**IN THE COURT OF APPEAL OF THE STATE CALIFORNIA**
**SECOND APPELLATE DISTRICT**
**DIVISION SIX**

DOUGLAS GILLIES,
Plaintiff and Appellant,
v.
CALIFORNIA RECONVEYANCE CO.,
Defendant and Respondent.

**Case No. B237562**
Santa Barbara County No. 1381828

**APPEAL FROM JUDGMENT FOLLOWING ORDER GRANTING MOTION TO STRIKE COMPLAINT WITHOUT LEAVE TO AMEND**

Hon. Denise de Bellefeuille, Judge

# APPELLANT'S OPENING BRIEF

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*in pro per*

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## I. NATURE OF THE ACTION

Plaintiff filed a complaint in Santa Barbara Superior Court against California Reconveyance Company on July 13, 2011, to enjoin a Trustee's Sale of his residence. He requested an Order declaring that CRC's Deed of Trust, Notice of Default, and Notice of Trustee's Sale are invalid and void because they do not state the name of the owner of the property and can not be properly indexed in the Grantor-Grantee Index. Defendant filed a motion to strike the complaint. In her tentative ruling, Judge Denise deBellefeuille wrote, "to the extent that these issues are more properly addressed by demurrer, the court deems the motion to strike as a demurrer. (Appellant's Motion to Augment Record, Exhibit 1, p. 4). She then granted defendant's motion to strike the complaint without leave to amend. Judgment of Dismissal was entered on November 8, 2011 (CT 751). Notice of Appeal was filed on November 16, 2011.

## II. STATEMENT OF APPEALABILITY

The Judgment of Dismissal stated:

The Motion to Strike Plaintiff's Complaint, in its entirety, by defendant California Reconveyance Company ("CRC") having been granted with prejudice:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The case is dismissed with prejudice against defendant CRC.
2. Judgment is hereby entered in favor of defendant of CRC and against Plaintiff.
3. Plaintiff shall recover nothing against defendant CRC. (CT 751)

Normally an order striking matter from a complaint is not an appealable

order. Cal. Code Civ. Proc. §904.1. When, however, the order granting a motion to strike operates to remove from the case the only cause of action alleged against a party and leaves no issues to be determined, it is appealable as a final judgment. *Wilson v. Sharp* (1954) 42 Cal.2d 675, 677 [268 P.2d 1062].

## III. ISSUES PRESENTED

1. Whether this Court should reverse a judgment of dismissal entered by the Honorable Denise deBellefeuille of the Santa Barbara Superior Court (Case No. 1381828) because disputed material facts exist to support all causes of action and they should properly be decided by a jury of Appellant's peers.

2. Whether a demurrer to a complaint, which alleged that a Notice of Default was not recorded, is a bar to a subsequent conplaint alleging that a Notice of Trustee's Sale was intentionally filed under a fictitious name and therefore was not and could not be properly indexed.

3. Whether plaintiff has sufficiently alleged that defendant California Reconveyance Company committed fraud when it knowingly presented a Notice of Trustee's Sale to the Santa Barbara County Recorder misstating the name of the trustor, which caused the record to be indexed improperly.

4. Whether the alleged failure of CRC to contact plaintiff to explore alternatives to foreclosure before filing a notice of default raises a different fact or issue than CRC's use of the statutory language of Cal. Civ. Code §2923.5 in its declaration of compliance on the notice of default.

5. Whether a motion to strike can be granted when a complaint alleges new facts and issues.

## IV. STANDARD OF REVIEW

The trial court deemed the motion to strike to be a demurrer. In reviewing a demurrer, the court accepts as true all of the complaint's allegations of material facts. *A1 Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1312. If it appears the plaintiff is entitled to any relief, the complaint will be held good. *Chase Chemical Co. v. Hartford Acc. & Indemn.* (1984) 159 Cal.App.3d 229, 242.

## V. INTRODUCTION

This is a second lawsuit between the parties challenging a pending trustee's sale of a California residence. In the first action, *Gillies v. California Reconveyance Co.* and *JPMorgan Chase* ("Gillies I"), plaintiff alleged that a Notice of Default describing his property filed by defendants California Reconveyance Co. ("CRC") and JPMorgan Chase ("Chase") was not recorded (CT 446:11). Defendants filed a demurrer and attached a copy of a recorded Notice of Default (CT 525-527). In his Opposition to Demurrer, plaintiff reported that he discovered after filing the complaint and receiving defendants' demurrer that the Notice of Default ("NOD") did not correctly state the name of the trustor, spelling his name *Dougles* rather than *Douglas*. Therefore, plaintiff argued, the NOD did not comply with Cal. Civ. Code §2924, which requires that a NOD state the name of the trustor (CT 537:1-13). Plaintiff requested leave to amend. The court did not address the misspelling and sustained the demurrer without leave to amend.

