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No. S_____
Court of Appeal Nos. B224995 & B237562
Santa Barbara Super. Ct. No. 1381828 (related to No. 1340786)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DOUGLAS GILLIES,

Plaintiff and Appellant,

v.

CALIFORNIA RECONVEYANCE CO.,

Defendant and Respondent

After a Decision By The Court of Appeal Second Appellate District, Division Six

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PETITION FOR REVIEW

DOUGLAS GILLIES (SBN 53602)
3756 Torino Drive
Santa Barbara, CA 93105
Telephone: (805) 682-7033
douglasgillies@gmail.com
in pro per

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ISSUES PRESENTED

1. Is a Notice of Default or a Notice of Trustee's Sale sufficient to commence a nonjudicial foreclosure under Civil Code §2924 if the trustor's name is misspelled and the Notices cannot be located in the Grantor-Grantee Index by searching under the trustor's name? Is it permissible for a trustee to intentionally misspell the trustor's name?

2. After a demurrer is sustained without leave to amend and the action is dismissed, can the plaintiff file a new action alleging new facts and a different theory for recovery, or does res judicata bar all claims that could have been raised in the original complaint?

INTRODUCTION

In the Second Appellate Division, Division Six, it appears to be the law according to the Court of Appeal's decision in this case:

1. It is immaterial that the trustee misspells the name of the trustor on a Deed of Trust, a Notice of Default, and a Notice of Trustee's Sale, so long the trustor receives a copy, and it is irrelevant that the trustee knowingly misspells the name in a recorded notice.

2. A demurrer sustained without leave to amend at the first and only hearing in a declaratory relief action extinguishes all claims that could have been raised by plaintiff, whether or not they were known to

plaintiff at the time the complaint was filed.

These conclusions, if allowed to stand, could undermine the reliability and insurability of title to real property and impose an unreasonable burden on plaintiffs to include every real and imagined fact, theory and issue that might possibly arise in the lengthy process of litigation every time they file a complaint.

STATEMENT OF THE CASE

Plaintiff/Appellant Douglas Gillies acquired title to his Santa Barbara single-family residence by grant deed in 1992. He borrowed money from Washington Mutual ("WaMu") in 2003 secured by a trust deed on the Property (Clerk's Transcript "CT" 64:1-3). He made timely payments for six years until he started receiving correspondence from Chase in 2009 that said, "WaMu is becoming Chase."

On August 12, 2009, California Reconveyance Company ("CRC") mailed a notice of default ("NOD") to plaintiff. The NOD named Washington Mutual Bank, FA, as Beneficiary but instructed whomever received the NOD to contact JPMorgan Chase Bank in Jacksonville, Florida, to stop the foreclosure. Chase's role was not described. Plaintiff searched the Grantor-Grantee Index at the Santa Barbara County Recorder's Office under "Douglas Gillies" and found that no documents had been recorded under his name since January

2006 (CT 436:1-4). No recorded document indicated that WaMu's interest in the Property had changed since the inception of the loan in 2003. A Notice of Trustee's Sale ("NOTS") was posted on the residence on November 16, 2009. Plaintiff could not locate the NOD or the NOTS in the Grantor-Grantee Index on the following day.

Plaintiff sued CRC and Chase alleging that no NOD had been recorded (*Gillies I*). Defendants' demurrer was sustained without leave to amend and the Court of Appeal affirmed. A Petition for Rehearing was denied. CRC then recorded another NOTS. Plaintiff sued CRC again alleging that that the trustor's name was intentionally misspelled on the NOTS filed with the County Recorder (*Gillies II*). The trial court concluded that the action was barred by the doctrine of res judicata and the Court of Appeal affirmed in a 4-page opinion. A Petition for Rehearing was not filed in *Gillies II*.

