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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHERALYN PRECIADO,

Plaintiff and Appellant,

v.

AURORA LOAN SERVICING LLC, et al.,

Defendants and Respondents.

D068141

(Super. Ct. No. 37-2014-00011496-
CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Law Offices of Ronald H. Freshman and Ronald H. Freshman, for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich, for Defendants and Respondents Aurora Loan Servicing, LLC, Nationstar Mortgage, LLC, Deutsche Bank Trust Company Americas as Trustee and Mortgage Electronic Registration Systems, Inc.

McCarthy & Holthus, Melissa Robbins Coutts and Matthew B. Learned, for Defendant and Respondent Quality Loan Service Corporation.

I

INTRODUCTION

Cheralyn Preciado appeals from a judgment dismissing her action for claims related to efforts to conduct a nonjudicial foreclosure sale of her home. The court dismissed the action after sustaining without leave to amend a demurrer by Quality Loan Service Corporation (Quality) and a separate demurrer by Aurora Loan Servicing, LLC (Aurora), Nationstar Mortgage, LLC (Nationstar), Deutsche Bank Trust Company America as Trustee for RALI Series 2006-07 Trust (Deutsche), and Mortgage Electronic Registration Systems, Inc. (MERS).

Preciado contends we must reverse the judgment because the court erred in determining claim preclusion bars this action and in determining her operative first amended complaint failed to state any viable claims. We need not decide the second point because we conclude the court correctly determined claim preclusion bars this action. We, therefore, affirm the judgment.

II

BACKGROUND

In July 2006 Preciado executed a promissory note (note) for \$498,750, which was secured by a deed of trust on real property. The trustee of the deed of trust was Southland Title. The beneficiary of the deed of trust was MERS, acting solely as nominee for Homecomings Financial Network, Inc. and its successors and assigns. The deed of trust included a provision permitting the sale of the note and deed of trust one or more times without prior notice to Preciado.

In May 2008 MERS substituted Quality as the trustee under the deed of trust. The same month, Quality recorded notice of default and election to sell the property under the deed of trust because the note payments were in arrears by \$10,147.56.

In August 2008 Quality recorded a notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$560,876.61. In May 2009 Quality recorded a second notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$597,525.54.

In August 2009 MERS assigned the note and deed of trust to Aurora. In November 2010 Quality recorded a third notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$651,840.20. In December 2010 Quality recorded a fourth notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$656,967.58.

In June 2012 Aurora assigned the deed of trust to Nationstar. In August 2012 Quality recorded a fifth notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$736,238.44. In September 2011 Aurora denied Preciado's request for a loan modification. In August 2012 Preciado filed a complaint for damages and equitable relief against Aurora, Nationstar, Quality, MERS and another party whom Preciado later dismissed from the action (*Preciado v. Aurora Loan Services* (Super. Ct. San Diego County, 2013, No. 37-2012-00069115-CU-OR-EC) (first action)). The first action's operative first amended complaint alleged causes of action for slander of title, demand for accounting, injunctive relief, quiet title, intentional infliction of emotional distress, cancellation of trustee deed upon sale, violation of Civil

Code section 2923.5, violation of Civil Code section 2934, subdivision (a), negligent and oppressive wrongful foreclosure, unfair business practices, and fraud.

In September 2012 Quality filed a declaration of nonmonetary status, which Preciado did not oppose.¹ In December 2012 Nationstar, MERS, and Aurora demurred on the ground the first action's first amended complaint did not state any viable causes of action.² In May 2013 the court sustained the demurrer without leave to amend. In October 2013 the court dismissed the first action with prejudice.

In January 2014 Nationstar denied Preciado's request for a loan modification under the U.S. Treasury's Home Affordable Modification Program. In March 2014 Quality

¹ Civil Code section 2924*l*, subdivision (a), provides in part: "In the event that a trustee under a deed of trust is named in an action or proceeding in which that deed of trust is the subject, and in the event that the trustee maintains a reasonable belief that it has been named in the action or proceeding solely in its capacity as trustee, and not arising out of any wrongful acts or omissions on its part in the performance of its duties as trustee, then, at any time, the trustee may file a declaration of nonmonetary status."

