COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-206

ERIC ZUTRAU

vs.

NICHOLAS ZUTRAU, administrator[1] (and a consolidated case).[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This appeal and cross appeal arise from (1) a partition decree in Probate and Family Court action no. DU18E0003PP, awarding Nicholas Zutrau, as administrator of the estate of Leilani Zutrau (Nicholas), all right, title, and interest in the property located at 14 Prospect Avenue, Oak Bluffs (property), and (2) an order dismissing the equity complaint in Probate and Family Court action no. DU19E0005QC. We affirm.

Background. The core undisputed facts are as follows. The parties are tenants in common of the property. On September 22, 2006, Eric Zutrau (Eric) executed a note (Note A) in favor of his sister, Leilani Zutrau (Leilani), in the amount of $241,000.

[1] Of the estate of Leilani Zutrau.

[2] Nicholas Zutrau, as administrator of the Estate of Leilani Zutrau vs. Eric Zutrau.

Note A was secured by a mortgage on the property, which was registered with the Dukes County Registry of Deeds on the same day. The full amount of Note A was to be paid in a single lump sum on or before April 22, 2007. Section 7 of Note A provided:

> "If [Eric] is more than 15 days late in making payment, Lender may declare that the entire balance of unpaid principal is due immediately, together with any interest that has accrued. If [Eric] is unable to make full payment to satisfy this [p]romissory [n]ote, [Eric] agrees to sign over all right, title, and interest of [his] share of [the property]."

Eric failed to make the required payment, and on May 11, 2009, Leilani sent a written notice declaring the full amount due, and demanding immediate payment or, in the alternative, that Eric sign over all right, title, and interest in the property. Eric did neither.

On September 6, 2018, after the United States Bankruptcy Court exempted Note A, as well as any interest and attorney's fees that may be due on it, from his bankruptcy estate, Eric brought the underlying partition action, seeking a decree permitting him to purchase sole ownership of the property or, in the alternative, that it be sold for not less than $900,000.

On April 16, 2019, Nicholas filed the underlying equity action, seeking specific performance of Section 7 of Note A, statutory interest from July 29, 2010, through the date of judgment, and legal fees and costs associated with enforcing Note A and the mortgage. Nicholas also sought to have the

equity action decided before the partition petition, and for the two cases to be consolidated.

Dispositive motions were filed in both cases: Eric moved to dismiss the equity action; Nicholas moved for summary judgment in the partition action. The parties treated these dispositive motions as cross motions, and briefed them in consolidated motion papers. Ultimately, the motions were decided at the same time in a consolidated memorandum and order by the judge.

Discussion. In his motion for summary judgment in the partition action, Nicholas sought a decree that Eric's interest in the property be transferred to him in its entirety, without financial adjustment. In his motion to dismiss and opposition to Nicholas's summary judgment, Eric raised several arguments. First, Eric argued that the relief Nicholas sought was "sought and/or available" in other pending actions and that no court had ever ordered transfer of Eric's interest in the property. Second, Eric argued that Note A did not require forfeiture of Eric's interest in the property upon default, but only created a security interest in the loan. Third, Eric argued that res judicata, the statute of limitations, and the doctrine of laches barred Nicholas's relief.

On appeal, Eric argues that judgment should not have entered in Nicholas's favor for three reasons. First, Eric

contends that the judge should not have adopted or relied upon findings made in the bankruptcy litigation. Second, he argues that Note A should not have been enforced in the partition action because it was the subject of prior pending litigation between the parties. Third, he argues that the statute of limitations bars the enforcement of Note A. We address each argument in turn.

Although Eric argues now that the judge should not have relied on the bankruptcy judge's findings, he did not make this argument below. See Boss v. Leverett, 484 Mass. 553, 563 (2020) ("issues not raised below cannot be argued for the first time on appeal"). Moreover, in the statement of undisputed facts, Eric admitted the bankruptcy judge's findings, stated that the "decision speaks for itself," and raised no objection to the judge relying on those findings. In the circumstances, Eric's argument on appeal that the judge should not have relied on the bankruptcy judge's findings has been waived. "The reason for this fundamental rule of appellate practice is well established: It is important that an appellate court have before it an adequate record and findings concerning a claim to permit it to resolve that claim properly." R.W. Granger & Sons, Inc. v. J & S Insulation, Inc., 435 Mass. 66, 74 (2001).

Even were we to overlook the issue of waiver, Eric would fare no better because the judge was entitled to accept the

bankruptcy judge's findings, which were made after a full trial in which Eric and Nicholas (or his decedent) were both parties. "Issue preclusion prevents the relitigation of an issue determined in an earlier action when that issue subsequently arises in another action based on a different claim between the same parties or their privies."[3] Jarosz v. Palmer, 436 Mass. 526, 530 n.3 (2002), citing Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988).

Nor do we see any merit in Eric's argument that the judge's acceptance of the bankruptcy findings was an unfair application of the doctrine of offensive collateral estoppel. The three cases on which he relies for this argument are not persuasive as none held that the offensive use of collateral estoppel was inappropriate. See Bar Counsel v. Board of Bar Overseers, 420 Mass. 6 (1995); Whitehall Co. v. Barletta, 404 Mass. 497 (1989);

[3] The requirements of issue preclusion, all of which are satisfied here, are: "that '(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication was identical to the issue in the current adjudication'; and (4) 'the issue decided in the prior adjudication must have been essential to the earlier judgment.'" LaRace v. Wells Fargo Bank, N.A., 99 Mass. App. Ct. 316, 322 (2021), quoting Duross v. Scudder Bay Capital, LLC, 96 Mass. App. Ct. 833, 836-837 (2020). An issue was actually litigated if it was "subject to an adversary presentation and consequent judgment that was not a product of the parties' consent." Jarosz v. Palmer, 436 Mass. 526, 531 (2002), quoting Keystone Shipping Co. v. New England Power Co., 109 F.3d 46, 52 (1st Cir. 1997).

