaintiff's 3 September 2010 complaint in No. 10 SP 1077. In an order entered 12 November 2010, Durham County Superior Court Judge Orlando F. Hudson, Jr. dismissed plaintiff's complaint for lack of subject matter jurisdiction and lack of personal jurisdiction over defendants. The trial court sanctioned plaintiff pursuant to Rule 11 of the North Carolina Rules of Civil Procedure for filing a complaint that was not warranted by law, or a good faith argument for the extension, modification, or reversal of the law. Plaintiff was ordered to pay \$3,412.50 in attorneys' fees to BAC and \$2,410.25 in attorneys' fees to Brock & Scott.

After the foreclosure sale, plaintiff filed additional motions in 10 SP 1077 in an effort to have the foreclosure sale set aside or nullified. Plaintiff also initiated additional lawsuits against defendants in federal and state court, which we briefly review.

B. Federal Lawsuit

On 23 September 2010, plaintiff filed a complaint in the United States District Court, Eastern District of North

Carolina, Western Division, No. 5:10-CV-303-F, against the defendants BAC, Brock & Scott, and Jeremy B. Wilkins, and Lauren Reeves. Plaintiff's complaint included claims for: breach of the federal Fair Debt Collection Practices Act, breach of contract, breach of implied duty of good faith, breach of fiduciary duty, breach of the North Carolina Debt Collection and Servicing Act, and unfair and deceptive trade practices. The district court dismissed plaintiff's state law claims without prejudice on 29 September 2011.

B. No. 11 CVS 5341

On 11 October 2011, plaintiff filed an action, No. 11 CVS 5341, in Durham County Superior Court against BAC. In this complaint, plaintiff sought a temporary restraining order, preliminary injunction, and permanent injunction to enjoin defendants from evicting plaintiff from the Rougemont property. Plaintiff referenced his federal lawsuit in which he alleged breach of contract and violation of the Fair Debt Collections Practices Act by the defendants. Plaintiff noted that the federal district court had dismissed his state claims without prejudice, but plaintiff did not assert the state law claims in his complaint. BAC filed a motion to dismiss.

Plaintiff filed an amended complaint in No. 11 CVS 5341 on 25 October 2011 at 9:02 a.m. In the amended complaint, plaintiff named BOA and Brock & Scott as additional defendants. On 21 November 2011, Judge Paul G. Gessner dismissed plaintiff's complaint, with prejudice, for failure to state a claim upon which relief could be granted and denied plaintiff's motion for a restraining order and injunctive relief. There is no indication in the record that plaintiff appealed from the dismissal of his complaint in No. 11 CVS 5341.

C. No. 11 CVS 5453

On 25 October 2011 at 9:27 a.m., twenty-five minutes after filing his amended complaint in No. 11 CVS 5341, plaintiff filed the underlying action, No. 11 CVS 5453, in Durham County Superior Court against defendants BAC, BOA, and Brock & Scott. Plaintiff made the following claims in his complaint: breach of the North Carolina Unfair & Deceptive Practices Act against BAC and BOA; breach of contract against BAC; breach of implied duty of good faith against BAC; breach of fiduciary duty against Brock & Scott³; and breach of the North Carolina Debt Collection and Servicing Act against defendant BAC.

³ Plaintiff's claim of breach of fiduciary duty purports to include "Defendants Wilkins and Reeves" without describing them as parties to the action, providing their full names, or

On 23 November 2011, defendants raised numerous affirmative defenses in their answer including the defense that the doctrine of *res judicata* precluded plaintiff's claims. Defendants filed a motion seeking dismissal of plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, sought sanctions against plaintiff and his attorney for violations of Rule 11, and sought a gatekeeper order to bar plaintiff and his attorney, Sandra J. Polin ("Polin"), from filing additional related papers in Durham County Superior Court without seeking approval by a superior court judge.

On 11 January 2012, Judge Hudson held a hearing on defendants' motions and entered an order dismissing plaintiff's complaint with prejudice for failure to state a claim upon which relief could be granted. On the same day, Judge Hudson also entered an order sanctioning plaintiff and Polin, jointly and severally, in the amount of \$4,287.50, plus interest, for BAC's attorneys' fees and expenses. On 19 January 2012, Judge Hudson entered a separate order sanctioning plaintiff and Polin, jointly and severally, in the amount of \$3,175.50, plus interest, for defendant Brock & Scott's attorneys' fees and expenses. Also on 19 January 2012, Judge Hudson entered an

providing their relationship to the named defendants.

order limiting plaintiff's and Polin's ability to file additional papers related to the foreclosure. The order provides, in part:

[A]ny future papers filed with the Durham Clerk of Superior Court in this lawsuit and in any other lawsuit in Durham County related to: 1) The mortgage loan account that is the subject of this action; or 2) The foreclosure of the subject collateral; or 3) Any of the litigation that has arisen out of the subject mortgage loan account and/or subject collateral. [sic] must be certified by a North Carolina Superior Court Judge of Durham County as being compliant with Rule 11 of the North Carolina Rules of Civil Procedure. If [p]laintiff, Edgar Johnson and/or Sandra J. Polin, fails to comply with this [o]rder he or she shall be in [c]ontempt of [c]ourt.

