Court of Appeal Case No. B237562
Santa Barbara Superior County No. 1381828

In The Court of Appeal, State of California

SECOND APPELLATE DISTRICT

DIVISION SIX

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

Appeal From the Superior Court of the State of California
For the County of Los Angeles

Honorable Denise de Bellefeuille, Judge Presiding

RESPONDENT'S BRIEF

THEODORE E. BACON (CA Bar No. 115395)
MICHAEL B. TANNATT(CA Bar No. 117133)
ALVARADOSMITH
A Professional Corporation
633 W. Fifth Street, Suite 1100
Los Angeles, CA 90071
Tel: (213) 229-2400
Fax: (213) 229-2499

Attorneys for Defendant and Respondent
California Reconveyance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

California Reconveyance Company ("CRC" or "Respondent") hereby respectfully submits the following Respondent's Brief in opposition to the Opening Brief of appellant Douglas Gillies ("Appellant").

I. INTRODUCTION

This appeal concerns the second lawsuit filed by Plaintiff Gillies regarding a loan that he received from Washington Mutual Bank ("WaMu") in August, 2003 in the principal amount of $500,000.00 ("Subject Loan"). The Subject Loan was secured by real property located at 3576 Torino Drive, Santa Barbara, California, 93105 ("Subject Property"). The Subject Loan is still delinquent and a new Notice of Trustee Sale ("NOTS") has been recorded.[1] The Complaint at issue here contains four causes of action: 1) declaratory relief, 2) fraudulent transfer, 3) violation of Civil Code § 2923.5 and 4) injunction. The gravamen of these causes of action is that CRC should be precluded from proceeding with the foreclosure because the Appellant's name on the Notice of Default and Election To Sell ("NOD") and NOTS is Dougl*es* Gillies, not Dougl*a*s Gillies and that Defendant did not comply with Civil Code § 2923.5. As set forth below, the Appellant again fails to state a cause of action entitling him any relief. For this reason, CRC requests that the Court of Appeal affirm the judgment entered in favor of CRC.

II. STATEMENT OF THE CASE

The Appellant appeals from an order by the trial court ("Trial Court") granting Respondent's Motion To Strike the Complaint.[2]

---

[1] The first Notice of Trustee's Sale was recorded on November 18, 2009. (AA: 0000175 – 0000176). Pursuant to Civil Code § 2924g, subdivision (c) (2), a new Notice of Trustee's Sale must be issued before a trustee's sale can occur if more than 365 days have elapsed since the initial Notice of Trutsee's Sale was issued.

[2] The Trial Court, unsure of whether a Motion To Strike was "technically proper", it ruled that "both parties have argued the substantial legal issues presented on the preclusive effect of the judgment in Gillies I. On that

III. STATEMENT OF FACTS

In August, 2003, the Appellant entered into the Subject Loan, secured by a deed of trust ("DOT") on the Subject Property securing the amount of the Subject Loan in the amount of approximately $500,000. 00. (Clerk's Transcript ("CT"), 000545: 21 - 23; 000366 – 385). CRC is listed as the trustee in the DOT. (Appellant's Appendix ("CT"), 000545 000366 – 385).

Beginning in 2009, the Appellant stopped making payments on the Subject Loan. (CT: 00030: 9 – 11 and 00036 to 00037).

On or about August 12, 2009, a NOD was mailed to Appellant. See (CT: 00418: 6- 9, 00446: 9 – 11; 00423 to 00424.) The NOD includes a declaration that the Appellant had been contacted as required by California Civil Code § 2923.5. (CT: 00423 to 00424). The NOD was recorded on August 13, 2009 in the official records of the County of Santa Barbara's Registrar's Office as instrument number 2009-0049697. (CT 00015- 00016; 00526 – 00527).

On or about November 16, 2009, a NOTS was posted on the Subject Property. (CT: 000418: 10 – 12; 00446: 12 – 14; 00425 – 00426). On November 19, 2009, the NOTS was recorded in the official records of the Santa Barbara County's Registrar's Office as instrument number 2009-0069334. (CT: 000529-00531).

On June 30, 2011, a second NOTS was recorded in the official records of the Santa Barbara County's Registrar's Office as instrument number 2011-0037798. (CT: 000018-000019).

