STEVEN H. LUCORE, et al., Plaintiffs and Appellants,
v.
U.S. BANK, N.A., as Trustee, etc., et al., Defendants and Respondents.

No. D070103.

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

Filed February 22, 2017.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2015-00029825 CU-OR-CTL, Joel M. Pressman, Judge. Affirmed.

Steven H. Lucore, Sr., and Judy L. Lucore, in pro. per., for Plaintiffs and Appellants.

Severson & Werson, Jan T. Chilton, Robert J. Gandy, Mark Joseph Kenney, and Bernard J. Kornberg, 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NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

HALLER, J.

This appeal arises from a complaint filed in 2015 by Steven and Judy Lucore challenging the nonjudicial foreclosure sale of their home in 2011. The Lucores sued the foreclosing beneficiary, the loan servicer, and the successor trustee. They alleged they rescinded their secured loan in 2009 under the Truth in Lending Act (TILA) and therefore the deed of trust was void and the foreclosure wrongful. (See 15 U.S.C. § 1635.) They asserted causes of action for wrongful foreclosure, quiet title, and cancellation of instruments.

The superior court sustained defendants' demurrer without leave to amend. The court concluded the causes of action were barred by the res judicata doctrine based on a prior judgment against the Lucores in which the Lucores had challenged the same completed nonjudicial foreclosure of their home. The prior judgment was

affirmed by this court in an unpublished opinion. (*Lucore v. U.S. Bank, N.A.* (Dec. 19, 2014, D065486) (*Lucore I*).)

In this appeal, the Lucores contend the res judicata doctrine is inapplicable because (1) *Lucore I* was wrongly decided; (2) there is intervening new law; (3) *Lucore I* was based on the res judicata doctrine and therefore it was not on the merits; and (4) the interests of justice require they be allowed to relitigate the issues. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the facts based on the properly pleaded allegations, information in materials attached to the complaint, and matters subject to judicial notice.[1](*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924 (*Yvanova*); *Crowley v. Katleman* (1984) 8 Cal.4th 666, 672, fn. 2)

In April 2006, the Lucores borrowed money from American Home Mortgage to refinance a loan on their home. They executed a promissory note (Note) secured by a deed of trust (Deed of Trust) identifying American Home Mortgage as the lender; Fidelity National Title Company as the trustee; and Mortgage Electronic Registration Systems (MERS) as nominee for the lender and the lender's successors and assigns. BAC Home Servicing (Home Servicing) was the loan servicer.

Less than three years later, in January 2009, plaintiffs allegedly signed a notice to rescind the Note and Deed of Trust, based on claimed TILA and Regulation Z violations. (See 15 U.S.C. § 1635; 12 C.F.R., part 226.) In their complaint, plaintiffs allege they sent this notice to Home Servicing, which was "acting as the servicer and agent" for the holder of the Note and Deed of Trust. They attached the notice to their complaint. This notice reflects that it was mailed to Bank of America at a New York address.[2]

On August 30, a MERS representative executed a document (1) appointing Recontrust Company, N.A. (Recontrust) as the successor trustee on the Deed of Trust; and (2) assigning the Note and Deed of Trust to U.S. Bank, N.A., as trustee for a securitized investment trust.[3] This assignment and trustee-substitution document was recorded on September 14, 2010.

Two months later, in November 2010, the Lucores filed a superior court complaint (the First Action) against U.S. Bank, Recontrust, Home Servicing and others, seeking to prevent the foreclosure sale and quiet title to their property. The court

sustained the defendants' demurrer without leave to amend, finding the complaint was predicated on the erroneous allegation that MERS did not have the authority to record the assignment and substitution. The court rejected the Lucores' claim that the notice of default was void, ruling that MERS had the authority to substitute trustees and assign interests in loans. The court also ruled the recorded documents were valid and their recording was privileged.

In May 2011, a Notice of Trustee's Sale was recorded, and on August 18, 2011, a foreclosure sale was held. U.S. Bank purchased the property at the foreclosure sale.

The Lucores filed for bankruptcy, and in June 2012, they filed an adversary proceeding against MERS, U.S. Bank, Recontrust, and Home Servicing in the bankruptcy court, asserting claims for fraud and breach of contract in connection with their secured loan and the title documents. The Lucores sought a declaration that the foreclosure sale was void and to cancel the sale. In February 2013, the bankruptcy court dismissed the Lucores' adversary complaint without leave to amend.

