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CALIFORNIA RECONVEYANCE COMPANY
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA BARBARA

11 DOUGLAS GILLIES

12 Plaintiffs,

13 v.

14 CALIFORNIA RECONVEYANCE CO and
15 DOES 1 - 150
16 Defendants.

CASE NO.: 1381828

Case Assigned to Honorable Denies de Bellefeuille

NOTICE OF MOTION TO STRIKE COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

[FILED CONCURRENTLY WITH REQUEST FOR JUDICIAL NOTICE]

*****TELEPHONIC APPEARANCE*****

New Hearing Date: September 29, 2011
Department: 6
Time: 9:30 a. m.

Action filed on July 13, 2011

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22 PLEASE TAKE NOTICE that on September 29, 2011, at 9:30 a.m. or as soon thereafter as
23 counsel may be heard in Department "6" of the above entitled court located at 1100 Anacapa Street, ,
24 Santa Ana CA 92701, Defendant California Reconveyance Company ("CRC") will move the Court
25 for an order striking the entirety of Plaintiff's Complaint ("Compliant"), ¶¶ 1 to 41, including the
26 prayer at p. 10, ll. 1 to 17 , pursuant to California Code of Civil Procedure §§ 435 and 436,
27 subsection (b), which provide that Court may strike out all or any part of a pleading not drawn or
28 filed with the laws of this state, a court rule or an order of the court.

1 This motion to the entire complaint is made pursuant to Code of Civil Procedure sections 435
2 and 436 on the grounds that Judicata or collateral estoppel bars each of the causes of action stated in
3 Plaintiff's Complaint. Judgment on the merits was entered in favor of California Reconveyance
4 Company ("CRC"), defendant herein, in a prior action, and the judgment was affirmed on appeal. The
5 very issues that are raised here were presented both to the trial court and the Court of Appeal in the
6 prior action and were determined to be without merit. For these reasons, each of the four causes of
7 action set forth in Plaintiff's Complaint should be stricken.

8 If for any reason, the entire complaint is not stricken, Defendants move that

9 (1) The First Cause of Action for Declaratory Relief (§§ 13 to 20) be stricken pursuant to
10 Code of Civil Procedure section 435 and 546 on the grounds that Judicata or collateral estoppel bars
11 each of the causes of action stated in Plaintiff's Complaint.

12 (2) The Second Cause of Action for Fraudulent Transfer (§§ 21 to 25) be stricken pursuant
13 to Code of Civil Procedure section 435 and 546 on the grounds that Judicata or collateral estoppel
14 bars each of the causes of action stated in Plaintiff's Complaint.

15 (3) The Third Cause of Action for Violations of Civil Code § 2923.5 (§§ 26 to 36) be
16 stricken pursuant to Code of Civil Procedure section 435 and 546 on the grounds that Judicata or
17 collateral estoppel bars each of the causes of action stated in Plaintiff's Complaint.

18 (4) The Fourth Cause of Action for Injunction (§§ 37 to 41) be stricken pursuant to Code of
19 Civil Procedure section 435 and 546 on the grounds that Judicata or collateral estoppel bars each of
20 the causes of action stated in Plaintiff's Complaint.


21 This motion is made pursuant to Code of Civil Procedure sections 435 and 436 on the
22 grounds that Judicata or collateral estoppel bars each of the causes of action stated in Plaintiff's
23 Complaint. Judgment on the merits was entered in favor of California Reconveyance Company
24 ("CRC"), defendant herein, in a prior action, and the judgment was affirmed on appeal. The very
25 issues that are raised here were presented both to the trial court and the Court of Appeal in the prior
26 action and were determined to be without merit. For these reasons, each of the four causes of action
27 set forth in Plaintiff's Complaint should be stricken.

28 This motion will be made upon this Notice of Motion, the accompanying Memorandum of

1 Points and Authorities, the Request for Judicial Notice, the pleadings and records on file in this
2 action, and upon such other oral and/or documentary evidence as may properly be presented before
3 this Court at the time of the hearing.

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5 DATED: August 22, 2011

ALVARADO SMITH
A Professional Corporation

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7 By: 

8 THEODORE E. BACON
9 MICHAEL B. TANNATT
Attorneys for Defendants
10 CALIFORNIA RECONVEYANCE COMPANY
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant California Reconveyance Company ("CRC") respectfully submit this Motion To
3 Strike to the Complaint of Plaintiff Douglas Gillies ("Plaintiff").

4 **I. INTRODUCTION**

5 Plaintiff's Complaint has been filed in violation of the final judgment rule and the Complaint
6 should, therefore, be stricken.

