Filed 5/15/17 Renan v. JP Morgan Chase Bank CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JEHUDA RENAN, Plaintiff and Appellant, v. JP MORGAN CHASE BANK, N.A., Defendant and Respondent.	B266220 Los Angeles County Super. Ct. No. LC101709

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Affirmed.

Early Sullivan Wright Gizer & McRae and Scott E. Gizer for Plaintiff and Appellant.

Parker Ibrahim & Berg, John M. Sorich and Mariel Gerlt-Ferraro for Defendant and Respondent.

INTRODUCTION

This is the fifth in a series of lawsuits in which plaintiff and appellant Jehuda Renan has attempted to avoid or set aside foreclosure on three multi-million-dollar residential properties, notwithstanding his default on the loans secured by those properties. The lender, defendant and respondent JP Morgan Chase Bank, N.A. (Chase), demurred to the operative first amended complaint in the present action, arguing the doctrine of res judicata bars the claims asserted here. The trial court sustained the demurrer without leave to amend and, finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

1. The properties

Three residential properties are at issue: the first is located at 1100 Alta Loma Drive, #1505, West Hollywood (Alta Loma property), the second is located at 4850 Andasol Avenue, Encino (Andasol property), and the third is located at 1646 Woods Drive, Los Angeles (Woods property). Renan obtained three loans from the now-defunct Washington Mutual Bank (WaMu), each secured by a deed of trust on one of the three properties.[1] After

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[1] Pursuant to Evidence Code sections 452, subdivision (h), and 459, we take judicial notice of the following facts: The Federal Deposit Insurance Corporation (FDIC) was named Receiver for WaMu pursuant to its authority under the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d). Pursuant to the Purchase and Assumption Agreement between the FDIC as Receiver for WaMu, and Chase, dated September 25, 2008, Chase acquired certain of the assets of WaMu, including all loans and loan commitments of WaMu. A copy of that Purchase and Assumption Agreement can be found on the FDIC's website at

defaulting on the loans, Renan filed a series of lawsuits in which he sought to retain or regain possession of the properties.

2. The prior lawsuits

2.1. The Alta Loma lawsuit

In 2006, Renan obtained a loan in the amount of $1,687,500 from WaMu, secured by the Alta Loma property. In 2009, after Renan defaulted on the loan, Quality Loan Service Corporation (QLS) recorded a notice of default concerning the Alta Loma property. In late 2010, QLS recorded a notice of trustee sale.

In 2011, Renan filed a lawsuit in Los Angeles Superior Court against QLS and Bank of America, N.A.,[2] seeking to enjoin the foreclosure sale (*Renan v. Quality Loan Service Corp*., et al. (2011, No. BC452669)) (the prior Alta Loma suit). Renan asserted three causes of action: violation of statutory duties (Civ. Code, § 2923.5), unfair business practices (Bus. & Prof. Code, § 17200), and quasi contract. Generally, Renan challenged the authority of QLS to conduct a nonjudicial foreclosure sale, and on that basis sought to enjoin the sale.

Bank of America demurred to the operative second amended complaint on the ground the complaint failed to state a valid claim. Specifically, Bank of America argued that, as a

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<http://www.fdic.gov/about/freedom/Washington_Mutual_P_and_A.pdf> (as of May 11, 2017). (See also *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 882-883 [taking judicial notice of same facts].)

[2] Bank of America was named as a defendant as successor by merger to LaSalle Bank, N.A. as trustee for WAMU Mortgage Pass-Through Certificates series 2007-HY1 Trust. As noted, Chase obtained all of WaMu's mortgage loans from FDIC in 2008, after WaMu failed.

matter of law, none of the alleged defects in the foreclosure process cited by Renan provided a valid basis to enjoin the foreclosure sale. In a signed order, the court sustained the demurrer without leave to amend on September 9, 2011. Although Renan subsequently appealed, his appeal was dismissed after he failed to file an opening brief. (*Renan v. Quality Loan Service Corporation* (B239832, app. dismissed January 17, 2013).) The Alta Loma property was later sold at a nonjudicial foreclosure sale.