Commonwealth v. Two Parcels of Land, 48 Mass. App. Ct. 693 (2000).

Eric's second argument is that Nicholas's request that the equitable interest in the property be transferred to him is barred under Mass. R. Civ. P. 12 (b) (9), as amended, 450 Mass. 1403 (2008), which provides that "[p]endency of a prior action in a court of the Commonwealth" is a valid defense to a claim for relief. Rule 12 (b) (9) is "not a proper ground for dismissal of the action" if judgment has entered in the prior action, Mongeau v. Boutelle, 10 Mass. App. Ct. 246, 249 (1980), but it may be proper if the same issue is due to be tried in a separate court, see Don Lorenz, Inc. v Northampton Nat'l Bank, 6 Mass. App. Ct. 933, 933 (1978). At the time Eric argued that rule 12 (b) (9) applied,[4] the equity suit was the only other pending action between the parties involving Note A.[5] Although it is true that Nicholas sought transfer of Eric's interest in

[4] Eric's opposition to summary judgment was dated January 10, 2020.

[5] The 2009 Dukes County Superior Court action, which remained pending, did not involve Note A, but rather what the parties refer to as Notes B, C, D, and E. No other litigation was pending. Judgment had entered on July 29, 2010, in the 2009 foreclosure action. The bankruptcy case, as well as Leilani's adversary proceeding in it, had gone to trial, and the amended judgment was affirmed on appeal on February 16, 2017. Eric had defaulted in the second foreclosure action, which Nicholas had commenced on April 11, 2018, and the case was subsequently dismissed on April 8, 2019, without the default having been removed.

the property in the pending equity suit, that fact alone did not mean that Nicholas was not entitled to relief on his summary judgment motion in the partition action. The most salient reason is that the two cases were pending before the same judge, at the same time, with the same issues joined in each, on motions that the parties themselves understood and presented as cross motions for determination together.

Finally, Eric argues that the statute of limitation barred enforcement of Note A. To begin with, the judge could partition the property as she did even without considering Note A; there are many equitable reasons to partition property including, as amply evident here, when the owners are "at war." Even were that not the case, Eric's argument is not supported by the record. The chronology set out in the statement of undisputed facts showed that the bankruptcy petition was filed on March 3, 2011, and discharged on April 19, 2017. Accordingly, the automatic stay provision of 11 U. S. C. § 362(a)(1), tolled the statute of limitations for a period of six years, one month, and two weeks. See Zuckerman v. 234-6 W. 22 St. Corp., 267 A.D. 2d 130, 130 (N.Y. App. Div. 1999). Even assuming, as Eric contends, that the statute of limitations began to run on April 22, 2007, when he failed to make the balloon payment on the note, Nicholas's equity action seeking specific performance of the note was timely. The parties agree that the New York

statute of limitations of six years applies. N.Y. C.P.L.R. § 213(2). Accordingly, Nicholas had a total of twelve years, one month and two weeks (i.e., the statutory limitations period plus the period of tolling) from the date of breach in which to file suit. His equity complaint was filed on April 16, 2019 -- just within that period.

Although our discussion above disposes of the three arguments Eric makes in his brief, we have also considered an issue that arose at oral argument namely, whether the judge should not have, on summary judgment, transferred all right and interest in the property to Nicholas without considering the value of the interest transferred and any offsets to that value. To begin with, we note that Eric did not make this argument below. Furthermore, the record shows that Nicholas stated a fair market value of $900,000 in his partition petition and gave a tax value of $724,500 in his opposition to the motion for summary judgment. Giving him the benefit of the higher number, his equitable interest in the property had a value of approximately $450,000, without taking into account any offsets. But considering the amount owed under Note A ($241,000), the length of time that prejudgment interest on the debt will have accrued, and the fees and costs associated with enforcing the note in prior actions, including in a five-day Federal court trial, Eric has failed to persuade us that the judge erred in

transferring Eric's equity without financial adjustment. This is particularly so given the bankruptcy court's findings of fraud, which the judge could take into account for this purpose. See Sanborn v. Johns, 19 Mass. App. Ct. 721, 723-724 (1985).

Nonetheless, we are persuaded that Eric's interest in the property could not be transferred without financial adjustment unless Nicholas's rights under Note A and the mortgage were extinguished. Accordingly, although we are affirming the partition decree, we are remanding the case with an instruction that the partition decree be amended to make clear that Nicholas's rights under Note A, including any claims for interest or fees and costs, and the mortgage are extinguished.

Deciding the issues raised in the partition action as we have, it bears little discussion to affirm the dismissal of the equity action, although we do so on different grounds than the judge.

Conclusion. We affirm the judgment in the equity case, and we also affirm the partition decree, with an instruction

that the judgment be amended to declare that Nicholas's rights under Note A and under the mortgage are extinguished.[6]

So ordered.

By the Court (Wolohojian, Englander & D'Angelo, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: February 7, 2023.

[6] Nicholas's request for fees and costs on appeal is denied.

[7] The panelists are listed in order of seniority.