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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

TEENA COLEBROOK, as Trustee, etc.,  
et al.,

Plaintiff and Appellant,

v.

CIT BANK, N.A.,

Defendant and Respondent.

B279942

(Los Angeles County  
Super. Ct. No. YC070487)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stuart M. Rice, Judge. Affirmed.

Teena Colebrook, in pro. per., for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Timothy B. McGinity and Rachel M. Sanders for Defendant and Respondent.

Plaintiff and appellant Teena Colebrook (plaintiff), as trustee of the Empire Revocable Living Trust (the trust), appeals from the judgment entered in favor of defendant and respondent CIT Bank, N.A. (defendant) after the trial court sustained, without leave to amend, defendant's demurrer to plaintiff's third amended complaint. We affirm the judgment.

### **BACKGROUND**

#### **The loan, plaintiff's default, and defendant's foreclosure attempts**

On or about November 3, 2004, plaintiff, as trustee of the trust, obtained a \$400,000 adjustable rate loan (the loan) from First Federal Bank of California (First Federal), secured by a deed of trust (deed of trust) on certain real property owned by plaintiff and located on 142nd Street in Hawthorne, California (the property).

On December 18, 2009, First Federal failed and the Federal Deposit Insurance Corporation (FDIC) was named as its receiver. On March 29, 2010, the FDIC assigned the deed of trust to defendant (formerly OneWest Bank).

In August 2013, four months after plaintiff defaulted on the loan, defendant commenced foreclosure proceedings. The foreclosure sale was originally scheduled for December 11, 2013.

On December 2, 2013, a deed purporting to assign part of plaintiff's interest in the property to Ann Mejia was recorded in the Los Angeles County Recorder's Office. Mejia filed for bankruptcy on December 6, 2013, thereby halting the scheduled foreclosure sale. The Mejia bankruptcy was dismissed on December 30, 2013.

Plaintiff filed for bankruptcy on January 15, 2014. On June 26, 2014, defendant was granted relief from the bankruptcy stay to exercise its remedies under the loan to foreclose on the property. A foreclosure sale was scheduled for July 24, 2014.

Plaintiff moved, unsuccessfully, to set aside the order granting defendant relief from the stay. Plaintiff then moved to dismiss the bankruptcy, and on October 23, 2014, that motion was granted.

On July 1, 2014, a deed purporting to grant plaintiff's interest in the property to Leslie Pascascio was recorded. On July 24, 2014, the day of the scheduled foreclosure sale, the trustee received a fax indicating that Pascascio had filed for bankruptcy on July 23, 2014, thereby halting the sale.

Defendant then filed a motion in the Pascascio bankruptcy case for extraordinary relief from the bankruptcy stay to allow it to proceed with the foreclosure. On October 31, 2014, the bankruptcy court issued an extraordinary relief order (the ER order) granting the motion, finding that the bankruptcy petition was part of a scheme to hinder, delay, or defraud creditors. The ER order was binding on any subsequent bankruptcies filed within two years. The Pascascio bankruptcy case was subsequently dismissed, and on November 20, 2014, it was closed.

Plaintiff then filed a lawsuit in San Luis Obispo in which she was granted a temporary restraining order (TRO) staying the foreclosure sale. The court in that case subsequently denied plaintiff a preliminary injunction and dissolved the TRO. The foreclosure sale was rescheduled for April 10, 2015.

On April 1, 2015, plaintiff filed a second bankruptcy, but because the ER order issued in the Pascascio case was binding for two years, defendant was permitted to proceed with the foreclosure sale. At the April 10, 2015 foreclosure sale, the property was sold to Nerja Investments LLC and Electric Capital LLC.

**Plaintiff's prior actions**

In addition to the actions discussed above, plaintiff filed two lawsuits against defendant that are relevant to the instant action.