Eight months later, in October 2013, the Lucores filed a new superior court action (the Second Action) against MERS, U.S. Bank, and Recontrust, challenging the August 2011 foreclosure sale. They alleged numerous causes of action, including wrongful foreclosure, unfair business practices, and cancellation of instruments. The Lucores alleged that U.S. Bank was not a proper party to foreclose because of flaws in the securitization process and improper assignments of the Note and Deed of Trust. The Lucores also alleged that several recorded documents were invalid because of improper signatures. The Lucores sought a declaration that the foreclosure sale and various recorded documents were void. They also sought to quiet title to the property free of the Deed of Trust, and requested an order barring the defendants from taking steps to transfer any interest in the property or proceed with eviction.

Defendants demurred. They argued the First Action and the bankruptcy adversary proceeding involved the same facts and theories, and thus the Second Action was barred under res judicata and collateral estoppel doctrines. The trial court sustained defendants' demurrer without leave to amend, agreeing that res judicata and collateral estoppel barred the Lucores from relitigating these same claims.

In February 2014, the Lucores filed a notice of appeal from the judgment in the Second Action. In December 2014, this court affirmed the judgment. (*Lucore I, supra*, D065486.) We concluded that the Second Action concerned the same

primary rights litigated in the First Action, and therefore the trial court properly sustained the demurrer without leave to amend on res judicata grounds. (*Ibid.*) We did not reach the issue whether the bankruptcy order also barred the action. (*Ibid.*)

Nine months later, the Lucores filed a third superior court action (the current action at issue, referred to as the Third Action) again challenging the August 2011 foreclosure sale. As in the Second Action, the Lucores asserted causes of action for wrongful foreclosure, quiet title, and cancellation of instruments. They named two of the same defendants as in the Second Action (U.S. Bank and Recontrust) and also added Home Servicing (collectively defendants). The Lucores again sought to invalidate the foreclosure sale, but on a different factual and legal theory. They no longer challenged the MERS assignments, and instead alleged the foreclosure sale was wrongful and the Deed of Trust must be invalidated because in January 2009, they timely rescinded the Note under the TILA by sending the written rescission notice to Home Servicing. They alleged they were not provided disclosures required by the TILA and therefore they were entitled to rescind the loan within three years of signing the Note.

Defendants demurred on two grounds. First, they argued the judgments in the First Action and the Second Action, as well as the dismissal of the Lucores' claims in the bankruptcy adversarial proceeding, barred them from relitigating their claims under the res judicata doctrine. Second, they contended the Lucores' claims failed on their merits because the Lucores alleged they mailed the notice of rescission to the loan servicer (Home Servicing), rather than to the creditor as required by the TILA. (See *Miguel v. Country Funding Corp.* (9th Cir. 2002) 309 F.3d 1161, 1165.)

The court sustained the demurrer without leave to amend on res judicata grounds, and entered judgment in defendants' favor. The court found the judgments in the First and Second Action pertained to the same primary rights as the claims asserted in the Third Action. The court also found the bankruptcy court's dismissal of the claims in the adversary action barred the claims.

The Lucores appeal from the judgment in the Third Action.

DISCUSSION

I. *Review Standards*

"`On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a

cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.'" (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813.) "We may consider matters that are properly judicially noticed." (*Ibid.*) We review for an abuse of discretion the trial court's denial of leave to amend. (*Ibid.*)

II. *Res Judicata Doctrine*

"Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).) **"Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity] (3) after a final judgment on the merits in the first suit."** (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) **"If claim preclusion is established, it operates to bar relitigation of the claim altogether."** (*Ibid.*)

The trial court found the Third Action was barred by the judgments in the First Action and Second Action, and by the bankruptcy dismissal order. We determine the trial court was correct that the current action is barred by the judgment in the Second Action. We therefore need not reach the res judicata issue regarding the First Action or the bankruptcy proceeding.

In challenging the res judicata determination, the Lucores do not dispute the Second Action and Third Action were between the same parties (or those in privity). But they argue the other two elements (same cause of action and judgment on the merits) were not satisfied. For the reasons explained below, we reject these contentions. We also reject the Lucores' argument that equitable principles preclude the application of the res judicata doctrine in this case.

III. *Same Causes of Action*

"To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts `[apply] the "primary rights" theory.'"** (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797; see *Mycogen, supra*, 28 Cal.4th at p. 904.) **"`"[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered. . . . It must therefore be distinguished from the legal theory on which liability for that injury is premised: . . . The primary right must also be distinguished from the remedy sought: . . ."' . . . `"`[T]he harm suffered'"' is `"`the significant factor'"' in defining a primary right." (*Alpha Mechanical, Heating & Air*

Conditioning, Inc. v. Travelers Casualty & Surety Co. of America (2005) 133 Cal.App.4th 1319, 1327.)