A. Gillies I

Plaintiff attached the NOD and NOTS to his Complaint filed on November 25, 2009, requesting a TRO, declaratory relief, and damages (CT 417-426).[1] He alleged in the First Cause of Action that defendants

[1] The Clerk's Transcript of all the trial and appellate proceedings in Gillies I was attached to CRC's Request for Judicial Notice, filed on Aug. 23, 2011 (CT 408-683), which is incorporated into the Clerk's Transcript filed on appeal in Gillies II.

did not comply with Civil Code §2924 because they did not record the Notice of Default (Complaint ¶6, CT 418).

With the Complaint he filed an ex parte application asking the court to restrain a Trustee's Sale of his residence of eighteen years on the grounds that the notice of default had not been recorded, it was not signed, and it did not include a declaration as required by Cal. Civ. Code §2323.5. Plaintiff's declaration stated that he found no evidence that the NOD had been recorded, and no documents related to the property had been recorded since January 31, 2006. The TRO was summarily denied by Judge Thomas Anderle, who inscribed a sizeable "X" across each page of the proposed Order to Show Cause (CT 442).

Plaintiff filed a First Amended Complaint adding one cause of action for Quiet Title on December 23, 2010 (CT 445-456). Defendants filed a demur on January 29, 2010 (CT 459) and attached a copy of a recorded NOD as Exhibit 3 to their Request for Judicial Notice (CT 474, 526-531).

In his Opposition to Demurrer filed on March 9, 2010, Plaintiff argued:

> On February 25, 2010, Plaintiff discovered that Exhibit 3 did not correctly state the name of the trustor. It stated the name Dougles Gillies, a fictitious person (so far as Google is concerned). A search of the Official Records for Douglas Gillies does not turn up a notice of default. The notice of default did not comply with § 2924, so a trustee's sale is not authorized under California law. A statutory violation has occurred. This is

a real controversy.

> Plaintiff requests leave to amend his Complaint to accurately state the newly discovered defect in both notices, but it remains true, as alleged in ¶9 of the First Amended Complaint, that defendants did not record a notice of default that complies with Civil Code § 2924. (CT 534, 537:7-17).

Judge Denise deBellefeuille sustained Respondents' demurrer without leave to amend based on a finding that the NOD had been recorded. She denied plaintiff's request to amend the Complaint to allege the new specific defects in the NOD and NOTS.

In her Order dated March 26, 2010, the trial court wrote:

> Plaintiff alleges that he is entitled to declaratory relief because the notice of default that he received on August 12, 2009 was not recorded, as required under Civil Code Section 2924 (a) (1). Plaintiff is mistaken … the notice of default was recorded on August 13, 2009 in the Official Records of the Santa Barbara Recorder's Office….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 556, 558:22-559:3).

Judgment of dismissal was entered on April 19, 2010. There was only one hearing, the demurrer was sustained without leave to amend, and the case was dismissed without reference to the misspelled name by the trial court.

The Court of Appeal affirmed. It found that Appellant had actual

notice of the Notice of Default. There was no reference in the decision to constructive notice and whether or not the NOD and NOTS could be properly indexed in the Grantor-Grantee Index if the grantor's name (i.e., the trustor's name) was misspelled. The court wrote, "Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number." (CT 672). There was no opportunity to introduce evidence that Santa Barbara's Grantor-Grantee Index cannot be searched by street address of parcel number.

Recording and indexing are two separate functions. *Ricketts v. McCormack* (2d Dist. 2009) 177 Cal.App.4th 1324, 1331-33. For more than a century it has been the law in California that a party does not have constructive notice of a recorded instrument until that document has been properly indexed so it can be located through a search of the public records. *Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1243; *Watkins v. Wilhoit* (1894) 104 Cal. 395, 399-400.

The Court of Appeal did not take into account that the Grantor-Grantee Index cannot be searched by street address or parcel number in Santa Barbara County, or that one cannot find a NOD or a NOTS in the Grantor-Grantee Index if they search by a misspelled grantor's name.

Appellant's Petition for Rehearing was denied on April 23, 1011.

