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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOHN T. HACKLEMAN, et al., Plaintiffs and Appellants, v. PROVIDENT FUNDING ASSOCIATES, LP, Defendant and Respondent.	2d Civil No. B264543 (Super. Ct. No. 14CVP0274) (San Luis Obispo County)

Plaintiffs John T. Hackleman and Julia T. Hackleman filed this wrongful foreclosure action against defendant Provident Funding Associates, LP (Provident). The trial court sustained Provident's demurrer without leave to amend, and dismissed the complaint with prejudice on the ground it was barred by res judicata.

In a prior federal action against Provident, which also was dismissed with prejudice, the Hacklemans alleged the same primary right underlying their present complaint, i.e., the

right to be free from the wrongful foreclosure of their home. The Hacklemans contend the present complaint is not barred by res judicata because it alleges different theories of recovery and facts not alleged in the prior action. We agree with the trial court that res judicata principles apply. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

In October 2007, the Hacklemans obtained a loan from Provident secured by a deed of trust against real property they purchased in Atascadero. The deed of trust designated Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and nominee for Provident. MERS subsequently assigned the deed of trust to Provident.

In February 2011, the Hacklemans defaulted on their loan payments. The trustee, Robert J. Hopp & Associates, LLC (Hopp), recorded a notice of default and notice of trustee's sale. Provident purchased the property at the sale on May 18, 2012.

Four days later, the Hacklemans filed their first complaint against Provident. They alleged that Provident and other defendants, including MERS, Hopp and Federal Home Loan Mortgage Corporation (Freddie Mac), committed constructive fraud and wrongfully foreclosed on their home. The defendants removed the action to the United States District Court for the Central District of California and then moved to dismiss the complaint for failure to state a claim for relief. The Hacklemans opposed the motion and lodged a proposed first amended complaint containing 18 causes of action.[1]

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[1] The causes of action included: (1) cancel and void note, (2) cancel and void deed of trust, (3) cancel and void instruments, (4) constructive fraud, (5) declaratory relief, (6) negligence, (7) quasi contract, (8) violation of Business and Professions Code section

In a detailed 15-page order, dated December 13, 2012, the federal court granted the motion to dismiss the complaint with prejudice and without leave to amend. The court found that "[d]efendants have the authority to foreclose and that the title documents are not false or misleading" and "there is no actual controversy regarding Defendants' right to enforce the [deed of trust], including Provident's right to collect mortgage payments under the [deed of trust]." The court entered a judgment of dismissal in favor of the defendants, including Provident. No appeal was filed.

On March 18, 2013, Provident filed an unlawful detainer action in state court against the Hacklemans. Following a court trial, the trial court entered judgment in favor of Provident, awarding it possession of the property and damages totaling $14,328.28.

On October 28, 2014, the Hacklemans filed the instant action against Provident. They allege causes of action for (1) fraud and deceit, (2) cancellation of instruments under Civil Code section 3214, (3) wrongful foreclosure, (4) violation of Business and Professions Code section 17200 et seq., (5) tortious interference with contract and (6) negligence. After Provident demurred to the complaint, the trial court issued a tentative ruling sustaining the demurrer without leave to amend. Following additional briefing, the court issued a second tentative

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17200 et seq., (9) accounting, (10) failure to meet conditions precedent, (11) breach of contract, (12) breach of the implied covenant of good faith and fair dealing, (13) wrongful foreclosure, (14) set aside trustee sale, (15) cancel trustee deed upon sale, (16) slander of title, (17) quiet title and (18) intentional infliction of emotional distress.

ruling, also sustaining the demurrer without leave to amend. On May 8, 2015, the trial court adopted its tentative rulings. Among other things, it reasoned that the present action is barred by principles of res judicata because "the instant complaint arises from the very same transaction and is based upon the same theories that were or could have been raised in the prior lawsuit, namely that Provident lost all of its beneficial interest in the note when it was sold, and that the assignment from MERS to Provident was fraudulent and void." The Hacklemans appeal.

DISCUSSION

Standard of Review

"'We independently review the ruling on a demurrer and determine de novo whether the pleading alleges facts sufficient to state a cause of action. (*McCall v. PacifiCare of Cal.*, Inc. (2001) 25 Cal.4th 412, 415.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded, and facts of which judicial notice can be taken. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)' . . . [¶] If the allegations in the complaint conflict with the exhibits, we rely on and accept as true the contents of the exhibits. However, in doing so, if the exhibits are ambiguous and can be construed in the manner suggested by plaintiff, then we must accept the construction offered by plaintiff." (*SC Manufactured Homes*, *Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 82-83.)

If, as here, the trial court sustained the demurrer without leave to amend, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If we find that an amendment could cure the defect, we conclude that

the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. (*Ibid.*)

Res Judicata Principles

Where an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right. (*Agarwal v. Johnso*n (1979) 25 Cal.3d 932, 954-955, disapproved on other grounds by *White v. Ultramar*, *Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.)

Under California law, "'"[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy." [Citation.]'" (*Boeken v. Philip Morris USA*, *Inc.* (2010) 48 Cal.4th 788, 797, italics omitted.) Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding. (*Busick v. Workmen's Comp. Appeals Bd*. (1972) 7 Cal.3d 967, 974-975 (*Busick*).) "A predictable doctrine of res judicata benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration.'" (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 897, italics omitted.)

