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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

NOV 08 2011

GARY M. BLAIR, Executive Officer
BY [Signature]
NARZHALLI BAKSH, Deputy Clerk

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA**

DOUGLAS GILLIES
Plaintiffs,
v.
CALIFORNIA RECONVEYANCE CO and
DOES 1 - 150
Defendants.

CASE NO.: 1381828
Case Assigned to Honorable Denies de Bellefeuille
~~PROPOSED~~ JUDGMENT OF DISMISSAL
Continued
Hearing Date: October 6, 2011
Department: 6
Time: 9:30 a. m.

Action filed on July 13, 2011
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.

DATED: 11/8/11

Denise de Bellefeuille
Honorable Denies de Bellefeuille
JUDGE OF THE SUPERIOR COURT

Nature of Proceedings: Motion: Strike

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For the reasons set forth herein, defendant California Reconveyance Co.'s motion to strike the complaint in its entirety is granted without leave to amend. This is the second action filed by plaintiff Douglas Gillies regarding the foreclosure of his residence.

Gillies is the owner of real property commonly known as 3756 Torino Drive, Santa Barbara, California (the "Property"). (Complaint, ¶ 5.) The grant deed to the property states plaintiff's name as "Douglas Gillies." (Complaint, exhibit 1.) (Note: The text of the complaint references exhibits by letter; the exhibits themselves are numbered. The exhibit numbers will be used herein.) The Property is subject to a deed of trust securing a loan to plaintiff.

On August 13, 2009, defendant California Reconveyance Company ("CRC") recorded a notice of default stating nonpayment on the loan and electing to sell under the deed of trust (the "NOD"). (Complaint, ¶ 7 & exhibit 2.) The NOD states that CRC is the appointed trustee under the deed of trust "executed by Douglas Gillies." (Complaint, exhibit 2, p. 2.) On June 30, 2011, CRC recorded a notice of trustee's sale stating that a foreclosure sale of the Property would take place on July 25, 2011 (the "NOTS"). (Complaint, ¶ 8 & exhibit 3.) The NOTS states that the deed of trust was executed by "Douglas Gillies." (Gillies decl., exhibit 3.)

The NOD, NOTS and Deed of Trust are indexed in the Grantor/Grantee Index of the Santa Barbara County real estate records under the name "Douglas Gillies" and not under the name "Douglas Gillies." (Complaint, ¶ 11.)

Plaintiff filed his verified complaint on July 13, 2011, setting forth four causes of action: declaratory relief, fraudulent transfer, violation of Civil Code section 2923.5, and injunction. The first cause of action, for declaratory relief, seeks a declaration that the NOD and NOTS are invalid based upon the assertion that the misspelling of "Douglas" makes the NOD and NOTS recordation invalid. The second cause of action, for fraudulent transfer, asserts that because the NOD and NOTS are invalid, a sale to a third party would be a fraudulent transfer. 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 and because defendants did not actually contact plaintiff. The fourth cause of action for injunction requests an injunction based upon the allegations of the first three causes of action, but does not set forth any independent basis for relief.

In Douglas Gillies v. California Reconveyance Co., Santa Barbara County Superior Court case number 1340786, plaintiff asserted similar, and in many cases identical, claims to those raised here. The court in case number 1340786 sustained defendants' demurrer without leave to amend and dismissed the action. Gillies appealed, and the Court of Appeal affirmed in full. CRC raises the issue, discussed below, of res judicata and collateral estoppel from this action. Thus it is appropriate and necessary to discuss both the arguments made in case number 1340786 and the disposition by the Court of Appeal. (See Rules of Court, rule 8.1115(b)(1).) For ease of reference, the facts, claims, arguments and disposition in the first lawsuit will be taken from the Court of Appeal decision, Douglas Gillies v. California Reconveyance Co. (Apr. 11, 2011, B224995) [nonpub. opn.] ("Gillies I") unless otherwise stated.

In Gillies I, plaintiff argued that the declaration made pursuant to section 2923.5, subdivision (b), was defective because it did not specify who contacted the borrower or who made the declaration. (Gillies I, at p. 4.) The Court of Appeal rejected this argument. (Gillies I, at pp. 4- 5.) Plaintiff also argued that the NOD misspells his name as "Dougles" rather than "Douglas." The Court of Appeal rejected this argument as well:

"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 argument fails to raise a material issue." (Gillies I, at p. 7.)

Defendant CRC brings this motion to strike the entirety of plaintiff's complaint on the grounds that the complaint and each cause of action therein are barred by the one-final-judgment rule and the doctrines of res judicata and collateral estoppel. CRC argues that the claims set forth in this action either were actually brought and disposed of

in Gillies I or could have been brought and litigated in that action.