2.2. The Woods lawsuit

In 2007, Renan obtained a loan in the amount of $1,893,750 from WaMu, secured by a deed of trust on the Woods property. In 2009, after Renan defaulted on the loan, the Woods property was sold at a nonjudicial foreclosure sale. Renan then filed an action in Los Angeles Superior Court (*Renan v. Washington Mutual Bank, F.A., et al.* (2011, No. BC429287)) (the prior Woods suit), seeking to recover possession of the Woods property. Renan named Chase, among others, as a defendant and alleged Chase improperly foreclosed on the Woods property without notice to him, and in spite of reassurances Chase made to Renan's counsel indicating no foreclosure sale would take place while loan modification negotiations were taking place.

The prior Woods suit came regularly for trial on February 27, 2012. Following a pretrial conference with the assigned judge, Renan's counsel filed a motion to disqualify the judge under Code of Civil Procedure section 170.6. The court denied the motion and called the matter for trial. Renan's counsel refused to participate in the trial and did not present any argument or evidence in support of Renan's claims against

Chase. The court granted Chase's motion for nonsuit and entered judgment accordingly.

Renan appealed from the judgment in favor of Chase, challenging only the court's ruling on the disqualification motion. Our colleagues in Division Eight of this court dismissed the appeal for lack of jurisdiction (*Renan v. Washington Mutual, et al.* (B241349, app. dismissed June 21, 2013)), as a petition for extraordinary relief is the only available avenue of review for such a ruling. (Code Civ. Proc., § 170.3, subd. (d) ["The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding"]; *People v. Panah* (2005) 35 Cal.4th 395, 444 [confirming Code Civ. Proc., § 170.3, subd. (d), "provides the exclusive means for seeking review of a ruling on a challenge to a judge, whether the challenge is for cause or peremptory"].)

2.3. The Andasol lawsuits

In October 2007, Renan obtained a loan in the amount of $2,720,000 from WaMu secured by a deed of trust on the Andasol property. In 2009, after Renan defaulted on the loan, a notice of default was recorded. Additional notices of default were recorded in 2010 and 2012. Renan contacted Chase in an attempt to negotiate a loan modification, but his request was denied.

In 2011, Renan filed a lawsuit in Los Angeles Superior Court (*Renan v. Quality Loan Service Corp., et al*. (2011, No. BC453133)) (the first Andasol suit) against Chase and QLS, in which he sought to enjoin the foreclosure. As in the prior Alta Loma suit, Renan asserted claims of violation of statutory duty, declaratory relief, and unfair business practices in violation of Business and Professions Code section 17200.

Chase moved for summary judgment and asserted it complied with all applicable statutory obligations to Renan relating to the foreclosure. Renan failed to oppose the motion for summary judgment, which the court ultimately granted. On April 12, 2012, the court entered a judgment in favor of Chase.

Approximately one year later, Renan filed another suit in Los Angeles Superior Court against QLS and Chase relating to the Andasol property (*Renan v. Quality Loan Service Corp., et al.* (2013, No. LC100128)) (second Andasol suit). This time, Renan styled the causes of action as cancellation of instruments, declaratory relief, and breach of fiduciary duty, but he still sought to enjoin the foreclosure sale. Chase demurred, asserting both that the complaint failed to state a valid cause of action, and that the claims stated in the complaint were resolved in the first Andasol suit and were therefore barred by the doctrine of res judicata. In January 2014, the court sustained the demurrer without leave to amend, finding Renan's suit was barred by the doctrine of res judicata and, in any event, the complaint failed to state a valid claim. Renan appealed from the judgment of dismissal, but the appeal was dismissed after he failed to file an opening brief. (*Renan v. Quality Loan Service Corp. et al.* (B255393, app. dismissed September 11, 2014).) No sale of the Andasol property is reflected in the record on appeal.