B. Gillies II

CRC filed another NOTS with the trustor's name misspelled on June 30, 2011. Plaintiff sued CRC again, alleging that the new recorded Notice of Trustee's Sale intentionally misstated the trustor's name. The complaint in *Gillies II* stated (CT 05:9-22):

> 22. On or about March 9, 2010, Plaintiff informed CRC that the NOD it recorded August 13, 2009, did not correctly state the name of the trustor, that it incorrectly stated the name of the trustor to be Dougles Gillies, a fictitious person, that a search of the Santa Barbara Official Records for Douglas Gillies did not turn up any NOD recorded by CRC, and that the NOD did not comply with Cal. Civil Code §2924 because a notice of default must be recorded prior to a non-judicial sale *stating the name of the trustor*.
>
> 23. Knowing that the name on the NOD, Dougles Gillies, is fictitious, CRC recorded a NOTS on June 30, 2011 stating that name, delivered a copy to Plaintiff announcing its intention to conduct a Trustee's Sale on July 25, 2011, and published the NOTS in a newspaper of general circulation falsely representing that CRC is the duly appointed Trustee pursuant to Deed of Trust Recorded 08-27-2003 executed by DOUGLES GILLIES AN UNMARRIED MAN, as Trustor.

The trial court dismissed the Complaint with prejudice and entered judgment in favor of defendant CRC at a hearing on defendant's demurrer/motion to strike complaint (CT 751).

In affirming the dismissal, the Court of Appeal referred to its unpublished opinion in *Gillies I*. "In affirming, we considered additional issues raised in Gillies's brief, including that the notice of

default misspelled his first name." However, the appellate court's opinion in *Gillies I* did not consider issues of indexing or constructive notice. It only referred to a finding that appellant received actual notice of the NOD. Then the Court of Appeal passed over the indexing issue in *Gillies II* on the basis of res judicata. The opinion states on page 3:

> Gillies points out that the judgment in *Gillies I* arose from the sustaining of a demurrer. He argues that the doctrine (res judicata) does not apply where the prior judgment arose from a demurrer. But the doctrine applies where a general demurrer was sustained on the merits of the prior action. (*Ojavan Investors, Inc. v. California Coastal Com. (*1997) 54 Cal.App.4th 373, 383-384.) Here the demurrer in *Gillies I* was a general demurrer sustained on the merits.
>
> Gillies argues the instant action is not barred by *Gillies I* because the instant action alleges different issues. He claims the instant action alleges that the trust deed and notice of default were not indexed properly. But res judicata bars re-litigation of not only claims that were determined in the prior action, but claims that could have been raised in the prior action. (*Ojavan Investors, Inc. v. California Coastal Com., supra*, 54 Cal.App.4th at p. 384.) Here there is no reason why Gillies could not have raised the new issues in *Gillies I*.

However, the trial court did not grant leave to amend the Complaint in *Gillies I* after the indexing issue was raised in plaintiff's Opposition to Demurrer (CT 537:7-17). Plaintiff could not raise the misspelled name and indexing issues in his complaint because he could not locate the NOD in the County Records, and when he discovered

the defect after receiving the recorded NOD included in the exhibits to defendants' demurrer, he was denied leave to amend his complaint.

The Court of Appeal did not accurately characterize Appellant's argument concerning res judicata. Appellant did not suggest that the res judicata doctrine does not apply where a prior judgment arose from a demurrer. His Opening Brief in *Gillies II* referred to res judicata with greater specificity in "Issues Stated" (Appellant's Opening Brief, p. 2):

> 2. Whether a demurrer to a complaint, which alleged that a Notice of Default was not recorded, is a bar to a subsequent complaint 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.

On page 4, the Opening Brief of *Gillies II* stated:

> 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. 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 Opening Brief continues on pp. 8-9:

> 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. There was no discussion of the misspelled name at the demurrer hearing in Gillies I. It was not referenced in the trial 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 defendants knew the name on the DOT was incorrect, they didn't say.

> 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.

One of the leading trustee corporations in California now has the court's blessing to file Notices of Default and Notices of Trustee's Sale that misstate the name of the trustor, knowing that if the name is misspelled the record cannot be located in a search of the Official Grantor-Grantee Index.

