

THERESA MCGREGOR, as Trustee, etc., Plaintiff and Appellant,
v.
JPMORGAN CHASE BANK, N.A., et al., Defendants and Respondents.

[No. D068615.](#)

Court of Appeals of California, Fourth District, Division One.

Filed April 19, 2017.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2014-00016611-CU-OR-NC, Timothy C. Casserly, Judge. Affirmed.

Dobe Law Group and Ronald H. Freshman for Plaintiff and Appellant.

Bryan Cave, Glenn J. Plattner and Deborah P. Heald for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

McCONNELL, P. J.

I

INTRODUCTION

Theresa McGregor, as trustee for the Theresa McGregor Trust dated October 20, 2004 (McGregor), appeals from a judgment dismissing her civil suit challenging the nonjudicial foreclosure sale of her home. The court dismissed the suit after sustaining without leave to amend a demurrer by JPMorgan Chase Bank, N.A. (JPMorgan); California Reconveyance Company (Reconveyance); Deutsche Bank National Trust Company, as trustee for Long Beach Mortgage Loan Trust 2006-8 (Deutsche); and Long Beach Securities Corporation (Long Beach) (collectively mortgagee defendants) on the grounds claim preclusion bars the suit and the operative second amended complaint otherwise failed to state any viable claims.

McGregor contends we must reverse the judgment because the court erred in both determinations. However, we conclude claim preclusion bars the suit and affirm the judgment. Given our conclusion, we do not address whether the second amended complaint otherwise states any viable claims.

II

BACKGROUND

This case has an extensive litigation history. We summarize it in some detail since the premise of McGregor's appeal is that she has not had an adequate opportunity to state her claims against the mortgagee defendants.

In August 2006 McGregor borrowed \$580,000 (the loan) from Washington Mutual Bank (WaMu). The loan was secured by a deed of trust on real property (the property). "WMB" was the trustee and WaMu was the beneficiary of the deed of trust.^[1] The deed of trust contained a provision expressly allowing the debt and deed of trust to be sold one or more times without notice to McGregor. Two days after the deed of trust was recorded, McGregor quitclaimed her interest in the property to "Theresa McGregor, Trustee, under the Theresa McGregor Trust dated October 20, 2004, for the benefit of Theresa McGregor."^[2]

In December 2008 JPMorgan, WaMu's successor in interest, transferred all of its beneficial interest in the deed of trust to Deutsche. The same day Deutsche substituted Reconveyance as trustee and Reconveyance recorded a notice of default.

In March 2009 McGregor purportedly sent a letter to WaMu rescinding the loan "pursuant to the Federal Truth in Lending Act, 15 U.S.C. § 1635, Regulation Z § 226.23.2."^[3] In June, McGregor filed a complaint in superior court against JPMorgan under, among other statutes, the Truth in Lending Act "to enforce [her] right to rescind a consumer credit transaction, and to void [JPMorgan's] security interest in [her] home." In September 2010 approximately two weeks before the court was scheduled to hear JPMorgan's motion for summary judgment, the court dismissed the action without prejudice at McGregor's request.

In May 2011 McGregor filed a Chapter 7 bankruptcy proceeding. In August, the bankruptcy court entered a discharge of debtor order and closed the case.^[4]

In November 2011 Reconveyance sold the property to Deutsche at a foreclosure sale. In January 2012 Deutsche filed an unlawful detainer action against McGregor in superior court.

In March 2012 McGregor filed a Chapter 13 bankruptcy proceeding. In April, Deutsche filed a motion for relief from the automatic bankruptcy stay, which the bankruptcy court granted in May. In June, the bankruptcy court dismissed the bankruptcy proceeding after McGregor failed to appear at a creditors' meeting.

The same month, the superior court entered judgment for Deutsche in the unlawful detainer action. McGregor subsequently appealed the judgment.

In August 2012 while the appeal of the unlawful detainer judgment was pending, McGregor filed another Chapter 13 bankruptcy proceeding. The same day, McGregor filed a complaint in federal district court against JPMorgan, Reconveyance, Deutsche and others (district court action). The complaint contained numerous causes of action challenging the foreclosure sale by challenging the validity of the documents underlying it as well as the adequacy of the disclosures provided under the Truth in Lending Act.