7 CRC, along with defendant JPMorgan Chase Bank, N. A. ("JPMorgan") obtained a
8 judgment against Plaintiff on April 19, 2010 in the case entitled *Douglas Gillies v. California*
9 *Reconveyance Company, et al.*, Case No. 1340786, which was adjudicated in the Santa Barbara
10 Superior Court ("*Gillies I*"). *Gillies I* arose out of the non-judicial foreclosure proceedings against
11 3756 Torino Drive, Santa Barbara, CA 93105 ("Subject Property") following Plaintiff's default on a
12 \$500,000.00 loan that he obtained from Washington Mutual Bank on or about August 12, 2003
13 ("Subject Loan"). The Court entered judgment in favor of JPMorgan and CRC after sustaining their
14 Demurrer to Plaintiff's First Amended Complaint without leave to amend. Judgment of Dismissal
15 was entered in favor of JPMorgan and CRC on May 20, 2010.

16 Plaintiff appealed the April 19, 2010 Judgment of Dismissal. On April 11, 2011, the
17 California Court of Appeal filed an opinion affirming the granting of the Judgment of Dismissal.
18 Having now exhausted his remedies in *Gillies I*, Plaintiff filed the present action on July 13, 2011 in
19 the Santa Barbara Superior Court. However, the "new" wrongful foreclosure action should be
20 stricken because it arises out of the *same* non-judicial foreclosure proceedings against the *same*
21 property following Plaintiffs' default on the *same* loan. Each of the four causes of action set forth in
22 the Complaint are, therefore, barred by the final judgment rule because they have already been
23 adjudicated and found to be without merit. For that reason, CRC's motion should be granted.

24 **II. RELEVANT FACTS**

25 **A. Complaint in *Gillies I***

26 On November 25, 2009, Plaintiff filed a verified Complaint in *Gillies I*. (See Request for
27 Judicial Notice ("RJN") filed concurrently with the Opposition herein, Exhibit 1 [*Gillies I*]
28

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1 Complaint], pages 1 to 11¹. That lawsuit asserted four causes of action arising out of non-judicial
2 foreclosure proceedings commenced against the Subject Property after Plaintiffs defaulted on the
3 Subject Loan. (See RJN, Exhibit 1 [*Gillies I* Complaint] at ¶¶ 1 - 9, Exhibits A-B. Among other
4 things, Plaintiff challenged CRC' right or standing to foreclose because of flaws contained in the
5 Notice of Default and Election To Sell ("NOD") and the Notice Trustee's Sale ("NOTS"). (See RJN,
6 Exhibit 1 [*Gillies I* Complaint], pp. 2 to 6.

7 **B. First Amended Complaint in *Gillies I***

8 On December 3, 2009, Plaintiff filed a First Amended Complaint ("FAC"). (See RJN,
9 Exhibit "1", [*Gillies I* FAC], pp. 29 to 41. As with the previous Complaint, Plaintiff claimed that
10 CRC and JPMorgan had no right to bring the foreclosure action on the Subject Loan because of
11 problems concerning the NOD and the NOTS. Accordingly, JPMorgan and CRC filed a Demurrer
12 to all of the FAC's causes of action. (See RJN, Exhibit 1 [*Gillies I* Demurrer to FAC], pp. 43 to 118.

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

14 On March 25, 2010, the Court heard and sustained JPMorgan's and CRC's Demurrer without
15 leave to amend. (See RJN, Exhibit "1", Court's Minute Entry, p. 139.) Judgment of Dismissal was
16 entered on April 19, 2010 (RJN, Exhibit "1", Notice of Entry of Judgment, p. 148).

17 **D. Plaintiff's Appeal in *Gillies I***

18 On May 28, 2010, Plaintiff' filed a Notice of Appeal of the Court's judgment based on the
19 sustaining of JPMorgan's and CRC's Demurrer to the FAC without leave to amend. (See RJN,
20 Exhibit "1", Notice of Appeal, pp. 155 to 157.

21 On October 20, 2010, Plaintiff filed the Appellants' Opening Brief, attached as Exhibit "2" to
22 Declaration Michael B. Tannatt ("Tannatt Decl.").

23 On January 27, 2011, JPMorgan and CRC filed the Respondent's Brief, attached as Exhibit
24 "3" the RJN.

25 On February 15, 2011, Plaintiff served and filed the Reply Brief, attached as Exhibit "4" to
26 the RJN.

27
28 ¹ Included as Exhibit "1" is the Clerk's Transcript of Record On Appeal. The same numbering that
was used in the Clerk's Transcript is referenced herein.