This does not bode well for restoring confidence in title to real property in one of the hardest hit states in the foreclosure crisis. Intentionally recording false names of grantors and grantees is a time bomb with no expiration date.

The irony is that CRC has such an easy fix. The 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) in *Gillies II*. 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).

All CRC needed to do to resolve this litigation was ask the Note Holder to instruct Appellant to sign a corrected Deed of Trust. This contractual remedy was stated in Appellant's Reply Brief at pp. 10-11:

> A spelling discrepancy is a clerical error. CRC's remedy can be found in the contract, the Adjustable Rate Note (CT 0734-0739). The Trustee simply must instruct the Note Holder to request that the Trustor amend the Deed of Trust to correct a clerical error. Rather than follow the simple procedure in the contract to correct an error, CRC elected to intentionally present a false document to the County Recorder with the intention that it be recorded and indexed under a fictitious name.

The indexing issues raised in *Gillies II* are not precluded by the allegation in *Gillies I* that the NOD was not recorded. Different claims can arise from the same set of operative facts. *Agarwal v. Johnson* (1979)

25 Cal.3d 932, 954. Under one aspect of the doctrine of res judicata, "A valid final judgment on the merits in favor of a defendant serves as a complete bar to further litigation on the same cause of action." *Slather v. Blackwood* (1975) 15 Cal.3d 791, 795. Unless the requisite identity of causes of action is established, however, the first judgment will not operate as a bar. Under the "primary rights" theory adhered to in California it is true there is only a single cause of action for the invasion of one primary right. (*Ibid*.) But the significant factor is the harm suffered; that the same facts are involved in both suits is not conclusive. *Agarwal v. Johnson, supra* p. 954 (citing *Langley v. Schumacker* (1956) 46 Cal.2d 601, 602-603). The same wrongful conduct can violate different primary rights. *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 342.

REASONS FOR GRANTING REVIEW

I. THE DECISION CONFLICTS WITH CIVIL CODE § 2924

A. The Notice of Default and Notice of Trustee's Sale Did Not State the Name of Trustor

Gillies I. Plaintiff alleged in the *Gillies I* Complaint that the Notice of Default was not recorded. He did not realize that the Notice of Default did not show up in the Grantor-Grantee Index because the

name of the trustor/grantor was misspelled when he filed suit. When Chase filed a demurrer and attached a copy of a recorded Notice of Default, plaintiff discovered that he was unable to locate the record because his name was misspelled. In his Points and Authorities in Opposition to Demurrer leading up to the only hearing before the trial court, plaintiff requested leave to amend his complaint to state that the Notice of Default did not correctly state the name of the trustor (CT 537:7-17). The court sustained the demurrer without leave to amend on the grounds that the NOD was recorded. She did not make any reference to the misspelled name in the order dismissing the case. On appeal, plaintiff argued that the misspelled name raised issues of indexing and constructive notice, but the Court of Appeal ruled that misspelling was irrelevant because plaintiff had actual notice that a foreclosure was in process. The issue of constructive notice and indexing was not argued, briefed, or addressed.

Gillies II. When CRC recorded another defective NOTS and plaintiff filed the complaint in *Gillies II*, the trial court used legal gymnastics to explain how a new issue (indexing and constructive notice) based on facts that she had not mentioned in *Gillies I* and which were not addressed by the Court of Appeal (misspelled name on the Deed of Trust, Notice of Default, and Notice of Trustee's Sale) could have been adjudicated on the merits so as to preclude raising

the indexing issue in *Gillies II*.

The trial court's ruling stated, "Gillies directly raised the issue of indexing in his briefs filed with the Court of Appeal in *Gillies I*. 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…*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."

Yet the Court of Appeal did not rule on the indexing argument in *Gillies I*. The opinion addressed actual notice to plaintiff. It is puzzling how silence regarding indexing and constructive notice issues by the Court of Appeal could necessarily lead to the conclusion that there was no possibility that Appellant could state a valid cause of action by raising the indexing issue. The Court of Appeal wrote:

> "Gillies points out that the notice of default misspells his first name Dougles, 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. Gillies's argument fails to raise a material issue." (CT 672).