---

basis, to the extent that these issues are more properly addressed by demurrer, the court deems the motion to strike as a demurrer." Court's Minute Order, attached as Exhibit "1" to Appellant's Motion to Augment Record on Appeal, page 4.

IV. PROCEDURAL HISTORY

A. Complaint in Gillies I

On November 25, 2009, the Appellant filed a verified Complaint in a case entitled Douglas Gillies v. JPMorgan Chase Bank, N. A. and CRC, Santa Barbara Superior Court Case Number 1340786 ("Gillies I Complaint"). (CT: 00445 – 00458). The Gillies I Complaint stated four causes of action arising out of a non-judicial foreclosure proceedings commenced after the Appellant defaulted on the Subject Loan. Among other things, the Appellant challenged Respondent's right or standing to foreclose because of purported flaws contained in the NOD and the NOTS. (CT: 00445 – 0458).

B. First Amended Complaint in Gillies I

On December 3, 2009, the Appellant filed a First Amended Complaint ("Gillies I FAC") (CT:00445 - 00459). As with the Gillies I Complaint, the Appellant claimed that CRC and JPMorgan should not be allowed to proceed with the foreclosure action because of alleged deficiencies concerning the NOD and the NOTS. JPMorgan and CRC filed a Demurrer to all of the causes of action stated in the Gillies I FAC. (CT: 00459 – 00533).

C. Final Judgment Entered In Favor of CRC and JPMorgan in Gillies I

On March 25, 2010, the Trial Court heard and sustained JPMorgan's and CRC's Demurer without leave to amend. (CT: 00556 - 00417.) Judgment of Dismissal was entered on April 19, 2010. (CT: 000564-000570).

D. Appellant's Appeal in Gillies I

On May 28, 2010, the Appellant filed a Notice of Appeal of the Court's judgment based on the sustaining of JPMorgan's and CRC's

Demurrer to the Gillies I FAC without leave to amend. (CT: 000571-000573).

On October 20, 2010, the Appellant filed his Opening Brief. (CT: 000587 – 000615).

On January 27, 2011, JPMorgan and CRC filed their Respondents' Brief. (CT: 000617 – 640).

On February 15, 2011, the Appellant served and filed his Reply Brief. (CT: 000643 – 000664).

On April 11, 2011, the Second Appellate District for the California Court of Appeal filed its Decision affirming the Trial Court' s Judgment in *Gillies I.* (CT: 000666 – 675).

E. Appellant Filed the Present Lawsuit

Appellant filed the Complaint in the present action on July 13, 2011 (Gillies II Complaint"). (CT: 00001 – 00019).

As in Gillies I, the Gillies II Complaint's allegations arise out of the non-judicial foreclosure proceedings occurring after the Appellant's default on the Subject Loan. (CT: 0001 0 - 00010). Again, the Appellant complains that CRC should be precluded from proceeding with the non-judicial foreclosure action because the NOD and the NOTS contain a misspelling of his first name (Dougles instead of Douglas) and that California Civil Code § 2923.5 has not been complied with. (CT: 00010 - 00010).

F. Issue Presented For Review

Whether The Trial Court properly granted Respondent's Motion To Strike the Complaint, or to the extent deemed necessary, its Demurrer.

V. STANDARD OF REVIEW

A. Standard for Motion To Strike

The court may upon a motion made pursuant to Civil Code § 435 strike out any part of a pleading not drawn or filed in conformity with the

laws of this state, a court rule or an order of the Court. California Code of Civil Procedure § 436. The grounds for a motion to strike shall appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. California Code of Civil Procedure § 437.

B. Standard for Demurrer[3]

A demurrer tests the legal sufficiency of the complaint. (*Blank v. Kirwan,* (1985) 39 Cal.3d 311, 318). Code of Civil Procedure § 430.10 lists the grounds for sustaining a demurrer. The ground for a general demurrer is stated in subdivision (e) as follows: "The pleading does not state facts sufficient to constitute a cause of action." The appellate court reviews a judgment entered based on an order sustaining a demurrer by "independently review[ing] the pleading to determine whether the facts alleged state a cause of action under any possible legal theory." (*Davaloo v. State Farm Ins. Co.,* (2005) 135 Cal.App.4th 409, 414). The appellate court accepts as true " ' "all material facts properly pleaded" ' " in the complaint, as well as facts from judicially noticeable sources. (*Evans v. City of Berkeley, supra,* 38 Cal.4th at p. 6). The appellate court gives no effect, however, to contentions, deductions or conclusions of fact or law. (*Ibid.*) The appellate court will affirm the demurrer if any proper ground for sustaining the demurrer exists, whether or not the trial court relied on it or the defendant asserted it in the trial court. (*Cantu v. Resolution Trust Corp.,* (1992) 4 Cal.App.4th 857, 880, fn. 10).