**The 2011 lawsuit**

On December 20, 2011, plaintiff filed an action against defendant in the United States District Court, Central District of California, captioned, *The Empire Revocable Living Trust, et al. v. OneWest Bank, FSB, et al.*, Case No. 2:11-CV11-10482-R-E (the 2011 lawsuit). The complaint alleged causes of action for (1) declaratory relief, (2) negligence, (3) quasi-contract, (4) violation of Title 15 of the United States Code, section 1641(g), (5) violation of Title 15 of the United States Code, section 1692, (6) violation of Business & Professions Code section 17200, and (7) accounting. All of the claims allegations were based on the loan and the property.

On March 27, 2012, plaintiff filed a first amended complaint, alleging the same causes of action. Defendant filed a motion under Federal Rule of Civil Procedure rule 12(b)(6) to dismiss the action, and the district court granted the motion to dismiss with prejudice and without leave to amend.

**The 2014 lawsuit**

On August 5, 2014, plaintiff filed an action against defendant and others in the Los Angeles Superior Court, asserting 20 causes of action in connection with the loan and the property. After the action was removed to the United States District Court for the Central District of California, defendant filed a motion to dismiss, arguing that the 2014 lawsuit was barred by the doctrine of res judicata in light of the court's ruling in the 2011 lawsuit; plaintiff lacked standing to sue, as the loan was entered into by the trust, and not plaintiff as an individual; the complaint failed to comply with applicable federal pleading

standards; and each individual cause of action failed to state a claim upon which relief could be granted.

On January 15, 2015, the district court entered an order granting defendant's motion to dismiss in its entirety, without leave to amend. Plaintiff appealed the dismissal, but the United States Court of Appeal for the Ninth Circuit issued an order denying plaintiff's request for a temporary restraining order and stated that the appeal was "frivolous." The Ninth Circuit subsequently found that the issues raised in plaintiff's appeal were "so insubstantial as not to require further argument," and summarily affirmed the district court's order dismissing the 2014 lawsuit with prejudice.

### **The instant lawsuit**

Plaintiff filed the instant action in the Los Angeles County Superior Court on March 25, 2015. Defendant filed an answer and then moved for judgment on the pleadings, arguing (1) that the action was barred by doctrine of res judicata in light of the orders entered in the 2011 lawsuit and the 2014 lawsuit dismissing with prejudice each of those respective actions; (2) that plaintiff lacked standing to sue as an individual, as the loan was entered into by the trust; and (3) that the complaint failed to allege facts sufficient to state a cause of action. The trial court granted the motion, but accorded plaintiff leave to amend.

Plaintiff filed a first amended complaint in which she asserted causes of action for declaratory relief, fraud, and violation of the California Homeowners' Bill of Rights. (HBOR) Defendant filed a demurrer. The trial court sustained the demurrer to the declaratory relief cause of action, but accorded plaintiff, in her capacity as trustee of the trust, 20 days leave to amend. The trial court sustained, without leave to amend, the demurrer to the fraud and HBOR causes of action, on the ground

that plaintiff had not been granted leave to add those new causes of action.

Plaintiff then filed a second amended complaint for damages, injunctive relief, rescission and cancellation of the loan documents, and an order setting aside the foreclosure sale. After defendant demurred to the second amended complaint, plaintiff requested and obtained leave to file a third amended complaint, the operative pleading in this action.

The third amended complaint asserts eight causes of action: (1) declaratory relief to void the note and deed of trust, (2) rescission, (3) cancellation of instruments, (4) quiet title, (5) wrongful foreclosure, (6) violation of the HBOR, (7) fraud, and (8) unfair business practices.

Defendant demurred to the third amended complaint, and the trial court sustained the demurrer, without leave to amend, ruling that the principles of res judicata and collateral estoppel barred all of the causes of action. The trial court further ruled that the statute of limitations barred plaintiff's claims that were based on any purportedly new facts that arose after dismissal of the 2011 and 2014 lawsuits.

Judgment was entered in defendant's favor, and this appeal followed.

## **DISCUSSION**

### **I. Standard of review**

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to state a cause of action. [Citation.] And when it is sustained without

leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]” (*Ibid.*) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

The instant case involves applicability of the doctrine of res judicata, a legal issue also subject to de novo review. (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 618.)