From this paragraph, the trial court drew the conclusion:

> "Because Gillies actually and fully litigated Gillies I

> (sic) 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." (Tentative Ruling, p. 6) [2]

By passing over the indexing issue, both courts missed the key point. A misspelled name cannot be located in the Grantor-Grantee Index. The Index cannot be searched by street address or assessor's parcel number. A reasonable person has to visit the Tax Assessor's Office in a separate building to search by street address or assessor's parcel number. These important issues could have been addressed if the either the trial court or the Court of Appeal had not elected to dismiss them on the basis of a demurrer to the original complaint without benefit of testimony, expert opinions, or argument.

B. A Misspelled Name on a Notice of Default and Notice of Trustee's Sale is a Substantial Error

1) The Notice of Default and Notice of Trustee's Sale did not state the name of the trustor, as required by Cal. Civ. Code §2924. This made

[2] The appellate record was augmented to include the trial court's tentative ruling in Gillies II.

it impossible to locate the notices in the Official Records of Santa Barbara County (RT 005:4-15).

The notice of default and the notice of trustee's sale must state the correct name of the trustor so that they can be properly indexed. An approximation of the name does not satisfy Cal. Civ. Code §2924.

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).

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 his Opposition to CRC's Motion to Strike Complaint in *Gillies II* (CT 684-740) plaintiff attached the results of his search of the Santa Barbara Grantor-Grantee Index.[3] The results for Douglas Gillies were marked Exhibit 4 and the results for Dougles Gillies were marked Exhibit 5 (CT 704-710). The Douglas 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 turned up 4 documents: a Deed of Trust (2003), a Notice of Default (2009), a Notice of Trustee's Sale (2009), and a Notice of Trustee's Sale (2011).

A document is in the chain of title when it can be located by a proper examination of the public records. When it cannot be found by a review of the public records in the proper manner, it is "outside the chain of title" and does not constitute constructive notice to subsequent parties. An instrument that cannot be located

[3] http://www.sbcvote.com/clerkrecorder/GrantorGranteeIndex.aspx

by examining the public records by this procedure is not in the "chain of title." If the name of the grantor is misspelled in the recorder's index, the recordation of the document does not impart constructive notice. Miller & Starr, California Real Estate (3d ed.) §11:34. *Orr v. Byers* (1988) 198 Cal.App.3d 666, 671-672.

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 short 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 asserts its claim are adrift in the County Records.

No person can be reasonably be expected to find a document in the Grantor-Grantee Index if 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 does not 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.' *Orr v. Byers* (1988) 198 Cal.App.3d 666, 670.

> …the trial judge found that requiring a title searcher to comb the records for other spellings of the same name would place an undue burden on the transfer of property. The court observed "if you put the added burden on those people 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." We agree. *Orr v. Byers*, *Id.* pp. 671-672.

CRC, a trustee that files thousands of foreclosure documents for JPMorgan Chase in California every year, now has the court's approval to make up names and file notices that cannot be found in the Official Grantor-Grantee Indexes.

Kane was the name of a character played by Orson Wells; Cain was the brother of Abel. A letter or two can make a difference, especially when real property transfers are recorded. "[A] bona fide purchaser for value who acquires his interest in real property without notice of another's asserted rights in the property takes the property free of such unknown rights. *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 451.

C. The Decision Below Conflicts with Other Court of Appeal Decisions Regarding Constructive Notice and Indexing

Miller & Starr, *California Real Estate* (3d ed.), §11:19, states, "The recorder must maintain an index. After reproduction, the recorder must describe the instrument in an index so that the document can be located. Cal. Gov. Code §§ 27232 to 27263. The recorder has a choice of two indexing systems, and an instrument that is not recorded and indexed in a book or record recognized by one of these two systems does not constitute notice of its contents (citing *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 452).