The Court of Appeal affirmed, stating that the misspelled name on the notice of default did not raise a material issue. CRC then filed a new Notice of Trustee's Sale on June 30, 2011 and again misspelled the trustor's name (CT 355-356). This time it must have been deliberate.

Puzzled by CRC's persistence in filing a Notice of Trustee's Sale ("NOTS") that could not be properly indexed by the County Recorder, plaintiff returned to the County Records and discovered that a Deed of Trust ("DOT") recorded in 2003 (CT 711-732) referenced in the NOTS had also misspelled his name on the first page, and therefore it had been recorded and indexed under the fictitious name of *Dougles* Gillies[1]. A search of the Grantor-Grantee Index under the name on the 1992 Grant Deed, Douglas Gillies, does not turn up the Deed of Trust, the Notice of Default, or the two Notices of Trustee's Sale. They are indexed on their own miniature chain, four documents with no links in the Grantor-Grantee Index to plaintiff's residence. No court had considered this.

Plaintiff filed the present complaint against CRC ("Gillies II") stating new facts and new theories. It alleged that the DOT, NOD and NOTS, although recorded, were not properly indexed in the county records because they stated a fictitious name. It alleged that CRC filed a NOTS knowing that the name of the trustor was fictitious and intended to fraudulently sell defective title to an unsuspecting buyer if not restrained. The complaint also alleged that the requirements of Cal. Civ. Code §2923.5 were not satisfied because CRC did not contact plaintiff to explore alternatives to foreclosure before filing a NOD. (CT 3-9).

CRC filed a Motion to Strike. In his Opposition, plaintiff attached the results of his search of the Santa Barbara Grantor-Grantee Index at http://www.sbcvote.com/clerkrecorder/GrantorGranteeIndex.aspx . The results for Douglas Gillies were marked Exhibit 4 and the results for Dougles Gillies were marked Exhibit 5 (CT 704-710). The Douglas

[1] A Google search for "Dougles Gillies" on April 26, 2012, returned 12 hits, all of which referred to the Gillies I litigation. A search under the name "Douglas Gillies" returned 61,400 hits.

search shows the history of plaintiff's ownership of the property, which includes 23 records starting with a Grant Deed in 1992. The Dougles search lists four documents – a Deed of Trust (2003), Notice of Default (2009), Notice of Trustee's Sale (2009), and another Notice of Trustee's Sale (2011).

In his Opposition to CRC's Motion to Strike, plaintiff suggested a remedy to the indexing snafu. The Adjustable Rate Note states in Paragraph 12 that in the event of a clerical error, "I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors." (CT 687:9 – 688:7).

Rather than simply ask the Note Holder to correct the error on the Deed of Trust by following the procedure described in paragraph 12, CRC decided, with knowledge of its indexing error after litigating Gillies I, to maintain its questionable course and file a misleading Notice of Trustee's Sale, which raises a question. Why?

Why litigate rather than ask the Note Holder to send a notice?

Three possibilities come to mind:

(1) The lawyers need the money;

(2) CRC doesn't know that it is wrong to file inaccurate records; or

(3) CRC cannot find the Note Holder and the bank wants the house.

The odds may be in favor of (3).

The trial court declined to address the indexing issue in Gillies II. She stated inaccurately in her tentative ruling, "…in ruling on plaintiff's indexing argument, the Court of Appeal necessarily determined that there was no reasonable possibility that Gillies could state a valid cause of action against the defendants by amending his complaint to add the indexing issue…Gillies actually and fully litigated Gillies I whether the NOD and the NOTS were invalid by reason of indexing problems."

(Appellant's Motion to Augment Record, Exhibit 1, p. 6).

The Court of Appeal did not address indexing issues raised by the Deed of Trust, the NOD, or the NOTS. "Gillies points out that the notice of default misspells his first name Dougl*e*s, instead of the correct *'Douglas*.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice." (CT 672). The word *index* was not used, and the improbability that anyone other than the parties could find the Deed of Trust and the three notices in the Grantor-Grantee index was not considered.