(Hereinafter, "the gatekeeper order.")

Plaintiff appeals from the 11 January 2012 order dismissing his complaint in No. 11 CVS 5453, the 11 January 2012 order imposing sanctions for BAC's attorneys' fees, the 19 January 2012 order imposing sanctions for Brock & Scott's attorneys' fees, and the 19 January 2012 gatekeeper order.

Discussion

A. *Res Judicata* & Rule 12(b)(6)

Plaintiff argues that the trial court erred in dismissing his complaint as being barred under the doctrine of *res judicata*

and as failing to state a claim pursuant to Rule 12(b)(6). We disagree.

We review *de novo* the trial court's ruling on a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following conditions is satisfied: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

"The doctrine of *res judicata* provides that a final judgment on the merits in a prior action precludes a second suit based on the same cause of action between the same parties or those in privity with them." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994). The doctrine not only bars "the relitigation of matters determined in the prior proceeding but also 'all material and relevant matters within the scope of the pleadings, which the

parties, in the exercise of reasonable diligence could and should have brought forward.'" *Id.* (quoting *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524 (1989)). Additionally, "[t]he defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985).

We conclude plaintiff's complaint was barred by the doctrine of *res judicata*. A final judgment was entered on the merits of plaintiff's complaint in his prior lawsuit, No. 11 CVS 5341, which was filed against the same entities that are the parties in the lawsuit that is the subject of this appeal. While the claims in the complaint filed in No. 11 CVS 5341 and the underlying action differ, plaintiff could have raised the claims he made below in his complaint in No. 11 CVS 5341. Plaintiff's claims all stem from the same factual basis, the foreclosure proceedings on defendant's property in Rougemont. When plaintiff filed his amended complaint in No. 11 CVS 5341 on 25 October 2011, his state law claims against defendants had been dismissed without prejudice by the federal district court nearly one month earlier on 29 September 2011. Thus, plaintiff could and should have raised his state law claims in No. 11 CVS

5341, but he failed to do so. When plaintiff's complaint in No. 11 CVS 5341 was dismissed with prejudice on 21 November 2011, the doctrine of *res judicata* precluded plaintiff from litigating the claims in a subsequent action. Accordingly, plaintiff's complaint in the underlying action was properly dismissed for failure to state a claim upon which relief could be granted.

B. Sufficiency of the Findings of Fact & Conclusions of Law

Plaintiff argues that the trial court erred by failing to include findings of fact or conclusions of law in the order dismissing his complaint where he made a request them pursuant to Rule 52(a)(2) of the North Carolina Rules of Civil Procedure. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(2) (2011) provides, in part, that "[f]indings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b)." However, in *G & S Bus. Servs. v. Fast Fare, Inc.*, 94 N.C. App. 483, 490, 380 S.E.2d 792, 796, *appeal dismissed and disc. review denied*, 325 N.C. 546, 385 S.E.2d 497 (1989), this Court held that Rule 52(a)(2)'s mandate that a trial court must make findings of facts and conclusions of law upon a party's request does not apply where the trial court dismisses the plaintiff's

claim pursuant to Rule 12(b)(6), which the trial court did here. The case plaintiff cites in support of his argument, *Agbemavor v. Keteku*, 177 N.C. App. 546, 550, 629 S.E.2d 337, 341 (2006), is inapposite as it involves an appeal from a trial court's order dismissing a complaint pursuant to Rules 12(b)(2), (b)(3), and (b)(5), but not Rule 12(b)(6).

We note that while the trial court's order, here, does not contain findings of fact, it contains the conclusion of law that plaintiff failed to state a claim for which relief could be granted. Under this Court's holding in *Fast Fare*, however, the trial court did not err by not including findings of fact in its order dismissing plaintiff's complaint pursuant to Rule 12(b)(6).

C. Rule 11 Sanctions

Plaintiff argues the trial court erred in imposing sanctions for a violation of Rule 11 of the North Carolina Rules of Civil Procedure because there is insufficient evidence to support the trial court's finding that plaintiff's complaint had no basis in law and that there was no good faith argument for the extension, modification, or reversal of existing law. We disagree.

We review the trial court's decision to impose Rule 11 sanctions *de novo*. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). In our review, we must determine "(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* If these inquiries are answered in the affirmative, we must uphold the imposition of sanctions. *Id.* As for the appropriateness of the sanctions imposed, we review the trial court's order for abuse of discretion. *Id.*

Rule 11 provides, in pertinent part, that the signature of an attorney or party on a pleading, motion, or other paper

constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C. Gen. Stat. § 1A-1, Rule 11 (2011). A filing in violation of Rule 11 requires the trial court to impose "an appropriate sanction" on the offending attorney or party, or both, which may

include an order to pay the reasonable expenses and attorneys' fees that were incurred by another party as a result of the filing. *Id.*