For constructive notice to be conclusively presumed, the instrument or document must be "recorded as prescribed by law." (Cal. Civ. Code § 1213). Constructive notice is a "fiction." If a recorded document is going to affect title there must at least be a way for interested parties to find it. *Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1866-1867. "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." *Hochstein v. Romero*, supra, 219 Cal.App.3d at p. 452. A document not indexed as required by statute does not impart constructive notice because it has

not been recorded "as prescribed by law." *Lewis v. Superior Court, supra*, 30 Cal.App.4th at p. 1866. For more than a century it has been the law in California that a party does not have constructive notice of a recorded instrument until that document has been properly indexed so it can be located through a search of the public records. *Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1243.

If the name is misspelled on a notice of default and a notice of trustee's sale, the records cannot be properly indexed. A search of "Douglas Gillies" does not return either the NOD or the NOTS. A search of "Smith" in the Santa Barbara Records for the past ten years turns up over 6,000 records. Add the name *Michael* and the number drops to 234. Spell it *Micheal* and no records are found. Correct spelling is necessary for a Grantor-Grantee index to function. The public cannot be expected to search 6,000 records just in case CRC misspelled Mr. Smith's first name.

In *Cady v. Purser* (1901) 131 Cal. 552, a mortgage on property had been recorded, but had been improperly indexed in the book covering "Bills of Sale and Agreements" rather than in the mortgage book. The court noted that the statutory scheme for recording contemplated that indexes were to be kept, the purpose of which was to allow subsequent purchasers to locate liens against the property by searching the proper indexes. Because the purpose of proper indexing

was to allow the document to be located, the failure to properly index a document rendered it unlocatable, and hence the document had to be treated as though never having been recorded. (131 Cal. at 555-558). "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." 131 Cal. at 558.

In *Rice v. Taylor* (1934) 220 Cal. 629 a purchaser searching the appropriate index could not have located the recorded document because it was improperly indexed; the court held that the purchaser was not charged with constructive notice even though the document had been recorded. A misspelled name cannot be properly indexed, and therefore must be treated as though it was never recorded. *Rice v. Taylor, Id* at 633-634.

"Although the statutory rules governing the mechanics of recording and indexing documents have changed since the decisions in *Cady* and *Rice*, our review of the current statutory scheme convinces us that proper indexing remains an essential precondition to constructive notice." *Hochstein v. Romero* (1990) 219 Cal.App.3d 447, 453.

First Bank v. East West Bank (2011, 2d Dist. Div. 3) 199 Cal. App.4th 1309, 1314-1315, summarized the requirements for

constructive notice.

> Constructive notice is a legal fiction. (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1867.) For constructive notice to be conclusively presumed, the instrument or document must be "recorded as prescribed by law." (Civ. Code, § 1213; fn. 2 *Hochstein v. Romero*, supra, 219 Cal.App.3d at p. 452; accord, *Lewis v. Superior Court*, supra, at p. 1866.) The phrase "recorded as prescribed by law" means the instrument must be indexed. (*Hochstein v. Romero*, supra, at p. 452; see *Cady v. Purser* (1901) 131 Cal. 552, 556-557.) fn. 3 " 'A document not indexed as required by statute (see Gov. Code, §§ 27230--27265), does not impart constructive notice because it has not been recorded "as prescribed by law." ' [Citation.]" (*Lewis v. Superior Court*, supra, at p. 1866, italics added.) For more than a century it has been the law in California that a party does not have constructive notice of a recorded instrument until that document has been properly indexed so it can be located through a search of the public records. (*Dyer v. Martinez* (2007) 147 Cal.App.4th 1240, 1243; *Watkins v. Wilhoit* (1894) 104 Cal. 395, 399-400.)
>
> Stated otherwise, constructive notice of an interest in real property is imparted by the recording and proper indexing of an instrument in the public records. (Civ. Code, § 1213; *Dyer v. Martinez*, supra, 147 Cal.App.4th at pp. 1243-1246; *Watkins v. Wilhoit*, supra, 104 Cal. at pp. 399-400; *Cady v. Purser*, supra, 131 Cal. at p. 557; *Hochstein v. Romero*, supra, 219 Cal.App.3d at p. 452; *First Fidelity Thrift & Loan Assn. v. Alliance Bank* (1998) 60 Cal.App.4th 1433.) The recording of a document does not impart constructive notice; "[t]he operative event [for purposes of constructive notice] is actually the indexing of the document[.]" (*Lewis v. Superior Court*, supra, 30 Cal.App.4th at p. 1866).