3. The current lawsuit

In May 2014, Renan filed the current lawsuit against Chase, asserting causes of action for breach of contract as to all three properties, and quiet title as to the Alta Loma and Woods properties. Renan asserted Chase still held title to the Alta Loma and Woods properties, and sought an order compelling Chase to return title of those two properties to him. Renan also

sought to enjoin Chase from conducting a trustee sale of the Andasol property.

In December 2014, Renan filed the operative first amended complaint, which added causes of action for ejectment and declaratory relief. Renan's claims focus entirely on an alleged agreement he reached with Chase to modify each of the three loans. Specifically, Renan alleges that he obtained temporary modifications of the loans secured by the Alta Loma property and the Andasol property, and that Chase promised to approve a loan modification on the Woods property after the first two modifications were finalized. Renan asserts he complied with the terms of the temporary loan modifications and was therefore entitled, under the agreement negotiated with Chase, to permanent modification of the loans secured by the Alta Loma and Andasol properties. However, instead of providing permanent loan modifications, Chase conducted a trustee sale of the Alta Loma property and threatened to do the same with respect to the Andasol property. Further, Renan suggests, Chase conducted a trustee sale of the Woods property without notice, and despite assurances that it would not do so while loan modification negotiations were underway.

Chase demurred to the operative complaint in the current lawsuit under Code of Civil Procedure section 430.10, subdivision (a), on the ground the complaint failed to state facts sufficient to constitute a cause of action. In addition, Chase asserted the claims relating to each of the three properties had been fully litigated in prior lawsuits, and therefore the current lawsuit was barred in its entirety by the doctrine of res judicata. The court sustained the demurrer without leave to amend on the basis of res judicata.

4. The appeal

The court entered a judgment of dismissal on June 18, 2015. Chase served notice of entry of the judgment on June 26, 2015. Renan timely appeals.

CONTENTIONS

Renan contends the court erred by finding the claims stated in the present lawsuit are barred by the doctrine of res judicata because none of the prior lawsuits resulted in a resolution of the case on the merits. In the alternative, Renan contends the court should have exercised its discretion not to apply res judicata because the prior judgments resulted from the negligence of his attorneys.

DISCUSSION

1. Standard of review

On appeal from a judgment after a demurrer is sustained without leave to amend, 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.) We construe the pleading in a reasonable manner and read the allegations in context. (*Ibid.*) We 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 affirm the sustaining of the demurrer if the pleading or matters that are judicially noticeable disclose a complete defense. (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; see Code Civ. Proc., § 430.30, subd. (a).) Res judicata is a proper ground for demurrer, if the complaint and judicially

noticed facts demonstrate its applicability. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 225 [court may take judicial notice of court records in considering demurrer based on res judicata].)

2. Res judicata bars relitigation of claims that were or could have been litigated in a prior suit.

" ' "Res judicata" describes the preclusive effect of a final judgment on the merits.' [Citation.] It 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Under the doctrine of res judicata, 'all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.' [Citation.]" (*Estate of Dito* (2011) 198 Cal.App.4th 791, 801; *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) " ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897 (*Mycogen*).) 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.]" (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 557.)

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.) Whether a new cause of action is the same as one in a prior action is not determined on the basis of the legal theory or relief sought, but by whether they are both premised on a violation of the same primary right, i.e., " 'the plaintiff's right to be free from the particular injury suffered.' " (*Mycogen, supra*, 28 Cal.4th at p. 904.) As explained by our Supreme Court, "[t]he primary right theory is a theory of code pleading that has long been followed in California. . . . [¶] 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.)

3. The claims asserted in the current lawsuit are barred by the doctrine of res judicata.

3.1. The Alta Loma property

The court dismissed the prior Alta Loma suit after it sustained a demurrer without leave to amend, which Renan suggests was not a resolution on the merits, as required for the application of res judicata.