"It is well established '[t]here are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. . . . A violation of any one of these requirements mandates the imposition of sanctions under Rule 11.'" *Ward v. Jett Props., LLC*, 191 N.C. App. 605, 607, 663 S.E.2d 862, 864 (2008) (quoting *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002)) (emphasis added). As we stated in *Ward*, an examination of the legal sufficiency of a claim involves a two-step analysis. *Id.* First, we must determine whether the complaint is facially plausible. *Id.* at 608, 663 S.E.2d at 864. "If the paper is not facially plausible, the second issue is whether, based on a reasonable inquiry into the law, the alleged offender 'formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed.'" *Id.* (citation omitted). The party's failure to conduct a reasonable inquiry into the law is sufficient to impose Rule 11 sanctions. *Id.*

Here, plaintiff's complaint was not facially plausible. The claims in plaintiff's complaint fall within the scope of the

pleadings he filed in No. 11 CVS 5341. Those pleadings, filed against the same parties as the underlying action, were dismissed with prejudice. Although the dismissal was a final judgment on the merits of his claims, plaintiff did not appeal from the trial court's order. With this knowledge, a reasonable person in plaintiff's position, or that of his counsel, conducting a reasonable inquiry into the law, would have concluded that plaintiff's claims were barred by the doctrine of *res judicata* and were insufficient to state a claim upon which relief could be granted. See *Kuykendall*, 114 N.C. App. at 416, 442 S.E.2d at 97. We therefore conclude that the trial court's findings support its conclusion of law that plaintiff's complaint was legally insufficient and a violation of Rule 11. Because we hold that plaintiff's complaint violated the legal sufficiency prong of the Rule 11 analysis, we need not address plaintiff's arguments as to the factual sufficiency of the filing and the trial court's finding of an improper purpose. See *Ward*, 191 N.C. App. at 607, 663 S.E.2d at 864. We affirm the trial court's determination to impose sanctions.

D. Gatekeeper Order

Next, plaintiff contends that the trial court erred in entering the gatekeeper order because (1) the trial court failed

to consider all necessary factors in determining whether the gatekeeper order was warranted; (2) the order is too broad; and (3) the order violates his rights to due process and access to the courts. We disagree.

We review the trial court's imposition of a particular sanction, including a gatekeeper order, under an abuse of discretion standard. See *Fatta v. M & M Props. Mgmt., Inc.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2012 WL 6013080 at *8 (No. COA12-694) (Dec. 4, 2012) (reviewing the trial court's entry of a gatekeeper order for abuse of discretion). In support of his argument, plaintiff cites *Cromer v. Kraft Foods N. Am., Inc.*, 390 F.3d 812, 818 (4th Cir. 2004), in which the United States Court of Appeals for the Fourth Circuit stated that the imposition of a prefiling injunction requires the trial court to

weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.

Here, the trial court's order contains specific findings of fact reciting the history of plaintiff's litigation against defendants and its conclusion that there was no basis in law for

the underlying complaint. The trial court concluded that plaintiff's numerous filings were frivolous, amounted to harassment, caused defendants to incur needless expense, and placed an undue burden on the judicial system. The trial court noted that despite its previous sanctions against plaintiff and Polin, the two continued to file baseless documents related to the foreclosure in violation of Rule 11. We conclude the trial court gave proper consideration to these four factors and that its conclusions are supported by the record.

As the *Cromer* Court noted, in addition to giving proper consideration of these four factors, a trial court must also narrowly tailor a prefilling injunction "to fit the specific circumstances at issue." *Id.* Plaintiff contends the trial court failed to do so here. As described above, however, the trial court limited the scope of the gatekeeper order to those papers filed in Durham County that are related to the foreclosure on plaintiff's promissory note and collateral property. The order allows plaintiff to make such filings with the certification of any Durham County Superior Court judge. This is in contrast to the prefilling injunction vacated by the *Cromer* Court for being overbroad. There, the injunction imposed a categorical ban on the plaintiff's future filings by

prohibiting “any and all filings” in the United States District Court for the Western District of North Carolina concerning the underlying litigation and any *unrelated* litigation. *Id.* at 819. Additionally, any filings by the plaintiff required him to obtain the permission of the magistrate that entered the prefiling injunction. *Id.*

Judge Hudson’s gatekeeper order is more closely aligned with the prefiling injunction we reviewed in *Fatta*, __ N.C. App. at __, __ S.E.2d at __, 2012 WL 6013080 at *8. There, the trial court’s gatekeeper order prohibited the plaintiff from filing “any further motion, pleading, or other document” in Iredell County Superior Court unless the document was signed by a North Carolina licensed attorney. *Id.* The order was not too broad as it “provided room for potentially meritorious filings without imposing a type of categorical ban on future filings like those referenced in *Cromer*.” *Id.* at __, __ S.E.2d at __, 2012 WL 6013080 at *9. The gatekeeper order at issue here is similar in scope to the order in *Fatta* and is not overbroad. In summary, we conclude the trial court did not abuse its discretion in imposing the gatekeeper order as it properly considered the factors necessary for the imposition of the order, the trial court’s findings and conclusions are supported by the record,

and the order is narrowly tailored to the specific circumstances at issue.

Conclusion

For the reasons state above, we affirm the trial court's orders.

Affirmed.

Judges CALABRIA and ROBERT N. HUNTER, JR. concur.

Report per Rule 30(e).