

RAY PARKER GAYLORD, Plaintiff and Appellant,
v.
DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee, etc.,
et al., Defendants and Respondents.

[No. A151173.](#)

Court of Appeals of California, First District, Division Five.

Filed September 24, 2018.

Appeal from the San Francisco City and County, Superior Court No. CGC-16-549778.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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BRUINIERS, J.

In 2005, appellant Ray Parker Gaylord (Gaylord) obtained a mortgage on real property located at 140 South Van Ness Avenue # 801, San Francisco (Property), secured by a deed of trust. A 2011 assignment of the deed of trust was recorded from the original lender to Deutsche Bank National Trust Company (Deutsche Bank), as trustee for a securitized trust. Gaylord defaulted on the loan and Deutsche Bank foreclosed, ultimately acquiring title to the Property through a trustee's sale. In 2013, Gaylord sued Deutsche Bank among others (Super. Ct. S.F. City and County No. CGC-13-532479; hereafter First Action). The First Action was dismissed after demurrer to his second amended complaint was sustained as to all causes of action without leave to amend. Gaylord then filed this 2016 action (Super. Ct. S.F. City and County No. CGC-16-549778; hereafter Second Action) against respondents Deutsche Bank and Ocwen Loan Servicing, LLC (Ocwen). Demurrer was ultimately sustained as to all causes of action without leave to amend on res judicata grounds, and the second amended complaint in the Second Action was dismissed. We affirm.

I. Background and Procedural History

Gaylord obtained a residential loan in 2005 from New Century Mortgage Corporation, secured by a deed of trust against the Property. An assignment of the beneficial interest in the deed of trust from New Century Mortgage Corporation to Deutsche Bank was recorded in September 2011.^[1] A June 2012 notice of default was recorded by Ocwen as attorney in fact for Deutsche Bank. A notice of trustee's sale was recorded in January 2013, and the Property was sold at a trustee's sale the following March. Deutsche Bank recorded a trustee's deed upon sale in October 2015.

Gaylord filed the First Action in June 2013.^[2] The last operative pleading was the March 2014 second amended complaint (SAC1). The SAC1 alleged eight causes of action: cancellation of instruments; unfair business practices; declaratory relief; slander of title; promissory estoppel; violation of the Homeowner's Bill of Rights; violations of Civil Code section 2924, subdivisions (a)(6), (f)(3); and wrongful foreclosure. The trial court sustained the defendants' demurrer without leave to amend in January 2015. In its tentative ruling, the court noted Gaylord's failure to address in his opposition his "lack of standing to challenge the securitization re: causes of action 1-4, and 7." In its order after oral argument dismissing the First Action, the court (Hon. Ronald E. Quidachay) sustained the demurrer "as to each cause of action, and the entirety [*sic*] of the second amended complaint . . . for the reasons stated in the moving papers of the Demurring Defendants."^[3] No appeal was taken from the dismissal and the judgment became final.

Gaylord commenced the Second Action in January 2016, alleging causes of action for wrongful foreclosure and cancellation of instruments against Deutsche Bank and Ocwen. Following demurrer, Gaylord filed a first amended complaint, naming only Deutsche Bank as a defendant. Deutsche Bank again demurred. The court (Judge Quidachay) sustained the demurrer with leave to amend, noting that the Second Action continued to challenge Deutsche Bank's interest in the note and deed of trust encumbering the Property, and that "[t]he validity of these instruments has been adjudicated in [the First Action] and it is subject to res judicata." A second amended complaint (SAC2) was filed in September 2016. Deutsche Bank's demurrer to the SAC2 was sustained without leave to amend on the ground that the claims were "barred by res judicata." Judgment of dismissal was entered in February 2017. This appeal followed.

II. Discussion

Gaylord contends the trial court erred in finding the Second Action was barred by application of res judicata principles to the judgment of dismissal in the First Action. He argues the Second Action presents "different causes of action" from the First Action, and the sustained demurrer to his First Action did not involve an adjudication on the merits. Alternatively, he asserts further amendment to his complaint should have been permitted.