VI. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO STRIKE THE FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

Section 1060, of the Code of Civil Procedure, sets forth the

---

[3] Because the Trial Court has also to the extent necessary deemed CRC's motion as a demurrer, CRC also provides the review standard for a demurrer.

requirements for declaratory relief and states in relevant part:

> "Any person interested under a written instrument, excluding a will or a trust, or under a contract, or **who desires a declaration of his or her rights or duties with respect to another,** ..., may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a **declaration of his or her rights and duties in the premises**..."

(Emphasis added.)

A court may refuse to issue a judicial declaration in a case in which a judicial determination or declaration is not necessary or proper. *Code of Civil Procedure* § 1061.

In pleading a claim for declaratory relief, the plaintiff must specifically allege (1) whatever "rights or duties" the parties have with respect to the property and (2) the existence of an actual and present controversy. General statements about a controversy are unavailing. *Alturas v. Gloster*, 16 Cal.2d 46, 48 (1940). An actual controversy involving justiciable questions relating to the rights or obligations of a party must exist. *See Tiburon v. Northwestern Pacific Railroad Co.*, 4 Cal. App. 3d 160, 170 (1970). Thus, it is axiomatic that a cause of action for declaratory relief serves the purpose of adjudicating future rights and liabilities between parties who have some sort of relationship, either contractual or otherwise. *See Cardellini v. Casey*, 181 Cal.App.3d 389 (1986); *Bachis v. State Farm Mutual Auto. Ins. Co.*, 265 Cal.App.2d 722 (1968).

The Appellant alleges that even though he has received actual notice of the NOD and the NOTS (AA: 9 – 14), CRC should be precluded from proceeding with the non-judicial foreclosure because the NOD and NOTS contain a spelling of the Appellant's first name as Dougl*e*s Gillies, rather than Dougl*a*s Gillies, and, due to this difference in spelling, the following

indexing issue ("Indexing Issue") has occurred:

> No Deed of Trust recorded 08-27-2003 is listed in the Santa Barbara Grantor/Grantee Index under "Douglas Gillies" identifies CRC as a Trustee of the Property or Washington Mutual Bank, FA ("WaMu") as a Beneficiary. No Notice of Default and No Notice of Trustee's Sale are listed in the Santa Barbara Grantor/Grantee Index under "Douglas Gillies".

(CT: 00003, ll. 12 – 17).

A. The First Cause of Action Is Without Merit Because It Is Barred By the Doctrine of Res Judicata

The Demurrer that was sustained without leave to amend and was affirmed on appeal in *Gillies I* was on the merits. Therefore, the res judicata doctrine is applicable to *the Gillies II* Complaint. In *Ojavan Investors, Inc. v. California Coastal Com.*, 54 Cal.App.4th 373, 383 - 84 (Cal.App.2.Dist.1997), the Court of Appeal held that if a general demurrer has been filed, resulting in a final decision on the merits, the prior determination becomes conclusive in the second action. The Court of Appeal held in pertinent part:

> In analyzing these issues, we take note of *Ojavan Investor, Inc. v. California Coastal Com. supra,* 26 Cal.App.4th 516 (*Ojavan I*), which upheld dismissals of related actions brought by Ojavan Investors. Since *Ojavan I* is a final decision on the merits and concerned the same permits, deed restrictions and issue of whether the Commission's cease-and-desist order is enforceable against Ojavan Investors, the res judicata doctrine prohibits relitigation of matters already determined in Ojavan I. (1) **The fact the appeals in *Ojavan I* stemmed from general demurrers did not render the res judicata doctrine inapplicable.** [FN8] **Unlike a judgment following the sustaining of a special demurrer, a judgment following the sustaining of a general demurrer may be on the merits. (*Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52 [92 P.2d 804].)**
> FN8 A special demurrer attacks a pleading for uncertainty, while a general demurrer points out substantive pleading

defects such as failure to state a cause of action or affirmative defenses (e.g., statute of limitations or waiver).