## **II. Res judicata**

The doctrine of res judicata has two aspects. The first, called 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*).) The second aspect of res judicata, called collateral estoppel or issue preclusion, “precludes relitigation of issues argued and decided in prior proceedings.” [Citation.]” (*Ibid.*, fn. omitted.) Here, we are concerned with the claim preclusion aspect of res judicata.

Claim preclusion bars a plaintiff from bringing a second lawsuit on an identical cause of action that has already been litigated to judgment. (*Mycogen, supra*, 28 Cal.4th at p. 904.) Claim preclusion also “extends to all legal theories, proofs, and demands for relief that might have been presented in the first matter, provided both suits assert the same cause of action. [Citations.]” (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 541, fn. 21, italics omitted.)

### **A. Threshold elements**

The threshold elements for claim preclusion are: ““(1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party

against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]” [Citation.]” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.)

### ***B. The primary rights theory***

To determine whether a cause of action asserted in a subsequent action is identical to that adjudicated in a prior lawsuit, courts in California apply the “primary right” theory. (*Mycogen, supra*, 28 Cal.4th at p. 904.) A “primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] . . .” (*Ibid.*) “[T]he harm suffered” is “the significant factor” in defining a primary right. (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301.)

A primary right is distinguishable from the legal theory on which liability for that injury is premised. (*Mycogen, supra*, 28 Cal.4th at p. 904.) “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.” [Citation.] . . .’ [Citation.]” (*Ibid.*)

The distinction between a primary right and the legal theories upon which recovery for injury to that right may be based is illustrated by the court’s decision in *Slater v. Blackwood* (1975) 15 Cal.3d 791. In that case, the plaintiff, who was injured in an automobile accident while riding as a guest, filed a lawsuit in 1970 under California’s then existing guest statute for injuries caused by the defendant’s alleged intoxication and willful misconduct. Nonsuit was granted and the judgment was affirmed on appeal. After the guest statute was held to be unconstitutional as applied to an injured non-owner guest, the plaintiff filed a second lawsuit over the same accident, this time seeking recovery on a negligence theory. The trial court ruled that res judicata barred the second lawsuit, and judgment was entered in the defendant’s favor. (*Id.* at p. 794.) In affirming the



judgment, the California Supreme Court held that the “primary right” asserted by the plaintiff was the “right to be free from injury to her person” and that the claims asserted in the second lawsuit, although premised on different legal theories than those asserted in the 1970 action, were based on the same injury to the same right and were accordingly barred. (*Id.* at p. 795.)

A primary right is distinguishable not only from the legal theory on which an injury to that right is premised, but also from the remedy sought for such injury. (*Mycogen, supra*, 28 Cal.4th at p. 904.) In *Mycogen*, for example, the plaintiff brought two lawsuits alleging breach of the same contract but requesting different remedies. In the first lawsuit, the plaintiff sought and was awarded specific performance. The plaintiff then filed a second lawsuit for damages. Arguing that *res judicata* did not bar its second suit for damages, the plaintiff claimed that the damages sought were “for the delay in the implementation of specific performance relief.” (*Id.* at p. 905.) The Supreme Court rejected this argument, holding that “a breach of contract gives rise to a single cause of action in which all remedies based on that breach must be requested” and that “[d]elay damages must be requested in the initial action for breach of contract, even if they are still speculative at the time of the suit.” (*Id.* at pp. 906-907.) The court concluded that both actions “were based on the violation of the same primary right,” the defendant’s breach of contract, and that the plaintiff’s second lawsuit was accordingly barred. (*Id.* at p. 909.)

The primary rights theory as applied to claim preclusion thus “rests on the principle that a plaintiff is entitled to only one fair opportunity to litigate a given cause of action. He or she cannot ‘split’ it by reserving a portion for later adjudication; nor can he or she expect to be given a second opportunity to cure legal or factual deficiencies that led to his or her defeat in a prior suit.