Renan appears to concede—correctly—that an order sustaining a demurrer without leave to amend is generally considered a resolution on the merits for purposes of res judicata. (See, e.g., *Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52 (*Goddard*) [stating that "[a] judgment given after the sustaining of a general demurrer on a ground of substance, for example, that an absolute defense is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit"].) Nevertheless, Renan asserts we should not give the court's ruling preclusive effect here because "the sustaining of even a general demurrer is not always on the merits where the complaint fails for technical reasons, misconceives a remedy, or frames the complaint on the wrong cause of action." However, the complaint in the prior Alta Loma suit was not dismissed due to a technical defect; it was dismissed because Renan failed to assert any valid legal basis to avoid foreclosure. This is precisely the situation in which a judgment of dismissal should be given preclusive effect, and the court properly did so in this case.

Renan alludes to another possible defect in the court's application of the doctrine of res judicata. With respect to the first element of res judicata, Renan suggests the prior Alta Loma suit "only asserted foreclosure irregularities (and had nothing to do with the claims asserted in this case)." Here, Renan fails to appreciate the importance of the primary rights theory. As explained, *ante*, in evaluating whether two suits involve the same cause of action, we do not consider the legal theory but rather the rights underlying the claim. In the prior suit, as in the current suit, Renan contends Chase did not have the right to foreclose on the Alta Loma property. Although the specific theories about

why the foreclosure was improper are different, the primary right—the right to be free from foreclosure—is the same.

Further, and as Chase points out, the facts underlying Renan's current theory of liability were known to Renan at the time he filed the prior Alta Loma suit and therefore could have been asserted at that time. 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.) One of the primary rationales for the doctrine of res judicata is that it "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, supra*, 28 Cal.4th at p. 897, italics omitted.) Here, that policy would not be served by allowing Renan to assert claims against Chase that he could have—and should have—asserted in the prior Alta Loma suit.

Finally, Renan hints that privity may not exist between Bank of America (named as a defendant in the prior Alta Loma suit) and Chase (the named defendant in the current lawsuit). However, Renan has not cited any legal authority on the issue of privity, and we find no obvious factual support for that contention in his briefing here, or before the trial court. "[A]n appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655-656.) Accordingly, we decline to consider this issue.

3.2. The Woods property

As for the prior Woods suit, it was resolved by way of a nonsuit motion, which the court granted after Renan's counsel refused to present any evidence or argument at trial. Renan impliedly concedes (by failing to argue otherwise) that the first and third elements of res judicata are present. Regarding the cause of action, Renan seeks to recover possession of the Woods property here, just as he did in the prior Woods suit. Further, it is plain that privity exists because Renan, as plaintiff in both actions, named Chase as a defendant in the prior Woods suit and in the present action.

Renan argues the second element of res judicata is missing here because, in his view, the prior Woods suit did not result in a final judgment on the merits. The entirety of Renan's argument on this point is as follows: "First, the Woods Property was adjudicated against Renan [*sic*] after the granting of a nonsuit due to Renan's attorney's refusal to put on Renan's case because of perceived prejudice of the trial judge. [Record citation.] This is not resolution on the merits as it is impossible to determine the merits without evidence or argument."

Renan fails to provide us with any legal authority supporting this novel contention. Moreover, as Chase correctly asserts, Code of Civil Procedure section 581c, subdivision (c), expressly provides that if a motion for nonsuit "is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits." Our courts have affirmed that in the absence of an express statement from the trial court to the contrary, a judgment of nonsuit is a resolution on the merits, for purposes of res judicata. (See *American Broadcasting Companies, Inc. v.*

Walter Reade-Sterling, Inc. (1974) 43 Cal.App.3d 401, 406 [observing that "the 1961 amendment to section 581c of the Code of Civil Procedure made it explicit that a judgment of nonsuit operates as an adjudication upon the merits, *unless the trial judge expressly provides otherwise*"].)

Here, the order granting the motion for nonsuit states, "Defendants' Motion for Nonsuit as to the entire action is hereby granted, because Plaintiff refused to make an opening argument, submit any evidence in support [of] his claims, and in fact, expressly refused to participate in trial in any manner. The entire action is dismissed with prejudice as to Defendants, and each of them." The only reasonable interpretation of this order is that the court intended the nonsuit to operate as a resolution on the merits.