In September 2012 Deutsche filed another motion for relief from the automatic bankruptcy stay. The same month McGregor initiated an adversary case in bankruptcy court against JPMorgan, Reconveyance, Deutsche, Long Beach and others. The adversary complaint asserted causes of action for wrongful foreclosure, fraud, quiet title, declaratory relief, equitable relief, and injunctive relief. Like the district court action, the adversary complaint challenged the foreclosure sale by challenging the validity of the documents underlying it, particularly the documents evidencing the securitization of the loan.

In October 2012 the bankruptcy court granted Deutsche's motion for relief from the automatic bankruptcy stay. One month later, McGregor filed a voluntary request for dismissal of the bankruptcy proceeding, which the bankruptcy court granted in December. The bankruptcy court concurrently dismissed McGregor's adversary case.

In March 2013 McGregor filed a first amended complaint in the district court action. The first amended complaint asserted causes of action for declaratory relief; injunctive relief; violation of title 42 United States Code section 1983; violation of the Fair Debt Collection Practices Act; violation of the Truth in Lending Act; violation of the Racketeer Influenced and Corrupt Organization Act; quiet title; and slander of title. Like the original complaint, the first amended complaint

challenged the validity of the foreclosure sale by challenging the validity of the underlying documents. Additionally, the first amended complaint challenged the adequacy of the disclosures required by the Truth in Lending Act.

In April 2013 JPMorgan, Reconveyance, and Deutsche moved to dismiss the first amended complaint in the district court action. In July, the district court granted the motion and dismissed the first amended complaint with leave to amend. Of particular relevance to this appeal, the district court dismissed McGregor's claim under the Truth in Lending Act because the district court found the claim was untimely.

In August 2013 McGregor filed a second amended complaint in the district court action. The second amended complaint alleged causes of action for wrongful foreclosure, violation of the Fair Debt Collection Practices Act, violation of the Business and Professions Code section 17200 et seq., and fraud and deceit. Like the original and first amended complaint, the second amended complaint challenged the validity of the foreclosure sale by challenging the validity of the underlying documents. The second amended complaint also challenged the foreclosure sale by alleging JPMorgan failed to comply with federal and state law requiring JPMorgan to assist McGregor in obtaining a loan modification.

In September 2013 JPMorgan, Reconveyance, and Deutsche moved to dismiss the second amended complaint in the district court action. In October, the district court granted the motion without leave to amend and dismissed the case with prejudice. The district court granted the motion as to McGregor's Fair Debt Collection Practices Act claim because McGregor had not cured the previously identified pleading deficiencies for this claim. The district court granted the motion as to the remaining claims because they were new and McGregor had not obtained leave of court to add new claims. In addition, the district court found the claims could have been but were not alleged in her previous complaints.

In November 2013 McGregor appealed the district court action by filing a notice of appeal with the Ninth Circuit Court of Appeals. Meanwhile, in March 2014 the superior court affirmed the judgment in the unlawful detainer action.

In May 2014 the superior court issued a writ of possession to Deutsche. The same month, the Ninth Circuit granted a motion by McGregor to dismiss her appeal of the district court action. She also filed the present action in superior court.

In November 2014 JPMorgan, Reconveyance, Deutsche, and Long Beach demurred to the then operative first amended 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. In March 2015 McGregor filed a motion for leave to file a second amended complaint. The superior court granted the motion.

The second amended complaint alleged causes of action for cancellation of instruments, wrongful foreclosure, negligence, slander of title, violation of Business and Professions Code section 17200 et seq., declaratory relief, accounting, fraud and deceit, quiet title, tortious interference, and damages. As had many of McGregor's prior federal and state court complaints, the second amended complaint challenged the foreclosure sale by challenging the validity of the underlying documents. Of particular relevance to this appeal, the second amended complaint alleged the foreclosure sale was invalid because the underlying loan was nullified when McGregor sent WaMu the rescission letter in March 2009 and WaMu failed to timely dispute the rescission.