(2) Contrary to Ojavan Investors' contention, whether the res judicata doctrine applies does not depend on whether the causes of action in the present action are identical to the causes of action in a prior action. **Although the causes of action in a first lawsuit may differ from those in a second lawsuit, " '... the prior determination of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit between the same parties with respect to that issue and also with respect to every matter which might have been urged to sustain or defeat its determination....' "**

(*Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1301 [243 Cal.Rptr. 390], quoting *Safeco Insurance Co. v. Tholen* (1981) 117 Cal.App.3d 685, 697 [173 Cal.Rptr. 23].)

Ojavan Investors, Inc. v. California Coastal Com. 54 Cal.App.4th 373, 383 -384 (Cal.App.2.Dist.1997) ("Ojavan"). (Emphasis in bold added.)

In the Court's Minute Order granting Respondent's Motion To Strike, the Trial Court stated that even though the first and second causes of action in the Gillies II Complaint were different than those set forth in the Gillies I FAC, the issues concerning the Indexing Issue raised in the current causes of action were the same issues asserted in the appeal in Gillies I. Appellant asserted the Indexing Issue in regard to the Appellant's contention that the Trial Court had incorrectly not provided him with leave to amend the Gillies I FAC. Thus, the Trial Court determined that the doctrine of collateral estoppel barred the Appellant from asserting the Indexing Issue again in *Gillies II*. Specifically, the Trial Court stated:

> The issue of the validity of the NOD as affected by the misspelling of "Douglas" and the resulting indexing raised here is identical to the issue litigated in Gillies I. There is no question that this issue was litigated in Gillies I--Gillies directly raised the issue of indexing in his briefs filed with the Court of Appeal in Gillies I. (Appellant's Opening Brief,

at pp. 9-12 [Request for Judicial Notice ("RJN"), exhibit 2]; Appellant's Reply Brief, at pp. 13-14 [RJN, exhibit 4].) As the Court of Appeal noted, Gillies's argument over the misspelling was raised on appeal outside of the facts set forth on the face of the complaint. (Gillies I, at p. 7.) Consequently, the Court of Appeal did not consider this argument in determining whether the demurrer in Gillies I was correctly sustained. (Ibid.) However, the Court of Appeal construed Gillies's argument on the indexing issue as an argument that Gillies could have amended his complaint, and therefore the trial court erred in sustaining the demurrer without leave to amend. (Ibid.) The Court of Appeal then rejected this argument because it failed to raise a material issue. (Ibid.) "If there is a reasonable possibility that a plaintiff can amend his complaint to cure the defects, leave to amend must be granted." (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1042.) Therefore, 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.

Because Gillies actually and fully litigated Gillies I whether the NOD and NOTS were invalid by reason of indexing problems, and because the Court of Appeal determined that these facts and arguments did not raise a reasonable possibility that plaintiff could state any valid cause of action, that determination operates as collateral estoppel that these same facts and arguments do not state a valid cause of action here. Consequently, plaintiff's first and second causes of action do not allege facts sufficient to state a cause of action and are filed to circumvent the determination of the Court of Appeal in Gillies I.

Exhibit "1" to the Appellant's Motion to Augment Record on Appeal, pages 5 – 6. (The citations in the Trial Court's Minute Order pertaining to the briefs filed in the Gillies I appeal appear in the Clerk's Record as follows: the references to the Opening Brief filed in Gillies I are at CT: 000601 – 000603; the references to the Reply Brief filed in Gillies I are at CT: 000647 – 000649; the references to the Court Of Appeal's Decision issued

in Gillies I are at CT: 000262.)

For the reasons set forth in the Trial Court's Minute Order, CRC respectfully requests that the Court of Appeal affirm the judgment entered in its favor as to the first cause of action.

B. The Trail Court's Ruling Should Also Be Affirmed Because The First Cause of Action Has Resulted In No Prejudice To The Appellant

Although the Appellant claims that the misspelling of his first name created an Indexing Issue, he does not state any facts supporting that he has been prejudiced by the Indexing Issue. As set forth in recent cases, an alleged error or irregularity in a notice of default or notice of trustee's sale is not actionable unless some prejudice has been shown. See *Debrunner v. Deutsche Bank Nat. Trust Co.*, 204 Cal. App. 4th 433, 443 (2012), reh'g denied (Apr. 6, 2012), review filed (Apr. 30, 2012), in which the Court of Appeal held in pertinent part.