Civil Code section 2924*l*, subdivision (d), provides: "In the event that no objection [to the declaration] is served within [15 days from the service of the declaration], the trustee shall not be required to participate any further in the action or proceeding, shall not be subject to any monetary awards as and for damages, attorneys' fees or costs, shall be required to respond to any discovery requests as a nonparty, and shall be bound by any court order relating to the subject deed of trust that is the subject of the action or proceeding."

² We grant the unopposed motion for judicial notice filed by Aurora, Nationstar, Deutsche, and MERS to the extent it seeks judicial notice of the demurrer and the court's ruling on the demurrer. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We deny the motion to the extent it seek judicial notice of bankruptcy court documents, as consideration of these documents is not necessary to the resolution of this appeal. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418.)

recorded a sixth notice of trustee's sale. The notice stated the amount of the unpaid loan balance and other charges was \$738,691.36.

In April 2014 Preciado filed the present action against Aurora, Nationstar, Deutsche, MERS, Quality, and other parties not involved in this appeal. The operative first amended complaint (complaint) alleged causes of action for cancellation of instruments, negligence, slander of title, violation of Business and Professions Code section 17200, et seq., declaratory relief, accounting, violation of the California Homeowners' Bill of Rights, quiet title, tortious interference of contract and fraud.

In January 2015 Aurora, Nationstar, Deutsche, and MERS demurred to the complaint on the grounds the complaint was barred by the doctrine of res judicata and, alternatively, it failed to state any viable causes of action. The same month, Quality separately demurred to the complaint on the same grounds.³

In April 2015 the court heard the demurrers, sustained them without leave to amend, and dismissed the complaint on the ground the complaint was barred by the doctrine of res judicata and on the alternative ground the complaint failed to state any viable causes of action.

³ We include this fact in our summary because the parties do not dispute it; however, the record supplied by Preciado does not include a copy of Quality's demurrer. Preciado's failure to provide an adequate record of Quality's demurrer for our review requires us to resolve her challenges to the court's ruling on Quality's demurrer against her. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.)

In June 2015 Quality, as trustee and on behalf of Nationstar, sold the property to Deutsche at a trustee's sale. The following month, Deutsche sold the property to another entity.⁴

III

DISCUSSION

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.)

A

Preciado contends the court erred in determining the doctrine of res judicata barred the complaint. We review this issue de novo. (*Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1553; *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1100.)

The doctrine of res judicata is "an umbrella term encompassing both claim preclusion and issue preclusion." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823 (*DKN*)). This appeal involves claim preclusion, which is "the 'primary aspect' of res judicata, [and] acts to bar claims that were, or should have been, advanced in a

⁴ We grant Quality's unopposed motion for judicial notice of the trustee's deed upon sale showing the sale of the property to Deutsche and the grant deed showing the conveyance of the property from Deutsche to another entity. (Evid. Code, §§ 452, subd. (h), 459, subd. (a); *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 194.)

previous suit involving the same parties." (*Id.* at p. 824.) "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*Ibid.*)

B

Regarding the same cause of action requirement, claim preclusion " 'is based upon the primary right theory.' [Citation.] 'The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.]' [Citation.] 'As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." ' ' ' (*Wade v. Ports America Management Corp.* (2013) 218 Cal.App.4th 648, 657.)

The injury for which the first action sought relief was the threatened nonjudicial foreclosure of Preciado's home based on allegedly void instruments and assignments. The primary right involved is Preciado's right to prevent the loss of her home through nonjudicial foreclosure proceedings initiated and conducted by parties lacking the requisite legal authority. The present action involves the same injury and, consequently, the same primary right as the first action.

Although the present action contains new and additional factual allegations related to the funding of Preciado's mortgage and its effect on the validity of the note and deed of trust, these allegations do not preclude the application of the doctrine of *res judicata*. The

allegations are purportedly based on information Preciado obtained by a private investigator after the dismissal of the first action; however, they are within the scope of the first action and the record does not show Preciado lacked the opportunity to discover the information and assert the allegations in the first action. "A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202 (italics omitted); *Wade v. Ports America Management Corp.*, *supra*, 218 Cal.App.4th at p. 657.) Accordingly, the same cause of action requirement is met.