If any matter mentioned by a moving party in an appellate brief is deemed adjudicated on the merits and thereafter barred by res judicata, even if it is not mentioned in the underlying pleadings or addressed by the Court of Appeal in its decision, then "adjudication on the merits" is a whimsical notion and any remark can lead to forfeiture of rights.

In her tentative ruling, Judge deBellefeuille expressed reservations about defendant's choice of a motion to strike rather than a demurrer, and concluded, "to the extent that these issues are more properly addressed by demurrer, the court deems the motion to strike as a demurrer." (Appellant's Motion to Augment Record, Exhibit 1, p. 4). The tentative ruling concluded, "Defendant CRC's motion to strike will be granted to strike the entirety of the complaint without leave to amend." At the end of the hearing the court said, "I think you need to take it up with a higher court." (RT 6:11-12).

Plaintiff appeals.

## VI. STATEMENT OF FACTS

Plaintiff sued CRC and JPMorgan Chase in Gillies I. He alleged that the NOD was not recorded, and the form of the NOD was defective[2]. Defendants filed a demurrer and attached a copy of a recorded NOD. The trustor's (plaintiff's) name was misspelled. The trial judge wrote in her Order After Hearing, "Because the only basis for the first cause of action for declaratory relief is plaintiff's erroneous allegation regarding the non-recordation of the notice of default, the court finds that there is no 'actual controversy' for the court to determine. Accordingly, defendants' demurrer to the first cause of action is sustained." (CT 558:28 – 559:4). After rejecting the other three causes of action, the judge concluded, "Because plaintiff cannot allege any new facts that would entitle him to relief, the demurrer is sustained without leave to amend." (CT 563:17-18). Indexing was not addressed when the demurrer was sustained.

Three months after the court dismissed plaintiff's complaint without leave to amend, *Mabry v. Aurora Loan Services* (2010) 185 Cal.App.4th 208 [110 Cal.Rptr.3d 201] established that the foreclosing party has a duty to contact the borrower to discuss options *before* filing a notice of default. *Mabry* has been cited 433 times since it was published.

Plaintiff appealed. The court of appeal ruled, "The trial court properly sustained the demurrer to Gillies's first cause of action. The complaint alleged the notice of default was not recorded as required by section 2924, subdivision (a)(1). The trial court properly took judicial notice that the notice of default was recorded on August 13, 2009." (CT 669).

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[2] Defects in the NOD alleged in the Complaint: (1) it did not contain a declaration under penalty of perjury; (2) the statements on the NOD were not made by a declarant with personal knowledge of the facts; and (3) the "copy" delivered to the trustor was not identical to the recorded NOD.

The appellate court continued, "Gillies points out that the notice of default misspells his first name Dougles, instead of 'Douglas.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice. Gillies's argument fails to raise a material issue." (CT 672). The court of appeal affirmed on the grounds that plaintiff received actual notice of the NOD.

CRC filed a new Notice of Trustee's Sale on June 30, 2011 (CT 17-19). Again, the trustor's name was misspelled as Dougles Gillies. This time it was intentional.

Plaintiff filed a second complaint against CRC stating new facts and theories. He alleged that the Deed of Trust, NOD and NOTS, although recorded, were not properly indexed in the county records because they stated a fictitious name. He also alleged that the requirements spelled out in Cal. Civ. Code §2923.5 had not been met because CRC did not contact plaintiff to explore options before filing a NOD, a new fact not alleged in Gillies I, raising a new issue first articulated by *Mabry*.

The trial court granted CRC's motion to strike the complaint without leave to amend. Plaintiff appeals on the grounds that new issues and new facts are alleged in his complaint, and the former judgment on demurrer is not res judicata.

A judgment is on the merits for purposes of res judicata "if the substance of the claim is tried and determined." 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 313, p. 864.

> Whether a judgment entered on the sustaining of a demurrer has res judicata consequences depends on the character of the demurrer. A judgment on a general demurrer will have the effect of a bar in a

> new action in which the complaint states the same facts as those held not to constitute a cause of action on the former demurrer or, notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one. California Jurisprudence 3d §162.