> Plaintiff complains that the notice of default was defective because (1) it did not identify the beneficiary and (2) it listed Old Republic as the trustee even though there was no recorded substitution of this entity as trustee at that time.[4] With regard to the first protest, he acknowledges that an attached page, the Fair Debt Collection Practices Notice, did identify Deutsche Bank as the creditor, but he points out that Deutsche Bank's address and telephone number were not listed. That attached notice did, however, identify Saxon, the servicer, as Deutsche Bank's "attorney-in-fact," and the notice of default itself listed Saxon's address and telephone number. **Moreover, as the superior court pointed out, no conceivable prejudice is either shown or asserted.** As the First District, Division One, recently stated, "a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate [that] the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271, 129 Cal.Rptr.3d 467, citing *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1257, 26 Cal.Rptr.3d 413

> [presumption that nonjudicial foreclosure sale was conducted regularly and fairly may be rebutted only by substantial evidence of "prejudicial procedural irregularity"].)

Emphasis added. See also *Knapp v. Doherty*, 123 Cal. App. 4th 76, 99 (2004), which states in pertinent part:

> One of the signal purposes of the notice of default is to advise the trustor of the amount required to cure the default. (4 Miller & Starr, Cal. Real Estate, *supra,* § 10:183, p. 560.) There is no evidence that Borrowers here were misled in any way by the Default Notice. For instance, the fact that the date of default was stated incorrectly in the Default Notice did not cause Borrowers to act or fail to act in any way that resulted in their loss of the Property.
>
> Moreover, we reject Borrowers' contention that the irregularity in the Default Notice raised a triable issue of fact, because "[a] material defect in the notice, such as a gross misstatement of the amount in default, voids the sale." (Bernhardt, Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar 3d ed.2004) § 2.22, pp. 72–73.) It is clear that the error in the Default Notice—incorrectly stating the breach to have occurred with respect to the July 1, 2000 payment—was an *immaterial* one.
> Any suggestion by Borrowers that the Default Notice contained any material misstatements—such as an overstatement of the amount of default—is founded on nothing more than speculation. "Speculation, however, is not evidence" that can be utilized in opposing a motion for summary judgment. (*Aguilar, supra,* 25 Cal.4th 826, 864, 107 Cal.Rptr.2d 841, 24 P.3d 493; see also *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161, 1 Cal.Rptr.2d 636 [summary judgment opposition based on inferences "must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork"].) Borrowers' opposition to the summary judgment motions did not raise a triable issue of material fact concerning any claimed irregularities in the Default Notice.[16]

Likewise, the Court of Appeal in *Little v. Harbor Pacific Mortgage Investors,* (1985) 175 Cal.App.3d 717, 720 held that Civil Code § 2924c

had been sufficiently complied with if the borrower has received timely notice to cure the default and obtain reinstatement of the loan.

> A purpose of the required statement in the notice of default is to afford the *debtor* an opportunity to cure the default and obtain reinstatement of the obligation within three months after the notice of default as provided in section 2924c of the Civil Code. [Citation.]' [Citation.] The *debtor* is to be given enough information so the default can be cured. '[T]he statute is sufficiently complied with if the notice of default contains a correct statement of some breach or breaches sufficiently substantial in their nature to authorize the trustee or beneficiary to declare a default and proceed with a foreclosure.' [Citation.]" (*Id.* at p. 720) (Italics added.)

In this case, the Appellant alleges that the NOD was personally served on the Appellant and that the NOTS was posted on the Subject Property (CT: 00418: 6- 9, 00446: 9 – 11; 00423 to 00424). Likewise, the Appellant does not contend that actual notice of the second NOTS recorded on June 30, 2011 has not been received. In fact, the Appellant has appended it to his Gillies II Complaint. (CT: 00018). The Court of Appeal took notice of the actual receipt of the foreclosure notices in the prior appeal taken in Gillies I: ("Gillies last name is spelled correctly and the notice contains the street address of the property as well as the asessor's parcel number. *Moreover, Gillies does not contest that he received the notice."* (CT: 672 [italics added]).