[Citation.]” (*Ferraro v. Camarlinghi, supra*, 161 Cal.App.4th at p. 531.) Under the primary rights theory, a plaintiff is barred from asserting in a second lawsuit any claims that could have been raised in the previous action, regardless of whether or not those claims were raised, if those claims seek redress for the same primary right. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 11; see also *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226.)

### **III. Claim preclusion bars the instant lawsuit**

It is undisputed that plaintiff and defendant were parties to the previous 2011 and 2014 lawsuits and that the judgment entered in both those actions was final and on the merits. (See *Olwell v. Hopkins* (1946) 28 Cal.2d 147, 150 [decision that “plaintiffs were barred as a matter of law from any recovery” is a decision on the merits].) The second and third prerequisite elements of claim preclusion are thus satisfied in this case. Our review is therefore limited to determining whether the primary rights asserted in the instant action are the same as those litigated in the 2011 and 2014 lawsuits.

The primary right alleged to have been violated in the instant action is plaintiff’s ownership interest in the property as the result of an allegedly fraudulent loan transaction and defendant’s allegedly wrongful conduct in enforcing the loan and foreclosing on the property. The third amended complaint alleges that defendant “deprive[d] [plaintiff] of her property though an illegal and void foreclosure sale” and that as a result of defendant’s unlawful conduct, plaintiff “has suffered the loss of the Property, and the loss of use of the Property.”

The 2011 lawsuit alleges violation of the same primary right based on the same allegedly wrongful conduct. Plaintiff’s first amended complaint in that action alleges that defendant holds no lien or interest in the property and has no right to

foreclose on the property because the loan transaction was fraudulent and unlawful.

The 2014 lawsuit similarly alleges violation of the same primary right based on the same allegedly wrongful conduct. The complaint filed in that action alleges that defendant had no “interest, legal or equitable claim, lien, to title of the subject property” and was “initiating an illegal judicial foreclosure sale” under an invalid note and deed of trust.

As discussed further below, all of plaintiff’s causes of action are barred by the doctrine of res judicata.

***A. First through third causes of action***

Plaintiff’s first through third causes of action for declaratory relief, rescission, and cancellation of recorded instruments, respectively, are barred by res judicata, as these claims were previously adjudicated in the 2011 and 2014 lawsuits. Plaintiff asserted a declaratory relief cause of action based on the same allegedly fraudulent loan transaction that was adjudicated in defendant’s favor in the 2011 lawsuit. Plaintiff previously asserted claims to void the note and deed of trust and to rescind the loan transaction in the 2014 lawsuit, and those claims were adjudicated against her.

Plaintiff’s causes of action for declaratory relief, rescission, and cancellation of recorded instruments are also barred by the statute of limitations. Each of those causes of action is based on allegations that plaintiff served notices of rescission pursuant to the federal Truth in Lending Act, Title 15 of the United States Code, section 1601 et seq. (TILA). Plaintiff alleges that she served her first notice of rescission on November 11, 2011, and the second notice on March 2, 2015. The claims based on the notices of rescission fail as a matter of law because plaintiff’s

right to rescind the loan under TILA expired three years after she obtained the loan -- on November 3, 2007. (15 U.S.C. § 1635(f).)<sup>1</sup>

***B. Fourth, fifth, and eighth causes of action***

Plaintiff's fourth, fifth, and eighth causes of action are based on allegations that the loan transaction was void because it was obtained by fraud in the inducement. In the fourth cause of action for quiet title and the fifth cause of action for wrongful foreclosure, plaintiff alleges that the note and deed of trust are void because they were obtained by fraud in the inducement, the assignment of the deed of trust to defendant and the notice of default were robo-signed and therefore void, and the trustee's sale was void because the deed of trust and other recorded documents were void. Plaintiff's eighth cause of action for fraud in the inducement alleges that defendant and its representatives made materially false representations and concealed material facts in order to induce plaintiff into entering into the loan transaction and that plaintiff eventually suffered the loss of the property through foreclosure as a result.

