

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

MONROE COURT HOMEOWNER'S ASSOCIATION,	:	OCTOBER TERM, 2004
	:	
	:	No. 00777
Plaintiff,	:	
	:	COMMERCE PROGRAM
v.	:	
	:	Control No. 110858
SOUTHWARK REALTY CO.,	:	
CRAIG G. SMITH, SAUL Y. LEVY,	:	
JANET C. LEVY, ARISTIDE	:	
LINDENMAYER,	:	
	:	
Defendants.	:	

ORDER AND MEMORANDUM

AND NOW, this 7TH day of February 2005, upon consideration of the Preliminary Objections of defendants, Southwark Realty Co. and Craig G. Smith, plaintiff's response thereto, the briefs in support and opposition, and all other matters of record, it is hereby

ORDERED that the Preliminary Objections are **OVERRULED**, and defendants shall file an Answer to the Complaint within twenty (20) days of the date of entry of this Order.

BY THE COURT,

GENE D. COHEN, J.

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MEMORANDUM OPINION

Plaintiff, Monroe Court Homeowner's Association ("MCHA"), alleges in its Complaint that defendant Craig Smith, acting as a director of MCHA, caused a courtyard property (the "Courtyard"), which was owned by MCHA, to be sold at sheriff's sale. Smith is also a allegedly a principal of defendant Southwark Realty Co ("Southwark"), which purchased the Courtyard at the sheriff's sale and then conveyed portions of the Courtyard to defendants, Saul Y. Levy, Janet C. Levy, and Aristide Lindenmayer.

In this action, MCHA requests that the court exercise its equitable jurisdiction to set aside the sheriff's sale, to quiet title to the Courtyard, and to eject defendants from the Courtyard. Smith and Southwark object that MCHA's claims are barred by the statute of limitations and laches,¹ failure to join indispensable parties, and *res judicata*. In addition, they object that this

¹ "The defense of the bar of . . . statute of limitations can be asserted only in a responsive pleading as new matter under [Pa R. Civ. P.] 1030." Pa. R. Civ. P. 1028(a)(4), *Explanatory Note*. Likewise, the issue of laches shall be pled as New Matter. See Pa. R. Civ. P. 1030(a). Therefore, the court declines to address these issues at this stage in the proceedings.

court can no longer set aside the sheriff's sale and that MCHA has failed to set forth a claim against Smith.

I. Defendants' Objections Based on *Res Judicata* Must Be Overruled.

Defendants object that there have been two prior actions² involving the same subject matter, both of which were terminated, and that the termination of those actions has preclusive effect on the similar claims raised by plaintiff in this action. "Strict *res judicata*, also known as claim preclusion, provides that where there is a final judgment on the merits, future litigation on the same cause of action is prohibited." McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Commw. 2003).³

Invocation of the doctrine of *res judicata* (claim preclusion) requires that both the former and latter suits possess the following common elements:

1. identity in the thing sued upon;
2. identity in the cause of action;
3. identity of persons and parties to the action; and
4. identity of the capacity of the parties suing or being sued.

Gatling v. Eaton Corp., 807 A.2d 283, 287 (Pa. Super. 2002)

Neither of the prior actions has preclusive effect on the claims raised in this action.⁴

Specifically, the McGill Action was terminated by voluntary withdrawal by the plaintiff, which cannot be viewed as a final judgment on the merits. Similarly, the dismissal order in the Marucci

² The prior actions are Marucci v. Southwark Realty Co., November Term, 2001, No. 00391 (hereinafter the "Marucci Action") and McGill v. Southwark Realty Co., July Term, 2002, No. 00132 (hereinafter "the McGill Action"). The trial court's ruling in the McGill Action was appealed, and the appellate court issued as opinion that serves as relevant precedent with respect to a number of the issues raised by defendants in this action. See McGill v. Southwark Realty Co., 828 A.2d 430 (Pa. Commw. 2003).

³ Defendants also claim that the default judgment out of which the sheriff's sale arose has *res judicata* effect on this action. However, that default judgment had preclusive effect as to issues of liability only, not as to the issues of collection that are raised in this action. See McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Commw. 2003).