Although the Appellant cites to several cases pertaining to the Indexing Issue in his Opening Brief,[4] none of these cases concern foreclosure notices. All of these cases concern title issues where no actual or constructive notice had been provided. To this extent, Appellant is

---

[4] These cases include *Cady v. Purser*, 131 Cal. 552 (1901), *Lewis v. Superior Court*, 30 Cal. App. 1850 (1994); *Hochstein v. Romero*, 219 Cal. App. 3d 447 (1990); *Rice v. Taylor*, 220 Cal. 629 (1930) and *Orr v. Beyers*, 198 Cal. App. 3d 666 (1988).

mixing apples and oranges. Foreclosure notices do not affect title, ownership or possession of real property. See *Ortiz v. Accredited Home Lenders, Inc.*, 639 F.Supp.2d 1159, 1168 (S. D. Cal. 2009) "Plaintiffs are still the owners of the Property. The recorded foreclosure Notices do not affect Appellants' title, ownership, or possession in the Property. U.S. Bank's motion to dismiss is therefore granted, and Plaintiffs' cause of action to quiet title is dismissed without prejudice." As set forth above, the purpose of foreclosure notices under Civil Code § 2924 – 2924k is simply to give notice to the borrower of what he must pay to reinstate the loan. In this case, the Appellant has received actual notice.

In addition, the cases cited by Appellant hold that actual notice was sufficient to satisfy the notice requirement. See *Cady v. Purser*, 131 Cal. 552 (1901), where the Court held in pertinent part:

> It appeared that before the sale by the sheriff the mortgagee gave him actual notice of the existence of the mortgage, and the decision went upon the ground that he was thereby put upon inquiry. **Having received actual notice of the mortgage, there was no place for the doctrine of constructive notice, and what the court said with reference to section 1170 was irrelevant.**

Emphasis added.

Because it is clear from the record that the Appellant actually received the foreclosures notices, no prejudice due to the Indexing Issue has been shown to have occurred. Thus, the judgment should be affirmed as to this first cause of action.

VII. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO STRIKE THE SECOND CAUSE OF ACTION FOR FRAUDULENT TRANSFER

The Appellant does not allege any additional facts in support of this second cause of action. Consequently, for the same reasons set forth above,

the Court of Appeal is asked to affirm the judgment entered in favor of CRC as to this cause of action. This cause of action is also without merit because no transfer of the Subject Property has allegedly occurred. The basis of this cause of action is that "[i]f not restrained by the Court, CRC *may* attempt to fraudulently sell defective title to the Property. . ." CT: 000005, ll. 26 – 28 (italics added). Because no trustee's sale has yet allegedly held, this cause of action is based on mere conjecture. Thus, for this additional reason, the judgment should be affirmed.

VIII. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO STRIKE THE THIRD CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE § 2923.5

In the Appellant's Brief, Respondent erroneously contends that the doctrine of res judicata should not apply to the third cause of action because in Gillies II, he is now alleging a different purported violation of Civil Code § 2923.5 than the violation that he asserted in Gillies I. What the Appellant ignores is that the doctrine of res judicata bars not only every issue that was raised, but every issue that "might" have been raised. See *Ojavan, supra.* See also the California Supreme Court Case *Johnson v City of Loma Linda*, 24 Cal 4th 61, 76-77 ("The general rule that a judgment is conclusive as to matters that could have been litigated 'does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated [Citations].' [Citation.]" See also *Allied Fire Protection*, 127 Cal.App.4th 150, 155 (2005) and *Burdette v. Carrier Corp.*, 158 Cal.App.4th 1668, 1674-1675 (2008), which holds in pertinent part:

> A trial on the merits includes a trial in which the plaintiff fails to provide evidence in support of the claim. Res judicata bars the relitigation not only of claims that were conclusively determined in the first action, but also matter that was within the scope of the action, related to the subject matter, and

> relevant to the issues so that it could have been raised. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, 99 P.2d 652; *Merry v. Coast Community College Dist.* (1979) 97 Cal.App.3d 214, 222, 158 Cal. Rptr. 603.) **"A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik, supra*, at p. 202, 99 P.2d 652.)**

Emphasis in bold added.