Plaintiff previously asserted claims for quiet title and wrongful foreclosure in the 2014 lawsuit, based on the same allegations set forth here -- that the deed of trust and note were obtained by fraud in the inducement and were therefore void. In the 2014 lawsuit, plaintiff alleged that defendant concealed material facts from her, that she would never have entered into the loan transaction had full disclosure been made, and that

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<sup>1</sup> Title 15 of the United States Code, section 1635(f) states, that subject to exceptions that are not applicable here, "[a]n obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor."

defendant should be compelled to transfer possession and legal and equitable title in the property to plaintiff. The 2011 lawsuit similarly alleges that defendant concealed material facts from plaintiff when she entered into the loan, and that defendant had no right to foreclose on the property. Those claims were dismissed with prejudice, and res judicata bars plaintiff from reasserting them here.

***C. Sixth and seventh causes of action***

Plaintiff's sixth and seventh causes of action allege violations of the HBOR. The sixth cause of action alleges that defendant violated Civil Code section 2923.55 by failing to contact plaintiff to discuss foreclosure mitigation alternatives and by recording a false statement of compliance with that statute. The seventh cause of action alleges that defendant violated Civil Code section 2924.17, which requires that recorded foreclosure documents "be accurate and complete and supported by reliable evidence" by relying on documents that were false, fraudulent, and defective on their face. The allegedly false and defective documents on which these claims are based were recorded on August 16, 2013, or earlier.

The factual allegations that are the basis for plaintiff's HBOR claims occurred in 2013, when the allegedly false or defective documents were recorded. As these alleged violations occurred before plaintiff filed the 2014 lawsuit, she could have sought redress for them in that action. Res judicata bars plaintiff from asserting claims she could have raised in the 2014 lawsuit. (*Noble v. Draper, supra*, 160 Cal.App.4th at p. 11.)

***D. Unfair competition cause of action***

Plaintiff's ninth cause of action alleges that all of the previously alleged acts of malfeasance by defendant constituted unfair, unlawful, and deceptive practices in violation of Business and Professions Code section 17200. Plaintiff previously asserted

a claim under section 17200 in both the 2011 and 2014 lawsuits, and res judicata precludes her from reasserting that claim here.

***E. Plaintiff's claims based on new facts or theories of recovery***

Plaintiff argues that causes of action that are based on alleged facts that occurred after the 2011 and 2014 lawsuits are not barred by res judicata. She claims, for example, that completion of the foreclosure sale, which occurred after the 2011 and 2014 lawsuits, caused her to suffer injury to primary rights different from those asserted in her prior lawsuits, namely wrongful foreclosure, and wrongful withholding of surplus proceeds owed to her after the foreclosure sale because of defendant's use of an incorrect figure for the amount due.

Plaintiff previously alleged a wrongful foreclosure claim in the 2014 lawsuit based on a fraudulently obtained note and deed of trust, the same basis for her alleged injury in the instant case. Res judicata accordingly bars her from reasserting that claim in the instant action.

Plaintiff also previously alleged injury as the result of defendant's inaccurate or incorrect statement of the amount due and owing under the note. The complaint she filed in the 2014 lawsuit alleges, for example, that defendant "utilized amounts known . . . to be inaccurate to determine the amount allegedly due and owing for purposes of foreclosure" and "that the amount stated as due and owing in the notice of default is incorrect." Res judicata bars plaintiff from reasserting that claim here.

Plaintiff cannot avoid the res judicata bar by pleading new facts or asserting legal theories not previously alleged in her prior lawsuits, such as her purported tender, in 2013, of the amount due under the loan. "[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. [Citations.]” (*Eichman v. Fotomat Corp.* (1983) 147 Cal.App.3d 1170, 1174.)

The instant action involves the same injury -- plaintiff’s loss of her interest in the property -- as her prior lawsuits. That injury arises out of the same loan, and involves the same property and the same parties. Res judicata bars all of the causes of action asserted by plaintiff. The trial court did not err by sustaining defendant’s demurrer, without leave to amend, to plaintiff’s third amended complaint.

#### **DISPOSITION**

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
HOFFSTADT