MEMORANDUM DECISION

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NEWREZ LLC F/K/A NEW PENN FINANCIAL D/B/A SHELLPOINT MORTGAGE SERVICING, THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, AS TRUSTEE FOR CERTIFICATE HOLDERS OF THE CWABS, INC. ASSET-BACKED CERTIFICATES SERIES 2005-BC5, JEFFREY J. HANNEKEN

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IN THE
COURT OF APPEALS OF INDIANA

Mario L. Sims,
Appellant,

v.

David M. Bengs, Marinosci Law Group, et al.,
Appellees.

August 4, 2023

Court of Appeals Case No. 22A-CT-2280

Appeal from the St. Joseph Superior Court

The Honorable Mary Beth Bonaventura, Judge Pro Tempore

Trial Court Cause No. 71D07-1902-CT-63

Memorandum Decision by Judge Bailey
Judges Crone and Kenworthy concur.

Bailey, Judge.

Case Summary

[1] Mario L. Sims[1] appeals the denial of his motion to correct error, which challenged a grant of summary judgment to Newrez LLC f/k/a New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing; The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificate Holders of the CWABS, Inc., Asset-backed Certificates, Series 2005-BC5; and attorney Jeffrey J. Hanneken (collectively, at times, "Shellpoint Defendants"); and attorney David Bengs, upon Sims's claims of violations of the Civil Rights Act

[1] Sims's wife was a party in federal litigation, but she is not a named active party to this appeal.

of 1964, Section 1985(3) and Section 1986, in connection with a failed real estate acquisition. We affirm.

Issues

[2] Two consolidated and restated issues are presented for our review:[2]

I. Whether the submission of the case to the trial court judge should have been withdrawn upon Sims's motion alleging that the trial court judge failed to rule upon a motion for sanctions; and

II. Whether the trial court abused its discretion in denying the motion to correct error.

Facts and Procedural History

[3] The factual background and an abbreviated procedural history of this case were set forth in *Sims v. New Penn Financial, LLC* as follows:

> The Simses purchased a house from John Tiffany in October 2008 for $185,000. The Simses made a down payment ($12,000) and monthly payments ($1,400) to Tiffany for about a year.

[2] Sims articulates an additional issue, claiming that the trial court failed to address the merits of his post-judgment motions. The trial court issued an order summarily ruling upon both motions. Sims now asserts that he established grounds for equitable relief pursuant to Indiana Trial Rule 60(B)(1)-(2). Absent factual development, we are not in a position to address this purported issue. Trial Rule 60(D) provides: "In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule."

To their surprise, Bank of New York Mellon notified them in December 2009 that it was foreclosing on the property. (Tiffany had stopped making mortgage payments the prior May and still owed $126,000.)

To avoid a foreclosure sale and maintain possession of the house, the Simses then launched what became an extended effort to assume Tiffany's debt and mortgage. The Simses first offered to assume the debt when they wrote to the then-loan servicer, Resurgent, in January 2010. Tiffany followed up months later, writing to Resurgent that he was "willing to work toward a resolution in which Mr. and Mrs. Sims take over his obligation with the bank" and asking what was needed to "move this matter forward." (Under Tiffany's mortgage agreement, any purchasers of the property may assume the loan, so long as the loan servicer receives information to evaluate them "as if a new loan were being made" and determines that the assumption would not impair its security.) Over the next four years, the Simses maintain, they tried to assume Tiffany's mortgage, but Resurgent never advised them of what information it needed to evaluate their application.

Meanwhile, in 2012 the Simses acquired a quitclaim deed for the property from Tiffany, and in 2013 Bank of New York Mellon foreclosed on the house, which then was scheduled for a foreclosure sale.

Shellpoint, which began servicing the loan in March 2014, informed the Simses nine months later of what information they needed to provide in order to apply to assume the loan. To give the Simses an opportunity to submit the requisite documentation, Shellpoint agreed to postpone a foreclosure sale.

Over the next several months, the Simses tried to apply for the loan without success. They maintain that they thrice sent the

required financial records to Shellpoint. According to an affidavit prepared by one of Shellpoint's representatives, however, the Simses never submitted an application that Shellpoint deemed complete enough to warrant review. Shellpoint also informed the Simses in March 2015 that they needed to bring Tiffany's loan current before they could assume it. This requirement proved to be a sticking point: without Tiffany's written consent to discuss the status of his loan with a third party (here, the Simses), Shellpoint refused to disclose information about his missed payments, and the Simses assert that they could not bring his loan current without knowing how much it would cost them to do so.