In ruling on Respondent's Motion To Strike, the Trial Court determined that because the Appellant had unsuccessfully asserted a cause of action for violation of Civil Code § 2923.5 in Gillies I, the Appellant was barred by the doctrine of merger and bar from raising another issue in regard to Civil Code § 2923.5 in Gillies II that could have been asserted in Gillies I, even though the Appellant now claims a different violation has occurred than was alleged in Gillies I. In pertinent part, the Trial Court stated:

> Gillies also asserts a third cause of action for violation of Civil Code section 2923.5. In Gillies I, Gillies asserted that the declaration of compliance with Civil Code section 2923.5 was ineffective; the Court of Appeal disagreed. (Gillies I, at p. 5.) The Court of Appeal did note, however, that in Gillies I, Gillies did not allege that the substantive requirements of section 2923.5 were not carried out. (Ibid.) In this action, Gillies makes the specific allegation that the substantive requirements of section 2923.5 were not actually carried out. (Complaint, ¶ 30.)
>
> Gillies argues that this added allegation makes a difference in applying the collateral estoppel effect of Gillies I to this case. It does not. In Gillies I, Gillies asserted a claim that defendant's Civil Code section 2923.5 declaration was invalid in not stating that an agent of the lender "has contacted the borrower or tried with due diligence to contact the borrower." (Gillies I Complaint, $11 12, 13 [RJN, exhibit 1, at p. 00003].) Whether the lender actually contacted the borrower or tried with due diligence to contact the borrower was within

> the scope of the complaint in Gillies I, was related to and relevant to the subject matter of the issues in Gillies I, and could have been raised directly in Gillies I. Thus, the merger-and-bar aspect of collateral estoppel required Gillies to assert that claim in Gillies I.
>
> The purpose of the merger-and-bar aspect of collateral estoppel is precisely met here. Gillies would have known that he was not contacted by CRC (or anyone acting for CRC) by the time of the filing of the NOD. But Gillies did not assert actual noncompliance in Gillies I, instead arguing that the language of the NOD was technically improper. The Court of Appeal disagreed that the NOD was improper. Now, Gillies wants to keep the litigation going by adding in facts necessarily available when Gillies I was litigated. Having failed to raise the issue directly in Gillies I when it was appropriate and expedient to do so, Gillies cannot raise this issue now. The merger-and-bar aspect of res judicata bars the third cause of action.

Exhibit "1" to Appellant's Motion to Augment Record on Appeal, pages 7 – 8. (The citations in the Trial Court's Minute Order pertaining to the purported violation of Civil Code § 2923.5 asserted in Gillies I can be found in the Clerk's Record as follows: the references to the Court Of Appeal's Decision issued in Gillies I are at CT: 000269-000270; the reference to the Gillies II Complaint, ¶ 30 is at 00006 -00007; and the references to the Gillies II FAC are at 00447 -00449.)

For the same reasons stated in the Trial Court's Minute Order, the Court is requested to confirm the judgment entered in favor of CRC.

In Appellant's Brief at pages 19 - 22, the Appellant incorrectly asserts that a judgment based on the sustaining of a general demurrer based on the merits may not be accorded the same preclusive effect as any other judgment. In support of this incorrect contention, Appellant cites *Goddard v. Sec. Title Ins. & Guarantee Co.*, 14 Cal. 2d 47, 52 (1939) ("Goddard"), which in facts holds (contrary what is asserted by the Appellant) that a demurrer based on the merits *may* be deemed a judgment

on the merits and conclusive in a subsequent lawsuit:

> 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; and the same is true where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action. (2 Freeman on Judgments, [5th ed.] sec. 746, p. 1571; *Erganian v. Brightman,* 13 Cal. App. (2d) 696 [57 Pac. (2d) 971]; von Moschzisker, Res Judicata, 38 Yale L. J. 299, 318, and cases cited.)

Goddard, supra, 14 Cal. 2d 47 at 52.

In this case, the merits of the Appellant's causes of action in Gillies I were fully considered both by the Trial Court and by the Court of Appeal. In this regard, the nine state cases cited by Appellant at pages 19 to 22 are not relevant because none of them address the effect of the doctrine of merger and bar as it applies to this case.