In opposition, Gillies argues that this complaint raises two new issues. First, Gillies argues that the indexing problem created by the misspelling of "Douglas" invalidates the NOD and NOTS. Second, Gillies argues that contrary to the statement in the NOD, no one actually attempted to contact him to explore alternatives to foreclosure in violation of Civil Code section 2923.5.

In reply, CRC argues that the indexing issue was addressed in Gillies I and rejected by the Court of Appeal and that the Civil Code section 2923.5 could have been brought in Gillies I and cannot now be asserted.

On July 20, 2011, Gillies applied ex parte for a temporary restraining order to prevent the foreclosure sale of the property. The court granted the TRO and set a hearing on an order to show cause re preliminary injunction. On August 18, the court denied the application for preliminary injunction and dissolved the TRO. RULING:As an initial matter, there is an issue as to whether this motion to strike is the proper procedural vehicle to address the issues raised by CRC. "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: ... (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." (Code Civ. Proc., § 436.) CRC argues that plaintiff's claims are improper because they are barred by the doctrines of res judicata and collateral estoppel.

"The defense of res judicata is generally raised in an answer to the complaint or by motion for summary judgment. However, if all of the facts necessary to establish that an action is barred on res judicata grounds appear on the face of the complaint, the complaint is subject to demurrer." (Brosterhous v. State Bar (1995) 12 Cal.4th 315, 324.) Here, CRC asserts the defense of res judicata based upon judicially noticeable facts. As such, it appears that this defense should be grounds for a demurrer rather than a motion to strike. (See Warren v. Atchison, T. & S. F. Ry. Co. (1971) 19 Cal.App.3d 24, 41.) On the other hand, if the court finds that the present action was filed merely to circumvent the court's prior adverse ruling, a motion to strike may be an appropriate procedure. (Ricard v.

Grobstein, Goldman, Stevenson, Siegel, Levine & Mangel
(1992) 6 Cal.App.4th 157, 162.)

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 support of this motion, defendants have requested that the court take judicial notice of (1) the Clerk's Transcript in Gillies I, (2) the Appellant's Brief in Gillies I, (3) the Respondent's Brief in Gillies I, (4) the Reply Brief in Gillies I, (5) the decision of the Court of Appeal in Gillies I, and (6) this court's ruling of August 18, 2011, on the order to show cause re preliminary injunction. The court will take judicial notice of each of these documents as court records. (Evid. Code, § 452, subd. (d)(1).) Judicial notice is limited to the existence and contents of those documents (including what claims and arguments were made by the parties). (See Sosinsky v. Grant (1992) 6 Cal.App.4th 1548, 1569.)

This motion involves three related legal doctrines: res judicata, collateral estoppel, and merger-and-bar. "As generally understood, '[t]he doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy.' [Citation.] The doctrine 'has a double aspect.' [Citation.] 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. [Citation.]' [Citation.] 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment ... "operates"' in 'a second suit ... based on a different cause of action ... "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." [Citation.]' [Citation.] 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or

issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding. [Citations.]' [Citation.]" (People v. Barragan (2004) 32 Cal.4th 236, 252-253.)

"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.' [Citation.]" (Aerojet-General Corp. v. Am. Excess Ins. Co. (2002) 97 Cal.App.4th 387, 402.)

Plaintiff's first two causes of action, declaratory relief and fraudulent conveyance, are based upon the claim that the misspelling of "Douglas" invalidates the NOD and the NOTS because the misspelling prevents proper indexing of those documents in the real estate records. (Complaint, ¶¶ 15-18, 22-23.) Gillies argues that this indexing issue is a new argument and so Gillies I is not a bar to asserting that argument here.

Despite their similarity, plaintiff's causes of action set forth in this action are different than the causes of action plaintiff asserted in Gillies I. The difference in the causes of action makes collateral estoppel the aspect of res judicata that is applicable to the indexing issue. Gillies I resulted in a final judgment on the merits between the same parties. Thus, to the extent that an issue raised in the present action is identical to an issue litigated in Gillies I, collateral estoppel operates to conclusively determine that issue in this action.

The issue of the validity of the NOD as affected by the misspelling of "Douglas" and the resulting indexing problem 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.

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, ¶¶ 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.

Plaintiff's fourth cause of action is for an injunction. "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." (Shell Oil Co. v. Richter (1942) 52 Cal.App.2d 164, 168.) Gillies does not allege any cause of action separate from the first three causes of action upon which to base his action for an injunction. Consequently, the fourth cause of action is barred on the same grounds as the first three causes of action.

The court concludes that the all of the causes of action asserted by Gillies in this action were, or could have been, litigated in Gillies I, and were there conclusively determined adversely to Gillies. Accordingly, Gillies

cannot amend his complaint to state a cause of action.
Defendant CRC's motion to strike will be granted to strike
the entirety of the complaint without leave to amend.