Under these principles, **res judicata bars a claim on the same cause of action if the claim "was *or could have been* litigated in [the] prior proceeding."** (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1527, italics added.) **"' If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . A PARTY CANNOT BY NEGLIGENCE OR DESIGN WITHHOLD ISSUES AND LITIGATE THEM IN CONSECUTIVE ACTIONS.'"** (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)

The causes of action in the Second Action and the Third Action cases involve identical primary rights. In the Second Action, the Lucores sought to recover for the loss of title to their home resulting from the August 2011 nonjudicial foreclosure sale. In the Third Action, the Lucores seek to recover for the loss of title to their home resulting from the August 2011 nonjudicial foreclosure sale. The sole difference is the assertion of a new legal theory as a basis for invalidating the sale and the loan/title documents. In the Second Action, the Lucores argued the securitization and the alleged invalid assignments resulted in a wrongful foreclosure sale and the loss of their home. In the Third Action, the Lucores argue their loan rescission means that the Deed of Trust was extinguished, resulting in a wrongful foreclosure sale and the loss of the home. This difference in legal theories does not affect the applicability of the res judicata doctrine. (*Gillies v. JPMorgan Chase Bank, N.A.* (2017) 7 Cal.App.5th 907, 914 ["It matters not that appellant has a new theory of wrongful foreclosure. It is the same primary right which appellant has always claimed."].)

The Lucores do not suggest any basis for concluding the Second Action and Third Action involve different primary rights. Instead, the main thrust of their appellate challenge is that the judgment in the Second Action should not bar the Third Action because (in their view) the Second Action was wrongly decided in *Lucore I.* In so doing, they seek to collaterally attack this court's legal determination in *Lucore I.*

This argument is unavailing. It has long been settled that a judgment bars a second action on the same cause of action regardless whether the first judgment was legally correct. A "judgment[,] having become final . . . is conclusive, whether the

matter was rightly or wrongly decided, as to all matters presented or which [c]ould have been presented. . . ." (*Creditors Adjustment Co. v. Newman* (1921) 185 Cal. 509, 513; accord *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950-951; *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App.4th 1308, 1328; *Sterling v. Galen* (1966) 242 Cal.App.2d 178, 182.) The only exception is where the court in the prior action lacked fundamental jurisdiction of the person or the subject matter. (*In re Alexander P.* (2016) 4 Cal.App.5th 475, 489.) Here, the court in the Second Action had jurisdiction over the parties and the subject matter. Thus, *Lucore I* is final and cannot be collaterally attacked.

For similar reasons, we reject the Lucores' argument the judgment in the Second Action is not binding on them because the applicable law has changed. The Lucores rely on *Yvanova, supra*, 62 Cal.4th 919, a case decided after *Lucore I.* *Yvanova* clarified the law regarding a homeowner's standing to challenge a completed foreclosure sale based on alleged invalid assignments of secured loan documents.

IT HAS LONG BEEN SETTLED THAT RES JUDICATA APPLIES EVEN WHEN THERE HAS BEEN AN INTERVENING CHANGE IN LAW. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 796-797 (*Slater*); *Macy v. City of Fontana* (2016) 244 Cal.App.4th 1421, 1435.) The California Supreme Court explained: **"It cannot be denied that judicial or legislative action which results in the overturning of established legal principles often leads to seemingly arbitrary and unwarranted distinctions in the treatment accorded similarly situated parties. However, `[public] policy and the interest of litigants alike require that there be an end to litigation.' . . . The result urged by plaintiff, . . . would call `. . . into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case.' . . . The consistent application of the traditional principle that final judgments, even [after a change in the law] . . . are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs. . . ."** (*Slater, supra*, 15 Cal.3d at p. 797.)

Moreover, the Lucores do not show any valid basis for concluding that the *Yvanova* decision would support a valid cause of action in this case or in *Lucore I.* *Yvanova* was a narrow decision holding that a borrower whose home was sold in a foreclosure sale has standing to challenge the sale based on an alleged *void*assignment to the foreclosing beneficiary. (*Yvanova, supra*, 62 Cal.4th at pp. 929-942.) There were no allegations in the Second or Third Actions

supporting a finding of a void assignment, as that concept has been interpreted by subsequent courts. (See *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 810-820.) Nor did *Yvanova* change the law with respect to the interpretation of the TILA, or the need to bring all claims in one action regarding a single primary right. *Yvanova*'s holding has no effect on the res judicata bar in this case.

IV. *Judgment Was on the Merits*

The Lucores also contend res judicata does not apply because the judgment in the Second Action was not "on the Merits" as it was entered against them based solely on the res judicata doctrine. This contention is legally unsupported.