There is no connection in the Grantor/Grantee Index between the chain of title dating back fifty years which includes plaintiff's Grant Deed and the little chain consisting of a DOT, NOD, and two NOTS recorded by CRC. A Grantor-Grantee Index cannot give constructive notice when a recorded document misspells the name of the Grantor or the Grantee. The four documents upon which CRC stakes its claim are a deserted island in the County Records. These are new facts.

There was no discussion of the misspelled name at the demurrer hearing in Gillies I. It was not referenced in the court's Order After Hearing (CT 556-563) when the demurrer was sustained without leave to amend. When the Court of Appeal affirmed, the misspelled name on the Deed of Trust was never mentioned. Plaintiff was not aware of it, and if defendant knew the name on the DOT was incorrect, it didn't say.

Plaintiff's Grant Deed, recorded on April 30, 1992 was attached to the Gillies II complaint as Exhibit 1 (CT 697). The Deed of Trust that is the basis for CRC's claim to be a trustee is not properly indexed in the County Records so it has no connection to plaintiff's Grant Deed or the chain of title to plaintiff's property in the Santa Barbara County Recorder's Office, as shown by the search results in Exhibits 4 and 5 (CT 704-710).

## VII. ACCURATE SPELLING OF THE TRUSTOR'S NAME ON A DEED OF TRUST IS NECESSARY TO PROVIDE CONSTRUCTIVE NOTICE

The outcome of Gillies I was a determination that (1) a NOD was recorded in Santa Barbara, and (2) the homeowner did not deny that he received a copy of the NOD. There was no consideration as to whether or not the NOD was properly indexed so that anyone other than the parties could locate it in the County Records.

> A grantor-grantee index is a master reference book, ordinarily kept in the office of official records of a particular county, which lists all recorded deeds as evidence of ownership of real property. This index contains the volume and page number where an instrument can be found in the record books. The grantor-grantee index is frequently used to conduct a title search on property. By consulting the index, an individual can trace the conveyance history of the property and determine whether or not it is encumbered.
>
> West's Encyclopedia of American Law (2d ed. 2008)

The opinion of the court of appeal in Gillies I states: "Gillies points out that the notice of default misspells his first name Dougl*e*s, instead of the correct '*Douglas*.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor' parcel number."

Actual notice is not a substitute for constructive notice. The Official Records are maintained to provide constructive notice. Santa Barbara's Grantor-Grantee Index cannot be searched by street address or parcel number. The search interface is shown on CT 705 and 709. The public URL for the Index is:

www.sbcvote.com/clerkrecorder/GrantorGranteeIndex.aspx . A searcher must spell the name right. If CRC, Chase's in-house trustee and foreclosure executioner, misspells the grantor's name on a recorded document, it cannot be found in the Grantor-Grantee Index.

The power of sale shall not be exercised until a notice of default is recorded in the office of the county recorder, which shall include "a statement identifying the mortgage or deed of trust by stating *the name or names of the trustor*." Cal. Civ. Code §2924 (a)(1)(A). Constructive notice is not provided by a name that sounds like or looks like the trustor's name.

The notice of sale shall be recorded in the office of the county recorder at least 20 days prior to the date of sale and the notice of sale shall contain *the name of the original trustor*. Cal. Civ. Code §2924f (b)(1).

Neither the notice of default nor the notice of trustee's sale filed by CRC included a statement identifying the deed of trust by stating the name of the trustor. This fact was not alleged in the Gillies I Complaint nor was it mentioned by the court.

A Deed of Trust dated August 12, 2003, was attached to plaintiff's Memorandum in Opposition to Motion to Strike as Exhibit 6 in Gillies II (CT 711-732)**.** It names *Dougles Gillies* as the Borrower and the trustor on page 1. The signature page and the acknowledgment page (CT 726-727), and the signature page on the attached Fixed/Adjustable Rate Rider (CT 732) all state the name of the Borrower as it appears in the Grant Deed (CT 697) – *Douglas Gillies*. Every page that required the trustor's signature correctly stated the name.

No person can be expected to find a document in the Grantor-Grantee Index on which the first name of the Grantor is misspelled. To find Dougles Gillies, they would have to search every possible combination, including Douglass Gillies, Douglis Gillies, Dougliss Gillies, Duglass Gillies,

Dogless Gillies, Dougals Gillies, Dogulas Gillies, Duglas Gillies, Doguals Gillies, Toklis Gillies, Dougles Gillies, Dougls Gillies, Doglas Gillies, Taklis Gillies – it goes on and on. The Grantor-Grantee Index is not a Google search engine—it doesn't make educated guesses.