We review an order sustaining a demurrer de novo, exercising our independent judgment as to whether, as a matter of law, the complaint states a cause of action on any available legal theory. ([Los Altos El Granada Investors v. City of Capitola \(2006\) 139 Cal.App.4th 629, 650.](#)) We give the complaint a reasonable interpretation and accept as true the well-pleaded material facts, as well as the reasonable inferences that may be drawn therefrom. ([Evans v. City of Berkeley \(2006\) 38 Cal.4th 1, 6](#); [Reynolds v. Bement \(2005\) 36 Cal.4th 1075, 1083.](#)) We disregard, however, "contentions, deductions, or conclusions of fact or law." (*Evans*, at p. 6.) "[The appellant] has the burden to show either that the demurrer was sustained erroneously or that the court abused its discretion in sustaining the demurrer without leave to amend." ([Pinnacle Holdings, Inc. v. Simon \(1995\) 31 Cal.App.4th 1430, 1434.](#)) To prevail on appeal from an order sustaining a demurrer, the appellant must show "the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer." ([Intengan v. BAC Home Loans Servicing LP \(2013\) 214 Cal.App.4th 1047, 1052.](#)) We review the propriety of the court's ruling, not the validity of its legal reasoning, and we will affirm the judgment if it is correct on any theory. ([Staniforth v. Judges' Retirement System \(2016\) 245 Cal.App.4th 1442, 1449.](#))

A. "Res Judicata" and Claim/Issue Preclusion

"The law of preclusion helps to ensure that a dispute resolved in one case is not relitigated in a later case." (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.) In [DKN Holdings LLC v. Faerber \(2015\) 61 Cal.4th 813](#), our Supreme Court discussed the preclusive effect of judgments, and observed that its terminology in discussing the applicable principles "has been inconsistent and may have caused some confusion. We have frequently used 'res judicata' as an umbrella term encompassing both claim preclusion and issue preclusion, which we described as two separate 'aspects' of an overarching doctrine. [Citations.] . . . [¶] . . . [¶] . . . **If claim preclusion is established, it operates to bar relitigation of the claim altogether.** [¶] **Issue preclusion**

prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. [Citation.]

Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] . . . [¶] **Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit.** [Citation.] `Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citation.]" **In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party."** (*Id.* at pp. 823-825; *Samara*, at p. 326 [more accurate to "refer to `claim preclusion' rather than `res judicata'" and use "`issue preclusion' in place of `direct or collateral estoppel'"].) A court may sustain a demurrer on claim preclusion grounds "[i]f all of the facts necessary to show that the action is barred are within the complaint or subject to judicial notice." ([Carroll v. Puritan Leasing Co. \(1978\) 77 Cal.App.3d 481, 485.](#))

1. The First Action

a. Litigated Claims/Issues

Gaylord contends the First and Second Actions involved "different causes of action." We disagree.

The First Action alleged claims for wrongful foreclosure and for cancellation of instruments. **The elements of a tort cause of action for wrongful foreclosure are "(1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale . . . was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering."** ([Miles v. Deutsche Bank National Trust Co. \(2015\) 236 Cal.App.4th 394, 408.](#)) "A foreclosure initiated by one with no authority to do so is wrongful" and satisfies the first element. ([Yvanova v. New Century Mortgage Corp. \(2016\) 62 Cal.4th 919, 929.](#)) **TO PREVAIL ON A**

CLAIM TO CANCEL AN INSTRUMENT, A PLAINTIFF MUST PROVE AN INSTRUMENT IS VOID OR VOIDABLE. ([U. S. Bank National Assn. v. Naifeh \(2016\) 1 Cal.App.5th 767, 778.](#))

Gaylord's attempt to distinguish the claims of the two lawsuits focuses almost entirely on the cancellation of instruments cause of action.^[4] He argues the Second Action seeks cancellation of the trustee's deed, an instrument that did not exist at the time of the First Action. However, he premised all claims in the SAC1 on the assertion that the assignment to Deutsche Bank was "void," and Deutsche Bank consequently had no authority to foreclose on the Property. Specifically, he alleged Deutsche Bank did not "own the Note, ha[d] no legal authority to enforce the Note or Deed of Trust, and ha[d] no legal authority to enforce the Note or Deed of Trust, and ha[d] no legal authority to exercise the power of sale. . . ."

Gaylord's claim for cancellation of instruments in the First Action sought removal of the recorded assignment to Deutsche Bank, the notice of default, the notice of trustee's sale "and *any subsequent documents* reflects [*sic*] the wrongful foreclosure. . . ." ^[5] (Italics added.) His prayer for relief included a demand "[f]or an order compelling Defendants to remove *any* instrument, including the Assignment . . . along with any documents reflecting or memorializing the illegal foreclosure. . . ." (Italics added.)

b. Decision on the Merits

The trial court sustained Deutsche Bank's demurrer without leave to amend and dismissed the SAC1 with prejudice in what is now a final order. **"[F]or purposes of applying the doctrine of res judicata . . . , a dismissal with prejudice is the equivalent of a final judgment on the merits. . . .** [Citations.] . . . **The statutory term "with prejudice" clearly means the plaintiff's right of action is terminated and may not be revived. . . . [A] dismissal with prejudice . . . bars any future action on the same subject matter."** ([Boeken v. Philip Morris USA, Inc. \(2010\) 48 Cal.4th 788, 793,](#) italics added.) **Claim preclusion also "bars claims that could have been raised in the first proceeding."** ([Daniels v. Select Portfolio Servicing, Inc. \(2016\) 246 Cal.App.4th 1150, 1164,](#) 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.''' ([Villacres v. ABM Industries Inc. \(2010\) 189 Cal.App.4th 562, 576.](#))