⁴ The related doctrine of collateral estoppel also does not bar this action because the issues raised here were not "actually litigated" in any of the prior actions. See McGill, 828 A.2d at 435.

Action, which was based upon the failure to join indispensable parties, does not have *res judicata* effect.

[I]n the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of the missing party. . . . Thus the trial court [must dismiss such an] action without reaching the merits of [plaintiff's] claims since any order of the court on the merits would [be] null and void for want of jurisdiction.

D'Amico v. Royal Ins. Co., 383 Pa. Super. 239, 242, 556 A.2d 886, 887 (1988).

II. Defendants' Objection to the Claim to Set Aside the Sheriff's Sale Must Be Overruled.

Defendants object that MCHA's claim to set aside the sheriff's sale is untimely. "Upon petition of any party in interest before delivery . . . of the sheriff's deed to real property, the court may upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances." Pa. R. Civ. P. 3132. This provision would appear to preclude MCHA from seeking to set aside the sheriff's sale of the Courtyard, now that the deed has been issued to Smith and/or Southwark. However, a sheriff's sale that was tainted by fraud or other wrongdoing, such as the breach of fiduciary duty alleged here, may be vacated even after the deed has been issued. See McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Commw. 2003);⁵ Marine Bank v. Huhta, 279 Pa. Super. 130, 138, 420 A.2d 1066, 1070 (1980) ("Proof of fraud or overbearing may be a sufficient ground to set aside a sheriff's sale.") Therefore, the court will not dismiss this claim at this juncture.

⁵ This court declines to follow the Commonwealth court's holding in McGill that Pa. R. Civ. P. 3132 provides an adequate remedy at law which precludes plaintiff from seeking equitable relief as well. See McGill v. Southwark Realty Co., 828 A.2d 430, 435 (Pa. Commw. 2003). "A petition to set aside a sheriff's sale invokes the equitable powers of a trial court," and the plaintiff is entitled to request additional equitable relief from this court. See M&T Mortgage Corp. v. Keesler, 826 A.2d 977, 879 (Pa. Super. 2003).

III. Defendants' Objections Based on Indispensable Parties Must Be Overruled.

Defendants object that MCHA did not include as a defendant Richard Schleicher and other persons who were officers and directors of MCHA at the time that the Courtyard was sold at sheriff's sale. As alleged in the Complaint, these officers and directors, possibly at the instigation of Mr. Smith, made a number of the misrepresentations that MCHA claims constitute fraud sufficient to set aside the Sheriff's sale. However, the only relief requested by Plaintiff relates to the ownership and possession of the Courtyard, which Mr. Schleicher and the other officers and directors never owned or possessed. Therefore, the officers and directors are not parties indispensable to this action because "the merits of the case can be determined without prejudice to [their] rights." Sprague v. Casey, 520 Pa. 38, 49, 550 A.2d 184, 189 (1988) ("a party against whom no redress is sought need not be joined.")

IV. Plaintiff Has Set Forth A Valid Claim Against Smith.

Smith objects that plaintiffs have failed to set forth with sufficient specificity the facts underlying their claims of fraud against him. Smith is correct that the allegations against him lack the specificity to support a claim of fraud, but the court reads the underlying claim against him as one for breach of fiduciary duty, rather than for fraud, and the material facts on which a claim for breach of fiduciary duty is based need only "be stated in a concise and summary form." *Compare* Pa. R. Civ. P. 1019(a), *with* Pa. R. Civ. P. 1019(b). If, as MCHA alleges, Smith was a director of MCHA, and he was involved in some sort of scheme by which he and/or his company, Southwark, improperly took title to MCHA's property, then Smith may be found guilty of breach of fiduciary duty, and MCHA may be entitled to obtain title to the Courtyard from defendants.

CONCLUSION

For all these reasons, defendants Southwark's and Smith's Preliminary Objections to plaintiff's Complaint are overruled.

BY THE COURT,

GENE D. COHEN, J.