An abstract of judgment containing a misspelled name that sounds like the correct name does not impart constructive notice of its contents under the doctrine of *idem sonans*. 'Reed,' 'Reid,' and 'Read,' are different ways of spelling one name, as are 'Kane' and 'Cain,' or 'Phelps' and 'Felps.' If you put the added burden on the searcher in addition to what comes up when the name is properly spelled, to track down and satisfy themselves about whatever comes up when the name is improperly spelled in all different ways that it might be improperly spelled, it leads to an unjustifiable burden. *Orr v. Byers* (1988) 198 Cal. App. 3d 666, 672 [244 Cal.Rptr. 13].

An Adjustable Rate Note dated August 12, 2003, is attached to plaintiff's Memorandum in Opposition to Motion to Strike as Exhibit 7 (CT 733 – 739). It is the contract that prescribes the remedy to be followed by the parties in the event of a clerical error. Paragraph 12 of the Note states, "In the event the Note Holder at any time discovers that this Note or the Security Instrument or any other document related this loan, called collectively the "Loan Documents," contains an error which was caused by a clerical or ministerial mistake, calculation error, computer error, printing error, or similar error (collectively "Errors"), I agree, upon notice from the Note Holder, to reexecute any Loan Documents that are necessary to correct any such Errors and I also agree that I will not hold the Note Holder responsible for any damage to me which may result from any such Errors." (CT 733-739).

In California, an obligation arises either from the contract of the parties

or by operation of law. Cal. Civ. Code § 1428; Cal. Code Civ. Proc. § 26. "A mortgage is a contract." Cal. Civ. Code § 2920(a). A power of sale is conferred on the mortgagee, trustee, or other person *by the mortgage*. Cal. Civ. Code §2924. The adjustable rate note drafted by the Lender in this case explicitly spells out the procedure to correct clerical mistakes. Trustor must receive notice from the Note Holder requesting that he reexecute the loan documents.

The Adjustable Rate Note states in ¶7(c), "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount…" (CT 736). If CRC is acting on behalf of the Note Holder, why does it persist with a defective trustee's sale? If, on the other hand, CRC is *not* acting on behalf of the Note Holder, why is it asking the court to deprive a homeowner of his property? The chain of title to support CRC's claim in the County Recorder's Office, consisting of one Deed of Trust, one Notice of Default, and two Notices of Trustee's Sale (CT 708 - 710), is not linked to any real property.

Anyone who takes title at CRC's pending trustee's sale will acquire defective, uninsurable title and protracted litigation. "An instrument must be recorded properly in order that it may be recorded as prescribed by law. If recorded in a different book from the one directed, it is to be regarded the same as if not recorded at all." *Cady v. Purser* (1901) 131 Cal. 552, 558.

For over a century, the law in California has been that a bona fide purchaser of real property has constructive notice of only those matters that could be located by a diligent title search. *Dyer v. Martinez* (2007) 147 Cal. App. 4th 1240, 1243.

*Hochstein v. Romero* (1990) 219 Cal.App.3d 447 addressed the issue of proper indexing. There, the court concluded that a duly recorded abstract of

judgment did not provide constructive notice to a bona fide purchaser because it had not been indexed in the name of the real property seller. The court recognized that real property purchasers or mortgagees cannot be charged with constructive notice of documents they cannot locate, observing: "The California courts have consistently reasoned that the conclusive imputation of notice of recorded documents depends upon proper indexing because a subsequent purchaser should be charged only with notice of those documents which are locatable by a search of the proper indexes. Conversely, where the document is improperly indexed and hence not locatable by a proper search, mere recordation is insufficient to charge the subsequent purchaser with notice." (Id. at p. 452).

In *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, purchasers closed escrow on a property four days after a lis pendens had been submitted for recording, but a day before the lis pendens was indexed. Because the lis pendens could not have been located through a diligent search, Lewis held the purchasers had no constructive notice of the pending action at the time they closed escrow. "The reason an improperly indexed document does not give notice is that no one can find it. The complete absence of indexing, even though it may be temporary, means exactly the same thing—no one can find the document." (Id. at p. 1867.)