An exception to this rule applies to dismissals based on matters of practice, procedure, jurisdiction, or form. **"The judgment is not on the merits if it is based merely on rules of procedure, and determines only that the plaintiff is not entitled to recover in the particular action; e.g., dismissal for lack of jurisdiction, or judgment after special demurrer sustained."** ([Boccardo v. Safeway Stores, Inc. \(1982\) 134 Cal.App.3d 1037, 1042.](#))

Gaylord attempts to invoke this exception, asserting the First Action was dismissed "because [he] did not yet have standing" and the action was "not timely." Thus, he argues, the merits of his claims were never determined. The record provided fails to support his argument.

Gaylord cites the trial court's order dismissing the First Action in support of his arguments, but the order recites that the demurrer was sustained "as to each cause of action, and the entirety [*sic*] of [the SAC1] for the reasons stated in the moving papers of the Demurring Defendants." Gaylord provides none of the moving (or responsive) demurrer papers from the First Action, nor does he provide any transcript of the hearings on demurrers in the First Action. **"[An appellant] has the burden of providing an adequate record. [Citation.] FAILURE TO PROVIDE AN ADEQUATE RECORD ON AN ISSUE REQUIRES THAT THE ISSUE BE RESOLVED AGAINST [APPELLANT]."** ([Foust v. San Jose Construction Co., Inc. \(2011\) 198 Cal.App.4th 181, 187.](#)) Gaylord provides nothing that would allow us to conclude the court's order in the First Action was anything other than one sustaining a general demurrer, i.e., a determination that his complaint in the First Action failed to establish the necessary elements of each cause of action, thus barring any further action on the same subject matter.

2. The Second Action

a. Litigated Claims/Issues

In the Second Action, Gaylord again based his claims on a challenge to the legal authority of Deutsche Bank to foreclose on the Property. He initially specifically alleged Deutsche Bank "did not own the Note, have, nor had any legal authority to enforce the Note or Deed of Trust, and have, nor had any legal authority to exercise the power of sale. . . ." The record in the Second

Action amply demonstrates the same trial court judge who sustained the demurrer without leave to amend in the First Action (Judge Quidachay) understood his earlier ruling to have adversely adjudicated the claim that Deutsche Bank lacked "legal, equitable, or pecuniary interest in the Note and Deed of Trust."⁶ The order sustaining the demurrer to the first amended complaint granted leave to amend "addressing wrongs not arising out of Deutsche Bank having no legal, equitable or pecuniary interest in the Notice [*sic*] and Deed of Trust." Rather than adding pleading detail, Gaylord continued to allege generally that Deutsche Bank "lacked any authority to initiate the non-judicial foreclosure," had "caused an illegal, fraudulent and willfully oppressive sale" of the Property, and "[n]either Deutsche Bank, nor its purported agent, had no [*sic*] authority to proceed with the foreclosure of [the Property]. . . ." At hearing on the SAC2 demurrer, the court noted it previously granted leave to amend, but "[b]asically the complaint remained the same."

b. Claim/Issue Preclusion

The court was correct. Both the First and Second Actions pursued claims for damages based on the same primary right. (*Boeken v. Philip Morris USA, Inc., supra*, 48 Cal.4th at pp. 797-798 ["[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests".]) **"[U]nder the primary rights theory, the determinative factor is the harm suffered.** When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Id.* at p. 798.) Gaylord sought, in both the First and Second Actions, monetary damages for wrongful foreclosure, with both cases premised on the identical issue—Deutsche Bank's purported lack of authority to foreclose. The claim for wrongful foreclosure in the Second Action is precluded by the final judgment in the First Action.

The claim for cancellation of instruments fares no better. The claim in the First Action sought removal not only of the then-recorded assignment to Deutsche Bank, notice of default, and notice of trustee's sale, but also "*any subsequent* documents reflects [*sic*] the wrongful foreclosure. . . ." (Italics added.) Gaylord's prayer for relief included a demand "[f]or an order compelling Defendants to remove *any* instrument, including the Assignment . . . along with any documents reflecting or memorializing the illegal foreclosure. . . ." (Italics added.) A trustee's sale had already taken place

when demurrer to the SAC1 was sustained, even though the trustee's deed had not yet been recorded. The relief sought by Gaylord, had it been granted, would certainly have encompassed the trustee's deed. The judgment of dismissal in the First Action similarly bars the claim in the Second Action.