C

Regarding the same parties requirement, the record shows both the first action and the present action were filed against respondents Aurora, Nationstar, Quality, and MERS. Although the present action was also filed against respondent Deutsche and the first action was not, Preciado does not dispute Deutsche is in privity with the other respondents. Indeed, the present action alleges Deutsche is an agent of the other respondents, which may be a basis for one party to be in privity with another. (See *Triano v. F.E. Booth & Co.* (1932) 120 Cal.App. 345, 347; see also, *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.) Therefore, the same parties requirement is also met.

D

Regarding the final adjudication on the merits requirement, the parties do not dispute the judgment in the first action is final. There is no record Preciado appealed the

judgment and the time to appeal has expired. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174.)

The parties do, however, dispute whether the judgment was an adjudication on the merits. On this point, the California Supreme Court has stated: "(1) A judgment entered after a general demurrer has been sustained 'is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will accordingly, be a bar to a subsequent action alleging the same facts.' [¶] (2) '[E]ven though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar.' (3) 'If, on the other hand, new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint.' " (*Crowley v. Modern Faucet Mfg. Co.* (1955) 44 Cal.2d 321, 323, quoting *Keidatz v. Albany* (1952) 39 Cal.2d 826, 828.)

The record shows Aurora, Nationstar and MERS demurred to the first action on multiple grounds, including that Preciado lacked standing to pursue her claims because she failed to allege she had the present ability to tender the amount owed on the note; she failed to plead the necessary elements of each cause of action; and she failed to allege facts constituting a cause of action. The court sustained the demurrer without leave to amend after finding each of her individual causes of action was factually and/or legally deficient.

To cure the defects in the first action and avoid the claim preclusion bar, the present action must contain viable causes of action based on new or additional facts. Causes of action reliant on the same facts and evidence as the first action are not sufficient to avoid the bar. (See *See v. Joughin* (1941) 18 Cal.2d 603, 606-609; *Erganian v. Brightman* (1936) 13 Cal.App.2d 696, 700–701.)

The only potentially material new or additional facts alleged in the present action relate to Preciado's claim her mortgage loan was table funded, which she correspondingly claims rendered the note, deed of trust, assignments of the note and deed of trust, and the nonjudicial foreclosure actions taken based on these documents void.⁵ Preciado premises these claims on an assertion table funding is an illegal business practice in California; however, she cites no specific authority for this assertion and instead refers generally to the California Finance Lenders Law (Fin. Code, § 22000 et seq.). We have found no provision in this statutory scheme prohibiting table funding.

Nonetheless, we note Business and Professions Code section 10234, subdivision (a), requires a real estate licensee who negotiates a mortgage loan secured by a trust deed to record the trust deed before the loan funds are disbursed, unless the lender provides written authorization for an earlier release of the funds. This code section further requires the trust deed to name the lender or the lender's nominee, not the licensee or the

⁵ In a table funding arrangement, the lender funds the loan at settlement and then takes assignment of the loan. (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 152.)

licensee's nominee, as the beneficiary of the trust deed.⁶ To the extent this code section has been interpreted to prohibit table funding in California (see California Regulatory Law Reporter (Winter 1999) 16-WTR Cal. Reg. L. Rep. 172, 176), the code section protects the lender, not the borrower, by ensuring public notice of the lender's security interest in the borrower's real property before the lender's funds are disbursed to the borrower, unless the lender otherwise agrees in writing. A mortgage loan funded in violation of this code section would be voidable, not void, at the protected party's or lender's election, not at the borrower's election. (See *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1082–1083.) Accordingly, Preciado's table funding allegations do not cure the defects in the first action and avoid the claim preclusion bar. Given this conclusion, we need not address whether Preciado's complaint states any viable causes of action. (*Sutphin v. Speik, supra*, 15 Cal.2d at p. 200 [if a trial court correctly determines claim preclusion bars an action, an appellate court must affirm the judgment on this ground alone and should not consider the merits of the other issues raised by the appellant].)

⁶ Business and Professions Code, section 10234, subdivision (a), specifically provides: "Except as provided in subdivision (d) [relating to property that is not a dwelling or not improved], every real estate licensee who negotiates a loan secured by a trust deed on real property shall cause the trust deed to be recorded, naming as beneficiary the lender or his or her nominee (who shall not be the licensee or the licensee's nominee), with the county recorder of the county in which the real property is located prior to the time that any funds are disbursed, except when the lender has given written authorization for prior release."

IV

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

HUFFMAN, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

01/31/2017

KEVIN J. LANE, CLERK

By  Deputy Clerk