As the recording party, CRC is responsible to spell the name of the Grantor correctly. To rely on the fiction of constructive notice, and abrogate the requirement for actual notice, the party seeking recordation must ensure all of the statutory requirements are met. Accordingly, the recorder is deemed to be an agent of the recording party for this purpose. The county recorder is the agent of the person who requests recording, and that person is responsible for any errors in recording or indexing. *Cady v. Purser* (1901) 131 Cal. 552, 556 [63 P. 844]. The person who presents a document

to the recorder has a duty to assure that it is properly and promptly reproduced and indexed. *Rice v. Taylor* (1934) 220 Cal. 629, 634 [32 P.2d 381]; *Cady v. Purser* (1901) 131 Cal. 552, 556; *Orr v. Byers* (1988) 198 Cal. App. 3d 666, 672 [244 Cal.Rptr. 13]. Although the recorder may be liable to the recording party, as between the recording party and third parties, it is the recording party who bears the risk of whether the recorder timely and properly files and indexes the document and of whether it imparts constructive notice. *Dyer v. Martinez* (2007) 147 Cal. App. 4th 1240, 1247 [54 Cal.Rptr. 3d 907]. The risk is borne by CRC and Chase.

Recording and indexing are two separate functions. In *Ricketts v. McCormack* (2d Dist. 2009) 177 Cal. App. 4th 1324, 1331-33 [99 Cal.Rptr. 3d 817], the court held that the recorder's obligation is solely to record, and not to index, a deed of reconveyance or discharge within the prescribed period, since indexing is a separate function. The Court of Appeal decision in Gillies I addressed actual notice to the trustor, but not indexing and constructive notice.

If CRC was seeking to offer good title at a trustee's sale, it could have elected not to file a demurrer and a motion to strike. A dismissal on the pleadings does not and cannot quiet title to real property. It is, at best, an editorial rebuke of the draftsman of the complaint that bars the court from resolving the underlying dispute and leads to a result that is limited to the sufficiency of facts and issues raised in the complaint.

## VIII. DELIVERY OF A NOTICE OF DEFAULT TO TRUSTOR DOES NOT SATISFY THE LEGAL REQUIREMENT TO CONTACT TRUSTOR TO EXPLORE OPTIONS TO FORECLOSURE (CIV. CODE §2923.5)

The trial court's tentative ruling stated, "The third cause of action asserts that the declaration in the NOD regarding exploring options to avoid

foreclosure does not comply with Civil Code section 2923.5 because it is too general." (CT p 678). This is not an accurate description of the third cause of action, which alleges that CRC did not contact plaintiff to explore options to avoid foreclosure before the notice of default was filed. Paragraph 30 of the Complaint in Gillies II alleges new facts and a new theory under Cal. Civ. Code §2923.5 that were not raised in Gillies I:

> 30. Defendant did not contact plaintiff, either in person or by telephone, to discuss plaintiff's financial condition and the impending foreclosure. Defendant did not call, it did not write, and it did not provide a toll-free HUD number to plaintiff. Defendant did not offer to meet with plaintiff and did not advise him that he had a right to request a subsequent meeting within 14 days. (CT 6:27-7:3).

In the previous action, the form of the Notice of Default was challenged. Three months after defendants' demurrer was granted in the previous action, *Mabry v. Aurora Loan Services* (2010) 185 Cal.App.4th 208 rejected this argument and held that the NOD satisfies the requirements of Cal. Civil Code §2923.5 if it recites the form language of the statute, regardless of whether or not it includes a declaration under penalty of perjury.

The form language in the NOD is not the basis for the third cause of action in the Gillies II complaint. Plaintiff alleges that he was not contacted. Cal. Civ. Code §2923.5 requires contact with the borrower, not form language. If the party sending the Notice of Default does not attach a declaration under penalty of perjury, the NOD has no evidentiary value in proving attempts to contact the borrower.

Cal. Civ. Code §2923.5

> (a) (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30

days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).

(2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.

(b) A notice of default filed pursuant to Section 2924 shall include a declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent.

(c) – (j) omitted.

The Court of Appeal ruled in *Mabry* that the declaration specified in §2923.5 does not have to be signed under penalty of perjury, but attempts to contact the borrower must be made prior to filing a Notice of Default.