The Simses, based on a conversation with a Shellpoint employee, believe that Shellpoint has not permitted them to assume Tiffany's loan because they are African-American. They assert that Shellpoint frequently rebuffed their inquiries to Shellpoint about their application's status. Shellpoint personnel, they insist, sometimes hung up on them or sent their calls to voicemail and did not call back. They eventually got through to a Shellpoint employee, K'tia Cox, who the Simses believe is African-American and who allegedly told them, "These people, you know how they treat us."

After several attempts to assume the loan without success, the Simses filed [] suit. Seeking damages and an injunction preventing a foreclosure sale of the house, they sued Shellpoint under the Equal Credit Opportunity Act, the Fair Housing Act, the Fair Debt Collection Practices Act, and Indiana state law. . . . [T]hey alleged that Shellpoint discriminated against them based on race by delaying their effort to assume Tiffany's loan and forcing them to make all of Tiffany's overdue payments as a condition of assumption—a condition that, they say, Tiffany's mortgage agreement does not require.

> In response to Shellpoint's motion to dismiss the complaint, the district court dismissed many claims but allowed the Simses to proceed on their claim under the Equal Credit Opportunity Act. The Act makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race...." 15 U.S.C. §1691(a)(1).
>
> After discovery, a magistrate judge, presiding by consent, 28 U.S.C. § 636(c), entered summary judgment for the defendant. The judge first determined that the Simses "probably were not 'applicants' " under the Act because they were seeking to assume a line of credit, rather than to "exten[d], renew[ ], or continu[e]" one. *See* 15 U.S.C. § 1691a(b). But even if the Act applied, the judge continued, the Simses failed to present evidence of discrimination under either a disparate impact or disparate treatment theory. Cox's statement ("These people, you know how they treat us"), the judge assessed, was ambiguous and lacked foundation, and thus it was insufficient to show race discrimination. In the end, the "dearth of evidence from the Simses" precluded them from calling into question Shellpoint's conduct or conclusion that they did not complete the prerequisites for assuming the loan.

906 F.3d 678, 678-80 (7th Cir. 2018). The 7th Circuit held that: "The district court correctly entered summary judgment for the defendants because no reasonable jury could find that Shellpoint discriminated against the Simses based on their race." *Id.* at 680.[3]

[3] Attorney Hanneken represented Shellpoint Mortgage Servicing during this litigation.

[4] On July 10, 2018, Sims filed a Chapter 13 petition in the United States Bankruptcy Court. The Bank of New York obtained relief from the bankruptcy stay and re-initiated foreclosure proceedings. Sims appealed, alleging that the bankruptcy court judge and district judge had ruled based upon racial animus. The Seventh Circuit Court of Appeals affirmed the decision on appeal and required Sims to pay the opposing party's attorney's fees, stating:

> Mario Sims agreed to pay John Tiffany for his home, but before he could finish the transaction, Tiffany defaulted on his home mortgage. When the Bank of New York foreclosed on that home, Sims filed for bankruptcy protection in order to stay the sale of Tiffany's home. But Sims was not a party to the mortgage, so the bankruptcy court lifted the stay and allowed the foreclosure. Sims appealed in district court, which denied relief. He now frivolously challenges several of the district court's rulings: he has either inadequately preserved those challenges or they lack any conceivable merit, so we affirm and impose a sanction.

Sims v. Bank of New York, 845 Fed.Appx. 454, 454 (7th Cir. April 28, 2021).

[5] In February of 2019, Sims brought an action in state court. The matter was moved to bankruptcy court and remanded back to state court. On August 1, 2019, Sims filed an amended complaint ("the Complaint"). On April 20, 2020, the trial court dismissed all of the claims except two under the Civil Rights Act, specifically, claims alleging violations of 42 U.S.C. §§ 1985(3) and 1986.