In April 2015 JPMorgan, Reconveyance, Deutsche, and Long Beach demurred to the second amended complaint on the grounds: (1) it was barred by the doctrine of res judicata, (2) any claims for damages and rescission under the Truth in Lending Act were time-barred, (3) McGregor had not tendered her outstanding loan balance, (4) five of her state law causes of action were time-barred, and (5) for various reasons, none of McGregor's causes of action stated facts sufficient to constitute a claim for relief.

The court sustained the demurrer without leave to amend and entered a judgment in favor of JPMorgan, Reconveyance, Deutsche, and Long Beach. Among the bases for its decision, the court found the complaint and each cause of action in it was barred by the doctrine of res judicata.

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

McGregor 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 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.*, italics omitted.)

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 district court action sought relief was the nonjudicial foreclosure sale of the property based on invalid documents. The primary right involved is McGregor's right to prevent the loss of the property 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 district court action.

Although the present action contains additional claims based on alleged improprieties in the funding of McGregor's loan and McGregor's purported rescission of the loan in 2009, these additional claims do not preclude the application of the doctrine of res judicata because they were within the scope of and could have been raised in the district court 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; *Wade v. Ports America Management Corp.*, *supra*, 218 Cal.App.4th at p. 657.)

The discovery of new evidence supporting McGregor's claims also does not preclude the application of res judicata. "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174.)

Likewise, new case law ostensibly favorable to McGregor's position on her rescission claim (i.e., *Jesinoski v. Countrywide Home Loans, Inc.* (2015) ___ U.S. ___, [135 S.Ct. 790, 190 L.Ed.2d 650]) does not warrant a different result. (See *Federated Dept. Stores v. Moitie* (1981) 452 U.S. 394, 398 [101 S.Ct. 2424, 2428, 69 L.Ed.2d 103] (*Federated*) ["Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case"].) Accordingly, the same cause of action requirement is met.

C

Regarding the same parties requirement, the record shows and the parties do not dispute both the district court action and the present action were filed by and against the same parties and their privies. Therefore, the same parties requirement is met.

D

Lastly, regarding the final adjudication on the merits requirement, because **we must give full faith and credit to the district court's judgment, the district court action has the same effect in state court as it would have in federal court.** (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173 (*Levy*).) In federal court, "[t]he dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a `judgment on the merits.'" (*Federated, supra*, 452 U.S. at p. 399, *fn. 3*.) Additionally, **in federal court "a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition."** (*Levy, supra*, at p. 172.) Since the district court's judgment was not reversed on appeal or modified or set aside by the district court, it constitutes a final judgment on the merits.

[*Goddard v. Security Title Ins. & Guarantee Co.* \(1939\) 14 Cal.2d 47 \(*Goddard*\)](#), upon which McGregor chiefly relies, is inapposite. Although the *Goddard* case discussed the application of the doctrine of res judicata to a prior federal court judgment, the *Goddard* case predated the *Levy* and *Federated* cases and did not discuss either full faith and credit principles or the preclusive effect of a dismissal for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure.

E

Since all of the requirements for claim preclusion are met based on the judgment in the district court action, we conclude the trial court did not err in sustaining the demurrer and dismissing McGregor's second amended complaint on this ground. Given this conclusion, we need not address whether the requirements for claim preclusion are met based on any of the prior bankruptcy court orders or the judgment in the unlawful detainer action. We also need not address whether McGregor's complaint otherwise 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**].)

IV

DISPOSITION

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

BENKE, J. and O'ROURKE, J., concurs.

[1] It is not clear from the record whether "WMB" is a separate entity or an acronym for WaMu.

[2] Since the parties do not dispute McGregor is in privity with the trust bearing her name and benefiting her, we use "McGregor" to refer to her both as an individual and as the trustee of the trust.

[3] It is not clear from the record whether the letter was actually sent or received. The record includes a certified mail receipt for the letter with handwritten markings listing the addressee and the total postage and fees. Although the certified mail receipt has an area for a postmark, there is no postmark stamped on it. There is also no corresponding return receipt.

[4] The parties have not addressed whether or how the bankruptcy discharge affects McGregor's ability to pursue any claims based on the earlier rescission letter.