On remand, the *Mabry* trial court found that the Notice of Default did contain the statutory form language stating that the lender contacted the borrower, or tried with due diligence to contact the borrower. However, the declaration on the Notice of Default was not signed under penalty of perjury, and therefore it had no evidentiary value in proving whether or not the defendants satisfied the notice requirements of section 2923.5. After reviewing declarations submitted by the parties in an evidentiary hearing,

the court found that Aurora did not make the necessary contacts as required by §2923.5 and granted Mabry's application for a preliminary injunction to stay foreclosure proceedings until the defendant complied with the requirements of Civil Code §2923.5 to contact the borrower. (*Mabry v. Aurora Loan Services* (Super. Ct. Orange County, 2010, No. 30-2009-00309696).)

CRC cannot satisfy the requirements of §2923.5 to contact the borrower simply by stapling statutory form language to the Notice of Default. An unsigned or unsworn declaration has no evidentiary value. The verified complaint alleges that the contacts were not made (CT 6:27-7:3). CRC must prove that it made the contacts required by the statute. To determine compliance with the notice requirements, an evidentiary hearing is necessary.

The verified complaint which defendant moved to strike alleges specifically in paragraphs 29-36 that the contacts were not made. It alleges that defendant did not contact plaintiff, either in person or by telephone, to discuss plaintiff's financial condition and the impending foreclosure. Defendant did not call, did not write, and did not provide a toll-free HUD number to plaintiff. Defendant did not offer to meet with plaintiff and did not advise him that he had a right to request a subsequent meeting within 14 days. Furthermore, defendant did not satisfy the due diligence requirements spelled out in Civil Code §2923.5(g). (CT 06-09)

The third cause of action does not challenge the form of the NOD. The earlier ruling does not settle the issue of whether the necessary contacts were made thirty days before the NOD was filed.

The court of appeal in Gillies I wrote, "In reviewing a ruling on a demurrer we are not concerned with 'evidentiary value.' We are solely concerned with the allegations of the complaint. Here the complaint alleges

only that the notice of default is defective in form. It does not allege that the substantive requirements of section 2923.5, subdivision (a)(2), mandating contacting the borrower, were not in fact carried out." Plaintiff could have alleged the substantive requirements after Mabry clarified the law, but the court did not give plaintiff an opportunity to amend the complaint. There was one pitch, one swing—game over. Due Process?

## IX. A JUDGMENT OF DISMISSAL FOLLOWING A DEMURRER DOES NOT BAR A COMPLAINT ALLEGING NEW FACTS AND ISSUES

Defendant argues that an issue that was not raised in the pleadings or addressed by the court in Gillies I was silently and conclusively resolved by a single demurrer without leave to amend.

After a full trial on the merits, a judgment is res judicata not only as to issues actually raised, but also as to issues that could have been raised in support of the action. However, it has been the settled rule in this state that a judgment entered on demurrer does not have such broad res judicata effect. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830.

When a demurrer is sustained, the case is dismissed, and then new or additional facts are alleged that cure the defects in the original pleading, it is settled that the former judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his complaint. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 828; *Goddard v. Security Title Ins. & Guar. Co*. (1939) 14 Cal.2d 47, 52.

We are instructed by Keidatz that we must evaluate the second complaint to determine whether new or additional facts are alleged which cure the defects in the original pleading. If they are, the order of dismissal must be reversed. *Kanarek v. Bugliosi* (1980) 108 Cal. App. 3d 327, 335.

Where a general demurrer is sustained, and a new and different complaint is filed, the defense of res judicata has no application. *Rose v. Ames* (1945) 68 Cal.App.2d 444, 448; *Dyment v. Board of Medical Examiners*, 93 Cal.App. 65, 71; *Takekawa v. Hole*, 17 Cal.App. 653, 656 (prior judgment on the pleadings was not a bar to new action alleging entirely different facts).

If the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, because the merits of the cause disclosed in the second case were not heard and decided in the first. *See v. Joughin* (1941) 18 Cal.2d 603, 606.

While a judgment upon demurrer is conclusive in subsequent actions between the parties as to those matters which it actually adjudicates, it may or may not operate as a bar, depending upon whether the subsequent action was upon the same cause of action or claim, and whether the circumstances of the first case were such as to make the judgment one on the merits of the claim. If either of those conditions is lacking, the judgment is not a bar. If an essential fact missing in the first complaint is supplied in the second, the former judgment is not a bar. *Erganian v. Brightman* (1936) 13 Cal.App.2d 696, 699-700 (cited by J. Traynor in *Keidatz*).