Moreover, the predicate issues of whether the assignment to Deutsche Bank was void, and whether Deutsche Bank consequently lacked authority to foreclose, were litigated and determined in the First Action. (See [DKN Holdings LLC v. Faerber, supra, 61 Cal.4th at p. 824.](#)) Nothing pleaded in the Second Action separately established the trustee's deed was void in the face of those determinations. Even if viewed as a matter of issue preclusion, the judgment in the First Action eliminates a foundational issue necessary for the claim in the Second Action.

B. Leave to Amend

Gaylord contends he should now be given further leave to amend to pursue a theory that foreclosure on the Property was wrongful because the trustee (Western Progressive) was never properly substituted. A notice of default may be filed only by "[t]he trustee, mortgagee, or beneficiary." ([Yvanova v. New Century Mortgage Corp., supra, 62 Cal.4th at p. 927](#); Civ. Code, § 2924, subd. (a)(6).)

Where the court sustains a demurrer without leave to amend, we must decide whether there is a reasonable possibility the defect could be cured with an amendment. An appellant has the burden to show the court abused its discretion in sustaining the demurrer without leave to amend and to show an amendment would cure the defect. ([Schifando v. City of Los Angeles \(2003\) 31 Cal.4th 1074, 1081](#); [Pinnacle Holdings, Inc. v. Simon, supra, 31 Cal.App.4th at p. 1434.](#)) **"[B]ecause it is not a reviewing court's role to construct theories or arguments which would undermine the judgment [citation], we consider only those theories advanced in the appellant's briefs."** ([Mead v. Sanwa Bank California \(1998\) 61 Cal.App.4th 561, 564.](#))

The amendment Gaylord proposes would not obviate the essential defect in his pleadings. He simply seeks to advance a different theory of wrongful foreclosure. (See [Gillies v. JPMorgan Chase Bank, N.A. \(2017\) 7 Cal.App.5th 907, 914](#) [new theory of wrongful foreclosure irrelevant because same primary right is claimed].) The trial court therefore did not abuse its discretion in sustaining the demurrer without leave to amend.^[7]

III. Disposition

The judgment of dismissal is affirmed. Deutsche Bank shall recover its costs on appeal.

JONES, P.J. and NEEDHAM, J., Concur.

[1] The assignment was executed by JPMorgan Chase Bank, N.A., as successor by merger, to Chase Home Finance LLC.

[2] In addition to Deutsche Bank and Ocwen, Gaylord named JPMorgan Chase Bank, California Reconveyance Company, and Western Progressive, LLC as defendants. The original complaint asserted 10 causes of action: cancellation of instruments; unfair business practices (Bus. & Prof. Code, § 17200 et seq.); set aside of trustee's sale; declaratory relief; slander of title; promissory estoppel (causes of action six & eight); violation of the Homeowner's Bill of Rights; "Violation of 2923.7"; and injunctive relief under Civil Code section 2924.12.

[3] As discussed *post*, no transcript of this hearing is in the appellate record.

[4] Gaylord makes no attempt in his opening brief to distinguish the wrongful foreclosure cause of action presented in the First Action from that presented in the Second Action. He suggests for the first time in his reply brief that the wrongful foreclosure causes of action in the two matters are different because he "suffered no harm in the prior action" (because the trustee's deed had not yet been recorded) and the trial court dismissed the First Action on that basis. We do not consider arguments raised for the first time in a reply brief. ([People v. Tully \(2012\) 54 Cal.4th 952, 1075](#) [**"axiomatic that arguments made for the first time in a reply brief will not be entertained because of unfairness to the other party"**].) His argument is also factually incorrect and ignores the allegations of his own pleadings, as well as the terms of the order entered by the trial court.

[5] The SAC1 alleged a trustee's sale had already occurred. The trustee's deed was later recorded in October 2015.

[6] In colloquy at oral argument, the trial court asked: "But if I'm not mistaken—here is what I have. Plaintiff is now seeking relief because Deutsche Bank has no legal equitable or pecuniary interest in the note and deed of trust. But that was particularly asserted in the prior action, is that correct? [¶] [PLAINTIFF'S COUNSEL]: That was—some of that was raised in the prior action, yes, your Honor. [¶] THE COURT: And you are now saying you are able to support that even though it was alleged and it was determined in the prior action. You are able to raise it again, and the primary reason is they did not complete the foreclosure, is that what I am hearing?"

[7] Gaylord rather surprisingly contends he was "never given the chance" to amend. Initially we observe he made no request to further amend or articulate how he could do so. His assertion further ignores the trial court's clear direction, in sustaining the demurrer

to his first amended complaint in the Second Action, that he was required to "address[] wrongs not arising out of Deutsche Bank having `no legal, equitable or pecuniary interest in the Notice [*sic*] and Deed of Trust."