When compared to *First Bank v. East West Bank*, this case reveals a lack of uniformity in decision between Division 3 and Division 6 in the Second District with respect to constructive notice and indexing.

II. THE DECISION BELOW CONFLICTS WITH OTHER COURT OF APPEAL DECISIONS REGARDING RES JUDICATA AFTER SUSTAINING A DEMURRER

The decision below indicates a lack of uniformity with other Court of Appeal decisions as to whether new and different issues are barred by the doctrine of res judicata after a demurrer is sustained. This case is a vehicle for resolving this conflict.

There are three requirements for application of the res judicata doctrine: (1) the issues in the earlier and later actions must be identical; (2) the prior judgment must have been final and on the merits; and (3) the two actions must involve the same parties or their privies. *Levy v. Cohen* (1977) 19 Cal.3d 165, 171; *Consumer Advocacy Group v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 685-686.

"The doctrine applies basically to all types of final judgments that are rendered on the merits of litigation. It may apply to a final judgment, i.e., a dismissal, even though entered after sustaining a demurrer, if the demurrer was sustained on substantive grounds." *Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 216 (rejecting the argument that dismissal of Shuffer's petition was a final judgment on the merits).

"If the trial court has sustained the demurer, we determine whether the complaint states facts sufficient to state a cause of action.

If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. The plaintiff has the burden of proving that an amendment would cure the defect." *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081. "As a general rule, if there is a reasonable possibility the defect in the complaint could be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 459, in which a judgment sustaining a demurrer was reversed.

An amendment here would have cured the defect based upon the allegation that the NOD had not been recorded. This case raises an important issue. The significance of the legality of foreclosure proceedings in a nonjudicial state at this time cannot be overstated. RealtyTrac.com reports in October 2012 that there are a quarter million foreclosure homes in California. Cases point to the exhaustive procedures that must be followed to accomplish foreclosure in a nonjudicial state. If those procedures are not followed and banks file nonconforming documents with the assurance that courts will not

give homeowners an opportunity to amend their complaints after reading defendants' responsive pleadings, then defects in title will remain for future generations to sort out. Illegal foreclosures approved by trial courts based only on the pleadings and dismissed without leave to amend on demurrer are not equal to quiet title actions on the merits. They are ticking time bombs. New facts and theories will continue to surface as title issues are litigated over and over as a result of sloppy paperwork in nonjudicial foreclosures. The courts must meet this challenge head-on and adjudicate the rights of the parties according to applicable law and principles. Until then, property values will remain unstable as title companies refuse to insure title to bank-owned and foreclosure-sale property, and law firms litigate title issues over and over.

III. THE COURT OF APPEAL APPLIED THE RES JUDICATA STANDARD FOR NONSUITS IN RULING ON A DEMURRER

The Court of Appeal wrote in its 4-page opinion in *Gillies II*:

> Gillies argues the instant action is not barred by *Gillies I* because the instant action alleges different issues. He claims the instant action alleges…that the trust deed and notice of default were not indexed properly. But res judicata bars re-litigation of not only claims that were determined in the prior action, but claims that could have been raised in the prior action. (*Ojavan Investors, Inc. v. California Coastal Com.*, supra, 54 Cal.App.4th 373, 384.) Here there is no reason why Gillies could

not have raised the new issues in *Gillies I*.

There is one good reason why indexing was not raised in *Gillies I*. The trial court did not give the plaintiff leave to amend. The *Ojavan* case stated that res judicata doctrine "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. *Ojavan Investors, Inc. v. California Coastal Com*., (1997) 54 Cal.App.4th 373, 384.

The rule respecting judgments on demurrer 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.