The rule respecting such judgments is analogous to the rule that was applicable to nonsuits before section 581c was added to the Code of Civil Procedure in 1947. A judgment of nonsuit was not on the merits, and a plaintiff could start anew and recover judgment if he could prove sufficient facts in the second action. Section 581c now provides that a judgment of nonsuit operates as an adjudication upon the merits unless the court otherwise specifies.

Less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial until a nonsuit is granted, and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint, is not materially greater. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 830.

A judgment based on a general demurrer is not "on the merits" if the defects are technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action. *Goddard v. Security Title Ins. & Guar. Co*. (1939) 14 Cal.2d 47 , 52.

In *Goddard*, the court sustained a general demurrer and the judgment against the plaintiff was affirmed on appeal. In the new action, the record was examined, and it appeared from the minute order of the trial judge and the opinion of the appellate court that the fatal defect was in the form of the action – the complaint was framed on a theory of conversion rather than case. "The court's determination amounted to nothing more than that the plaintiff had failed to establish a right of recovery against the defendant by that particular complaint. The judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and under the rules set forth above, is not res judicata." Id. at 53.

In *Lunsford v. Kosanke* (1956) 140 C.A.2d 623, 628, a contract action, defendant demurred and objected to all evidence. The trial judge ruled that

the pleading was insufficient but also filed findings against plaintiffs on the merits. Later, plaintiff brought a second action with a good complaint. *Held*, the first judgment was not res judicata. It was not on the merits, for the judge had held the complaint so defective as to preclude the introduction of any evidence under it. Because the case was decided purely on the insufficiency of the pleadings, the findings on the merits were improper and void.

The First and Second Causes of Action in the Gillies II complaint allege new facts that were unknown to plaintiff when the first case was filed and argued–that the Deed of Trust and the Notice of Default were not indexed properly, and as a result, CRC's chain of title is not linked in the Official Records to plaintiff's realty.

There need not be a judgment on the merits of a complaint in order to apply direct estoppel in a later action; only the issue being argued in the later action has to be fully and finally litigated in the first action. *South Sutter, LLC v. LJ Sutter Partners, L.P.* (3d Dist. 2011) 193 Cal. App. 4th 634 [2011 WL 900583].

This is the defect here. The issues raised in the later action were not fully and finally litigated in the first action. There was only one brief hearing—no discovery, no evidence, no leave to amend.

## X. MOTION TO STRIKE COMPLAINT CANNOT BE GRANTED IF NEW FACTS AND NEW ISSUES ARE RAISED IN GOOD FAITH

Cal. Code Civ. Proc. §436 states that the court may, upon a motion made pursuant to §435, or at any time in its discretion, and upon terms it deems proper, (a) Strike out any irrelevant, false, or improper matter inserted in any pleading, or (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a

court rule, or an order of the court.

The motion to strike has traditionally been, and should continue to be, invoked to attack defects not apparent upon the face of the pleading. *Lincoln v. Didak* (1958) 162 Cal.App.2d 625, 630 [328 P.2d 498]. Pleading new facts and theories following a demurrer and dismissal does not introduce defects that are not apparent on the face of the pleading. The new facts and issues in Gillies II are not irrelevant, false, or improper. Striking the complaint was improper.

## XI. CONCLUSION

Plaintiff opposed CRC's motion to strike the Complaint on the grounds that new facts and new theories were raised in the Complaint:

(1) The Deed of Trust does not state the name of the trustor, and therefore there is no constructive notice in the County Records that CRC's Deed of Trust, Notice of Default, and Notice of Trustee's Sale are related to plaintiff's real property; and,

(2) CRC did not attempt to contact plaintiff as required by Cal. Civ. Code §2923.5 to explore alternatives to foreclosure before CRC filed a Notice of Default in 2009.

These facts and theories were not alleged in the previous complaint or addressed by the court. The doctrine of res judicata does not apply.

Plaintiff requests that the order dismissing his complaint be reversed.

Respectfully submitted

May 4, 2012

DOUGLAS GILLIES
Plaintiff and Appellant

## CERTIFICATE OF WORD COUNT

Appellant hereby certifies that this brief is produced using 13-point Roman type, including footnotes, and contains 6,910 words, relying on the word count of the computer program used to prepare this brief.

Dated: May 4, 2012

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Douglas Gillies, Appellant