For purposes of applying the doctrine of res judicata, the phrase "cause of action" has a precise and particular meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. (See *Bay Cities*

Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co. (1993) 5 Cal.4th 854, 860.)

As explained by our Supreme Court, California's res judicata doctrine and its definition of "cause of action" is based upon the primary right theory: "The primary right theory is a theory of code pleading that has long been followed in California. It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [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.] . . . [¶] 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.' [Citation.] The primary right must also be distinguished from the *remedy* sought: 'The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682.)

Res Judicata Bars the Present Action

The Hacklemans contend the trial court erred in concluding that the doctrine of res judicata precludes them from pursuing their current claims against Provident. We disagree.

"Res judicata bars a cause of action that was or could have been litigated in a prior proceeding if '(1) the present action is on the same cause of action as the prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding. [Citation.]' [Citation.]" (*Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1527.) All three elements are present here. First, the complaint in the present action and the complaint in the prior federal action are based on the same "cause of action" or claim of right: the alleged wrongful foreclosure under the deed of trust and the trustee's sale of the Hacklemans' property to Provident. Second, the federal action resulted in a final judgment on the merits because it was dismissed with prejudice. Third, it is undisputed the parties to the present action, the Hacklemans and Provident, were parties to the federal action.

With respect to the first element, the Hacklemans maintain that Provident "took very specific and deliberate steps to conceal that it had sold the debt to [Freddy Mac]," and that this concealment resulted in two specific, different primary rights of the Hacklemans: "One primary right was [their] right to be free from a foreclosure done by the wrong party; and the second primary right was the right to be free from tortious conduct that prevented [the Hacklemans] from participating in federally mandated modification programs to preserve their home ownership."

The fault in this analysis is that the Hacklemans, by their own admission, were aware that Provident was not the holder of the promissory note at the time they brought the federal

action. The Hacklemans specifically alleged that "the beneficiary of the Plaintiffs['] Note is or was [Freddy Mac] and as such, [the] Notice of Default appears to be false, fraudulent and defective on its face." They further alleged that they "receive[d] a letter from Provident stating the 'owner of the Note' is [Freddy Mac]." In the present action, they allege Provident failed to disclose "the loan was no longer held by [Provident] and that the loan was eligible for government home preservation programs as mandated by federal guidelines." As the trial court aptly observed: "The fact that Provident did not own the subject loan was alleged exhaustively in the original [federal] complaint. . . . This issue figured prominently in the Federal Court's order and this issue is the foundation of all of [the Hacklemans'] claims here."

Thus, any claims alleged in the present action could and should have been brought in the prior federal action. (*Busick*, *supra*, 7 Cal.3d at pp. 974-975.) And most critically for res judicata purposes, both actions alleged the same fundamental harm to the Hacklemans -- the loss of their home through foreclosure. In short, although the Hacklemans advanced different legal theories and sought different remedies in the two actions, they alleged the violation of a single primary right: the right to maintain ownership of the property. (See *Crowley v. Katleman*, *supra*, 8 Cal.4th at pp. 681-682.)

Regarding the second element, the Hacklemans assert that the federal court judgment was not "on the merits." It is well established, however, that full faith and credit must be given to a final order or judgment of a federal court. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173; Code Civ. Proc., § 1908.) A dismissal under rule 41 of the Federal Rules of Civil Procedure operates as an adjudication "on the merits" unless the dismissal

is for lack of jurisdiction, improper venue or failure to join a necessary party. (Fed. Rules Civ. Proc., rule 41(b); *Stewart v. U.S. Bancorp* (9th Cir. 2002) 297 F.3d 953, 956.) In particular, a dismissal under rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim is regarded by federal courts as a judgment on the merits. (*Federated Dept. Stores v. Moitie* (1981) 452 U.S. 394, 399, fn. 3; *Stewart*, at p. 957.) Here, the judgment in the federal action was not for lack of jurisdiction, improper venue or failure to join a necessary party. Rather, it was for the Hacklemans' failure to state a claim and, as such, it was a judgment on the merits. (*Stewart*, at p. 957.)

Our Supreme Court's recent decision in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), does not aid the Hacklemans' position. There, the court held that, in an action for the wrongful, nonjudicial foreclosure of a deed of trust securing a home loan, the borrower has standing to challenge the assignment of the note and deed of trust based on defects allegedly rendering the assignment void. (*Id.* at p. 924.)

Unlike the present action, *Yvanova* did not involve a second action that was barred by res judicata based on a prior action involving the same parties, in which the plaintiffs asserted injury to the same primary right they asserted in the second action. Here, for the reasons discussed, the judgment of dismissal in the prior action is final, and the Hacklemans cannot collaterally attack that judgment regardless of the reasons the action was dismissed.

In sum, we conclude that the Hacklemans' claims against Provident in the present action are barred by the doctrine of res judicata. As a result, we need not reach the issue of whether those claims are also barred by collateral estoppel or by

another theory raised by Provident. In considering whether the trial court abused its discretion in dismissing the complaint without leave to amend, we decide that it did not. The Hacklemans have not met their burden of establishing that there is a reasonable probability that they can allege facts to cure the preclusive effect of res judicata.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Ginger E. Garrett, Judge
Superior Court County of San Luis Obispo

De Clue Law Group and Joseph L. DeClue, for Plaintiffs and Appellants.

Aldridge Pite, Peter J. Salmon, Tim R. Pomeroy, Cuong M. Nguyen and Tami Crosby, for Defendant and Respondent.