Ojavanan Investors, Inc. v. California Coastal Com., supra, 54 Cal.App.4th 373, stated, "Unlike a judgment following the sustaining of a special demurrer, a judgment following the sustaining of a general demurrer *may* be on the merits." In *Ojavan I*, the trial court sustained the Coastal Commission's demurrers to the complaint on the grounds that Ojavan Investors' suits were barred by the applicable 60-day statute of limitations, and that the Commission's cease and desist order was a privileged publication that constituted a defense to the tort causes of action alleged. In *Ojavan II*, cross-complaints were filed and answered, summary judgment was entered, and the judge issued a permanent injunction at trial.

Ojavan Investors, Inc. v. California Coastal Com., cited by the Court of Appeal, does not provide clear direction to the circumstances in the present case due to significant differences. *Ojavan* was tried on the merits. *Gillies I* was dismissed at a hearing on demurrer without an opportunity to amend. *Gillies II* was later dismissed because indexing was not alleged in *Gillies I*. *Ojavan I* was dismissed on the merits because it was barred by a statute of limitations and an absolute privilege. It was then followed by *Ojavan II*, which proceeded all the way to summary judgment.

IV. A JUDGMENT ENTERED ON DEMURRER DOES NOT BAR A COMPLAINT ALLEGING NEW FACTS AND ISSUES

The Court of Appeal found that an issue that was not raised in the pleadings or addressed by either court in *Gillies I* was conclusively resolved by on demurrer without leave to amend.

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. *Goddard v. Security Title Ins. & Guar. Co*. (1939) 14 Cal.2d 47, 52.

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* (1928) 93 Cal.App. 65, 71; *Takekawa v. Hole* (1911) 17 Cal.App. 653, 656 (prior judgment on the pleadings was not a bar to new action alleging entirely different facts).

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.

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.

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.

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 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.

Judge deBellefeuille ruled that the Complaint in *Gillies I* was defective because the Notice of Default had been recorded. 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 *Gillies II* complaint allege new facts that were unknown to plaintiff when *Gillies I* 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 to plaintiff's grant deed in the Official Records. Issues raised in the latter 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.

If a court wrongly concludes that the plaintiff cannot amend his complaint to state a cause of action, and a new lawsuit reveals the error, then the court can revise its decision rather than dismiss the complaint. It is an abuse of discretion to sustain a demurrer without leave to amend if plaintiff shows there is reasonable possibility any

defect identified by defendant can be cured by amendment. *Shvarts v. Budget Group, Inc.* (2000) 81 Cal.App.4th 1153, 1157.

CONCLUSION

In a significant departure from settled case law, the Court of Appeal applied the res judicata standard for nonsuits to demurrers when it wrote, "But res judicata bars re-litigation of not only claims that were determined in the prior action, but claims that could have been raised in the prior action." How could claims be re-litigated if they were not raised in a prior action? A demurrer acts as a barrier to litigation. When the trial court dismisses a complaint challenging a nonjudicial foreclosure on demurrer without leave to amend prior to commencement of discovery, most indicators of contract breach and fraud that would turn up in discovery will remain hidden and can be overlooked. The outcome of every trial cannot depend upon what the parties knew or should have known before the complaint was filed.

On June 30, 2011, CRC filed a Notice of Trustee's Sale knowing that the name of the trustor was not stated correctly. The misspelled name of the trustor on the Deed of Trust, Notice of Default, and Notice of Trustee's Sale can be corrected if CRC can identify the Lender. If not, Appellant must be given the opportunity to amend his complaint in conformity with well settled principles of res judicata.

The petition for review should be granted.

Dated: October 13, 2012

Respectfully submitted,

_____

Douglas Gillies
Plaintiff and Appellant *in pro per*

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, rule 8.204)

The foregoing petition is double spaced and printed in proportionally spaced 13-point Palatino typeface. It is 35 pages long and contains 8,266 words (excluding tables, this certificate, and proof of service), relying on the word count generated by Microsoft Word.

Executed on October 13, 2012, at Santa Barbara, California

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Douglas Gillies