[6] In the Complaint, Sims alleged that the defendants conspired to conceal the conditions of mortgage assumption. He made factual allegations including:

attorney Bengs did not supply assumption paperwork and lied in bankruptcy court; the defendants were motivated by discriminatory animosity; the defendants acted in a plan pursuant to an agreement since 2010; and they schemed to interfere with the judicial system's impartiality. With respect to the Section 1985(3) claim in particular, Sims alleged that the defendant-attorneys and the Shellpoint Defendants had "knowingly obtained a credit bureau report using a social security number that did not belong to [Sims] and used it in a court proceeding." (App. Vol. II, pg. 13.) With respect to the Section 1986 claim, Sims alleged that the attorneys and Shellpoint Defendants "failed to expose, prevent, or otherwise aid in preventing the acts of deprivation of [Sims]'s civil rights in furtherance of the conspiracy of which they were a part." *Id.* at 15.

[7] The defendants filed two motions for summary judgment, and the trial court conducted a hearing on May 18, 2022. Awaiting a ruling, Sims filed a motion for sanctions upon some of the Shellpoint Defendants, attorney Nathan Blaske, and a law firm. On June 1, summary judgment was granted to all defendants, on statute of limitations and *res judicata* grounds. The parties filed memoranda in the trial court as to the sanctions. On June 27, Sims filed a Trial Rule 53.1 motion alleging that the trial court had failed to timely rule upon the motion for sanctions and the case should be withdrawn and submitted to a special judge. On July 11, 2022, the Chief Administrative Officer of the Indiana Supreme Court issued a determination finding that withdrawal of the submission of the matter from the trial judge was not warranted. (App. Vol. II, pg. 39.)

[8] Meanwhile, on July 1, Sims had filed a "Verified Motion to Correct Error and Motion for Relief from Order." (*Id.* at 82.) The trial court conducted a hearing on August 29, 2022, and one day later denied the motion. Sims now appeals.

Discussion and Decision

Withdrawal of Submission of Case to the Trial Court Judge

[9] Asserting that the trial court failed to timely rule upon his motion for sanctions, Sims filed a praecipe pursuant to Trial Rule 53.1(A), which provides:

> In the event a court fails for thirty (30) days to set a motion for hearing or fails to rule on a motion within thirty (30) days after it was heard or thirty (30) days after it was filed, if no hearing is required, upon application by an interested party, the submission of the cause may be withdrawn from the trial judge and transferred to the Supreme Court for the appointment of a special judge.

Rule 53.1(E) provides that, upon filing of the praecipe specifically designating the motion or decision delayed, the Clerk is to record the filing and forward the praecipe and a copy of the CCS to the Chief Administrative Officer of the Indiana Office of Judicial Administration ("the Officer"). The Officer "shall determine whether or not a ruling has been delayed beyond the time limitation set forth under Trial Rule 53.1 or 53.2." *Id.*

[10] Here, the Officer issued a Notice of Determination on July 11, 2022, concluding that Sims was not entitled to relief under Trial Rule 53.1. Sims appears to believe that the trial court was divested of jurisdiction despite the

Officer's determination, which was adverse to Sims; however, Sims cites no authority for this proposition and develops no argument in this regard.

[11] Sims asserts – contrary to the Officer's determination -- that the trial court failed to rule upon his motion for sanctions. He thus contends that the conclusion of the Officer is erroneous. However, "[t]he proper remedy for challenging the denial of a Trial Rule 53.1(E) lazy judge motion is to seek a Writ of Mandate from the Indiana Supreme Court to compel the clerk to give notice and disqualify the judge." *Strutz v. McNagny*, 558 N.E.2d 1103, 1110 (Ind. Ct. App. 1990), *trans. denied*. Sims did not pursue this avenue for relief, and his claim of error on the part of the Officer is not properly before us.

Motion to Correct Error

[12] Typically, a ruling on a motion to correct error is reviewable under an abuse of discretion standard. *In re Adoption of K.G.B.*, 18 N.E.3d 292, 296 (Ind. Ct. App. 2014). We will reverse "only where the trial court's judgment is clearly against the logic and effect of the facts and circumstances before it or where the trial court errs on a matter of law." *Perkinson v. Perkinson*, 989 N.E.2d 758, 761 (Ind. 2013). However, the matter is reviewed de novo when the issue on appeal is purely a question of law. *K.G.B.*, 18 N.E.3d at 296.

[13] Here, the motion to correct error challenged a grant of summary judgment. Alternate grounds for denying that motion were identified by the trial court: the applicable statutes of limitations and *res judicata*. As discussed more fully

below, Sims did not develop cogent argument upon either of those grounds in his motion to correct error or his appellate brief.