> Under the merger-and-bar aspect of res judicata, a matter is deemed to be conclusively decided by a prior judgment "if it is actually raised by proper pleadings and treated as an issue in the cause.... But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, italics in original.)

Aerojet-Gen. Corp. v. Am. Excess Ins. Co., 97 Cal. App. 4th 387, 402 (2002).

In this case, as is fully set forth in the Trial Court's *Minute Order*, Appellant had it within his ability to address the issue of whether sufficient

contacts had been made in Gillies I but by "negligence or design" did not do so. Thus, the judgment entered in favor of CRC in Gillies I and affirmed on appeal should constitute a bar to the Appellant's current claim brought under Civil Code § 2923.5.

IX. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO STRIKE THE FOURTH CAUSE OF ACTION FOR INJUNCTION

Appellant's Opening Brief does not address the Fourth Cause of Action for injunction. Accordingly, this fourth cause of action should be deemed to be abandoned. *See Herzberg v. County of Plumas*, 133 Cal. App. 4th 1, 20 (2005) ("Plaintiffs did not oppose the County's demurrer to this portion of their seventh cause of action and have submitted no argument on the issue in their briefs on appeal. Accordingly, we deem plaintiffs to have abandoned the issue.") Accordingly, Judgment entered in Respondent's favor should be affirmed as to this cause of action for the reasons set forth in Respondent's Motion To Strike and the Trial Court's Minute Order.

However, even if the injunction claim had been briefed by the Appellant, the trial court was still correct in dismissing it. An injunction can be issued only if a plaintiff demonstrates:

1) a likelihood of success on the merits;

2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied;

3) the threatened injury outweighs any damage the injunction might cause to defendant; and 4) the injunction will not disserve the public interest.

See *Production Co. v. Village of Gambell*, 480 US 531, 542 (1987); *Owner-Operator Independent Drivers Association, Inc. v. Swift Transportation Co, Inc.*, 367 F.3d 1108, 1111 (9th Cir. 2004).

Injunctive relief is a remedy and not, in itself, a cause of action, and a cause of action must exist before injunctive relief may be granted. See *Shell Oil Co. v. Richter,* 52 Cal.App.2d 164, 168, 125 P.2d 930 (1942) and *Camp v. Board of Supervisors,* 123 Cal.App.3d 334, 356 (1981); and 5 Witkin, California Procedure, Pleading, Section 825, pp. 241-242 (5th ed. 2008).

Consequently, when a complaint does not state sufficient facts to constitute a cause of action, the requested injunctive relief should be denied. *See Brown v. Rea,* 150 Cal. 171 (1907) and *Bishop v. Owens,* 5 Cal. App. 83, 89 (1907).

In the Trial Court's Order, the Trial Court correctly determined that the Appellant had failed to allege any facts entitling Appellant to injunctive relief. Although the Appellant has alleged several cause of action, the Trial Court correctly determined that these causes of action were without merit. For these reasons, the Court of Appeal is requested to affirm the Court's Minute Order as to this cause of action.

X. TO THE EXTENT NECESSARY, THE MOTION TO STRIKE SHOULD BE DEEMED A DEMURRER

The Appellant contends at pages 22 to 23 of the Opening Brief that the Trial Court should not have granted the Motion to Strike because "the new facts and issues in Gillies II are not irrelevant, false or improper." The Appellant's contentions ignore that the Trial Court ruled that to the extent necessary, CRC's Motion to Strike should also be deemed a demurrer:

> Whether or not a motion to strike is technically proper, both parties have argued the substantial legal issues presented of the preclusive effect of the judgment in Gillies I. On that basis, to the extent that these issues are more properly addressed by demurrer, the court deems the motion to strike as a demurrer. In either case, the court determines the motion based upon the facts pleaded in the complaint and upon those matters judicially noticeable. (Code Civ. Proc., § 437, subd.

(a) (motion to strike]; Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6 [demurrer].)

In this case, CRC has addressed the lack of merit of the Gillies II Complaint, and on that basis, the judgment should be affirmed.

XI. CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Court of Appeal affirm the Trial Court's Order in its entirety.

DATED: June 1, 2012

ALVARADOSMITH
A Professional Corporation

By: _____
THEODORE E. BACON
MICHAEL B. TANNATT
Attorneys for Respondent
CALIFORNIA RECONVEYANCE COMPANY