3.3. The Andasol property

As for the Andasol property, Renan concedes that the first Andasol suit was resolved when the court granted Chase's unopposed motion for summary judgment. Without citing to any legal authority, however, Renan claims the summary judgment is not a resolution on the merits because "judgment was entered against Renan first for his counsel's failure to oppose or argue against a summary judgment motion . . . . Again, failing to oppose and argue against a summary judgment motion cannot be said to have been an actual determination on the merits of Renan's claims (especially those that were never asserted)." Contrary to Renan's assertion, the court in the first Andasol suit did not grant Chase's motion for summary judgment *because* Renan failed to oppose the motion. Rather, the court granted the motion because Chase produced undisputed facts that entitled it to judgment as a matter of law.

In any event, it is well established that a summary judgment is a final judgment in all respects. (Code Civ. Proc., § 437c, subd. (m)(1) [stating "[a] summary judgment entered under this section is an appealable judgment as in other cases"]; see *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc.* (1981) 120 Cal.App.3d 622, 629 [concluding "[t]he summary judgment on the complaint is a judgment on the merits" for purposes of res judicata].) The fact that Renan did not oppose Chase's motion for summary judgment does not undermine the integrity of the judgment entered against him.[3]

4. Application of res judicata does not result in manifest injustice.

Finally, Renan contends the trial court should not have applied the doctrine of res judicata to bar the current suit "given the egregious circumstances surrounding the prior lawsuits." We disagree.

"Even if the[ ] threshold requirements are established, res judicata will not be applied 'if injustice would result . . . . [Citations.]' [Citation.]" (*Citizens for Open Access etc. Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1065; see also *Greenfield v. Mather* (1948) 32 Cal.2d 23, 35 [res judicata "will not be applied so rigidly as to defeat the ends of justice"]; but see *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796 [stating the "manifest injustice" exception to res judicata is "of doubtful validity" and has been "severely criticized"].) Renan concedes that the equitable relief he seeks is appropriate only in exceptional circumstances. Nevertheless, he contends the

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[3] In light of our holding, we do not need to discuss the preclusive effect of the judgment entered in the second Andasol suit.

negligence of his attorneys in all of the prior lawsuits compels equitable relief here.

Renan cites several cases in support of his argument, and asserts that courts will provide relief from the doctrine of res judicata on the basis of "extrinsic mistake" and "negligence of a party's attorney in not properly filing an answer." Renan relies primarily on *Kulchar v. Kulchar* (1969) 1 Cal.3d 467 (*Kulchar*), a case in which the court declined to provide equitable relief from a prior judgment. There, the court observed that application of the doctrine of res judicata may not be reasonable where a prior judgment is obtained by fraud or some other extrinsic factor, to the prejudice of the party against whom res judicata is asserted. (*Id*. at pp. 471-472.) The court went on to state, "[r]elief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary." (*Id.* at p. 472.) The court drew a sharp distinction between cases in which a party is effectively prevented from litigating a dispute due to some external factor, on one hand, and cases in which a party simply fails to effectively present a case, on the other: "Whether the case involves intrinsic or extrinsic fraud or mistake is not determined abstractly. 'It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.' " (*Id*. at p. 473.)

On the record before us, we conclude Renan was not deprived of the opportunity to present his case in any of the prior lawsuits. Moreover, to the extent that Renan's attorneys' negligent failure to present evidence or arguments in his favor resulted in judgments entered against him, the appropriate remedies include moving to set aside the judgment due to attorney fault under Code of Civil Procedure section 473, subdivision (b), and a suit against the attorney for professional negligence. It is not appropriate, however, to require Chase to repeatedly defend against lawsuits containing claims that have already been litigated, notwithstanding the purported negligence of Renan's counsel.

DISPOSITION

The judgment of dismissal is affirmed. Respondent to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.