[14] Summary judgment is appropriate only "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). A trial court's order on summary judgment is cloaked with a presumption of validity; the party appealing from a grant of summary judgment must bear the burden of persuading this Court that the decision was erroneous. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied*. We may affirm the grant of summary judgment upon any basis argued by the parties and supported by the record. *Payton v. Hadley*, 819 N.E.2d 432, 438 (Ind. Ct. App. 2004). However, Trial Rule 56(H) specifically prohibits this Court from reversing a grant of summary judgment on the ground that there is a genuine issue of material fact, unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court. *AutoXchange.com, Inc. v. Dreyer and Reinbold, Inc.*, 816 N.E.2d 40, 45 (Ind. Ct. App. 2004).

[15] Sims claimed that the defendants conspired to deprive him of equal protection of the law, in violation of 42 U.S.C. § 1985(3), which provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of

> preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

[16] State law governs the statute of limitations to be applied in a § 1985 action, and federal law governs the question of when that limitations period begins to run. *See Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). Indiana's personal injury statute requires commencement of an action within two years after the cause of action accrues. *See* Ind. Code § 34-11-2-4. "Under federal law, a cause of action accrues the moment the plaintiff knows or has reason to know of the injury that is the basis of his complaint. Thus, the statute of limitations begins to run from the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton v. Clements*, 832 F.2d 332, 334-35 (5th Cir. 1987).

[17] Sims also brought a derivative claim under 42 U.S.C. § 1986, which provides:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

[18] In ruling upon the motions for summary judgment, the trial court concluded that the two-year and one-year statutes of limitations, respectively, had expired. The trial court also determined that the allegation of racial animus was *res judicata*.[4] Sims challenged, in general terms, the summary judgment order

[4] The doctrine of res judicata bars litigation "of a claim after a final judgment has been rendered in a prior action involving the same claim between the same parties or their privies. The principle behind this doctrine, as well as the doctrine of collateral estoppel, is the prevention of repetitive litigation of the same dispute." *I.A.E., Inc. v. Hall*, 49 N.E.3d 138, 151 (Ind. Ct. App. 2015) (citing *MicroVote General Crop. V. Ind. Election Comm'n*, 924 N.E.2d 184, 191 (Ind. Ct. App. 2010)). The four criteria to be satisfied for preclusion of a claim under the doctrine of *res judicata* are: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Id*.

entered upon his claims. However, he failed to clearly and cogently articulate and support any post-judgment argument.

[19] Pertaining to a motion to correct error, Trial Rule 59(D) sets forth a specificity requirement:

> Any error raised however shall be stated in specific rather than general terms and shall be accompanied by a statement of facts and grounds upon which the error is based. The error claimed is not required to be stated under, or in the language of the bases for the motion allowed by this rule, by statute, or by other law.

Sims failed to comply with the specificity requirement. Moreover, the substance of Sims's argument in support of his motion to correct error did not challenge the merits of the trial court's summary judgment ruling.

[20] Rather, Sims's argument was directed to ostensible attorney misrepresentation and racial bias. Sims contended that one or more attorneys engaged in ethical violations related to a duty of candor toward a tribunal. Specifically, Sims asserted: "Most troubling is both the white Defendants and their white attorneys lack of candor and truthfulness and the white court's willingness to allow it." (App. Vol. II, pg. 89.) He asserted that "white people decided the only way for the Plaintiff to remove the Bank's lien is by assumption, in spite of the facts and the law." *Id.* Sims ultimately suggested that sanctions were appropriate.

[21] Additionally, Sims points out that there was no "order showing a payoff letter was ever issued in compliance with federal law." *Id.* Sims quoted 15 U.S.C. §

1639(g), which provides: "A creditor or servicer of a home loan shall send an accurate payoff balance within a reasonable time, but in no case more than 7 business days, after the receipt of a written request for such balance from or on behalf of the borrower." This provision of the Consumer Credit Protection Act affords Sims no relief from the judgment in favor of the defendants. His state law claims did not include a Consumer Credit Protection Act claim.

[22] Under these circumstances, Sims has not shown that the trial court misapprehended the facts and circumstances before it. Nor has Sims identified an error of law.

Conclusion

[23] The propriety of an adverse ruling made by a Chief Administrative Officer of the Indiana Office of Judicial Administration on a Trial Rule 53.1 motion is not a matter for review by this Court. The trial court did not abuse its discretion in denying Sims's motion to correct error that challenged the grant of summary judgment.

[24] Affirmed.

Crone, J., and Kenworthy, J., concur.