A judgment obtained "after the sustaining of a general demurrer on a ground of substance," including "that an absolute defense is disclosed by the allegations of the complaint," is "a judgment on the merits[ ] and conclusive in a subsequent suit." (*Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 52 (*Goddard*).) **A general demurrer premised on the substantive ground that there is an absolute defense to a cause of action qualifies as a judgment on the merits**. (*Ibid.*; see *Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1427-1428; *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 383-384.)

In contrast, a judgment in the defendant's favor after a demurrer "for technical or formal defects" is not on the merits and thus is not a bar to filing a second action. (*Goddard, supra*, 14 Cal.2d at p. 52.) For example, a judgment is generally not a bar if it was based on the court's sustaining a demurrer for defects such as uncertainty, incapacity to sue, misjoinder of parties, failure to pursue the correct remedy, or framing the complaint on the wrong form of action. (See *id.* at pp. 52-53.)

In this case, the judgment in the Second Action was based on the complete defense that the Lucores were legally precluded from relitigating their claims. This holding was not premised on a technical, procedural ground. This court determined in *Lucore I* that the Lucores' challenges to the lawfulness of the foreclosure sale were barred by the First Action judgment under the res judicata doctrine. This is a substantive ruling on the merits of the Lucores' claims. The Lucores thus cannot bring the same cause of action in a subsequent proceeding in an attempt to avoid the res judicata bar.

V. *Equitable Exception to Res Judicata*

The Lucores contend this court should hold that res judicata principles do not apply because precluding them from bringing the Third Action would be inequitable**. Res judicata may not be a bar to a new action "'if injustice would result or if the public interest requires that relitigation not be foreclosed.**' . . ." (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065.) This exception is narrowly construed. (*Slater, supra*, 15 Cal.3d at p. 796.)

Having examined the entire record, we find no basis for refusing to apply the general rule. The record shows the Lucores have lived in their home for more than five years after the foreclosure sale without paying any money on their secured loan. **The record also shows Mr. Lucore pled guilty to a forgery count in 2014 pertaining to his recording a false reconveyance title document on his home**. The Lucores have had numerous opportunities to judicially challenge the foreclosure, and did so by filing civil actions in the federal and state courts, by responding to the unlawful detainer actions, and by unsuccessfully asserting their claims challenging the foreclosure sale in bankruptcy court. There is no equitable reason to provide them with yet another opportunity.

Additionally, the sole factual basis for their current complaint is a rescission notice they claim they sent in January 2009, before they filed any of their court actions. This alleged loan rescission was clearly within their own knowledge. By failing to assert this factual basis for their claims earlier in the process, they alone are responsible for any inequities resulting from the claim preclusion determination.

"The doctrine of res judicata is dictated by the wisdom of eliminating needless and repetitive calls upon our law courts. The dignity and seriousness of the judicial process, and the necessity of preventing any harassment of litigants, require that reasonable restrictions be placed on the right to submit any one controversy between specific parties to our courts. . . . **A party plaintiff or defendant is entitled to his day in court; if he raises a question as to the respective rights of another person and himself he deserves, and will get, his answer; but once having secured a final determination of his right, he cannot again ask the court to redecide the same question on its merits. He cannot split his cause of action, or have his case decided piecemeal."** (*Lunsford v. Kosanke* (1956) 140 Cal.App.2d 623, 627.) The Lucores had their day (and many days) in court; they received their answer. Res judicata bars this action.[4]

VI. *Amendment*

An appellate court must reverse a judgment sustaining a demurrer if there is a reasonable possibility the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The plaintiff has the burden of establishing a reasonable possibility of curing a defect by amendment. (*Ibid.*; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.)

The court did not abuse its discretion in denying the Lucores leave to file an amended complaint. There is nothing in the record or in the Lucores' appellate briefs showing they could add facts to their pleading that would support a viable cause of action that is not barred by the res judicata doctrine.

DISPOSITION

Judgment affirmed. Appellants to bear respondents' costs on appeal.

McCONNELL, P. J. and AARON, J., concurs.

[1] Defendants request we take judicial notice of documents reflecting the Lucores' federal court action and their motions filed in the state court after the judgment was entered in this case. We deny the motion as these documents were not before the trial court. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *The Termo Co. v. Luther* (2008) 169 Cal.App.4th 394, 404.)

[2] In their reply brief, the Lucores suggest they can amend their complaint to add that their original lender told them to send all correspondence to Home Servicing at the Bank of America address.

[3] According to the complaint, the name of this trust is: "the Certificate Holders of Banc of America Funding Corporation Mortgage Pass Through Certificates, Series 2006-H." Further references to U.S. Bank include U.S. Bank's status as trustee for this trust.

[4] Based on our conclusion, we do not reach defendants' assertions that the Lucores have not stated a viable cause of action based on their alleged loan rescission.