1 On April 11, the Second Appellant District for the California Court of Appeal filed its
2 Decision affirming the Court's Judgment in *Gillies I*. See RJN, Exhibit "5".

3 **E. Plaintiff Re-Files Via the Present Unauthorized Lawsuit**

4 Having lost the appeal in *Gillies I*, Plaintiff has decided to re-file via the present action on
5 July 13, 2011. (See Complaint.)

6 Like *Gillies I*, this action arises out of the non-judicial foreclosure proceedings commenced
7 against the Subject Property after Plaintiff's default on the Subject Loan. (See Complaint, ¶¶ 5, 7 -
8 12, 14 to 20, 22 to 25, 27 to 36 and 41.) As in *Gillies I*, Plaintiff complains that CRC should be
9 precluded from proceeding with the foreclosure action concerning the Subject Loan because it has
10 failed to properly record the NOD and the NOTS. (See Complaint, ¶¶ 5, 7 - 12, 14 to 20, 22 to 25,
11 27 to 36 and 41.)

12
13 **III. CRC'S MOTION TO STRIKE SHOULD BE GRANTED BECAUSE PLAINTIFFS**
14 **COMPLAINT HAS BEEN FILED IN VIOLATION OF THE ONE JUDGMENT**
15 **RULE**

16 The Court may strike any pleading "not drawn or filed in conformity with the laws of the
17 state, a court rule or order of court." Code of Civil Procedure § 436. Having exhausted his
18 remedies in *Gillies I*, Plaintiff is bound by the rulings made therein. See *Ricard v. Grobstein,*
19 *Goldman, Stevenson, Siegel, LeVine & Mangel*, 6 Cal.App.4th 157, 162 (1992) ("Ricard"), which
20 holds:

21 California has consistently applied the primary rights theory, under which
22 the invasion of one primary right gives rise to a single cause of action.
23 "Even where there are multiple legal theories upon which recovery might
24 be predicated, one injury gives rise to only one claim for relief. . . ." Even
25 if a plaintiff may present different legal theories for relief, there exists
26 only one cause of action if the facts indicate that only one primary right of
27 the plaintiff has been violated.

28 *Id.* (emphasis added). Here, *Gillies I* and the present action assert various claims arising out of the
same non-judicial foreclosure proceedings arising out of the *same* loan and concerning the *same*
property. (see RJN, Exhibit 1 [*Gillies I* FAC] at ¶¶ 6 - 9, 11- 14, 17 - 22, 25, 24 - 26 and Exhibits

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A. Plaintiff's First And Second Causes of Action Should Be Stricken Because The Issues Raised In These Causes Of Action Were Litigated and Determined In Gillies I

Plaintiff's First and Third causes of action are merely a retread of *Gillies I*. Plaintiff alleges in the current Complaint that the NOD and the NOTS have been wrongfully regarded because of a misspelling of his name. Plaintiff asserts that the foreclosure is wrongful because his name in the NOD is referenced as "Douglas Gillies", not as he claims it should have been spelled: "Douglas Gillies". However, Plaintiff raised this issue in the prior action to the California Court of Appeal and this argument was held to be without merit. Here is what the Court of Appeal decided:

Gillies points out that the notice of default misspells his first name Douglas, 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. Gillie's argument fails to raise a material issue.

Unpublished Opinion of the California Court of Appeal, Second Appellate District, filed on April 11, 2011 ("Opinion"), page 7, attached as Exhibit "3" to the RJN.

Consequently, the very same issue that Plaintiff raised before the California Court of Appeal in *Gillies I* and that the California Court of Appeal held to be without merit cannot constitute a basis upon which to enjoin CRC from proceeding with the foreclosure action.

As the Court has stated in its ruling on the OSC/TRO Preliminary Injunction ("OSC Ruling") (a copy of which is attached to the RJN as Exhibit "6", the issue of the Plaintiff's misspelling of his name was directly raised in *Gillies I* and therefore is barred either by res adjudicate or by the doctrine of collateral estoppel:

Gillies argues that the indexing issue is a new argument, and so *Gillies I* is not a bar to asserting that argument here. Gillies is only partially correct. 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.) The Court of Appeal therefore did not consider this argument in determining whether the demurrer was correctly sustained. (*Ibid.*) However, the Court of Appeal construed Gillies's argument 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

1 because it failed to raise a material issue. (Ibid.)

2
3 The issue of indexing was raised directly by Gillies in his briefs filed with the Court of
4 Appeal in Gillies I. (Appellant's Opening Brief, at pp. 9-12 [Tannatt decl., exhibit 1];
5 Appellant's Reply Brief, at pp. 13-14 [Tannatt decl., exhibit 2].) The Court of Appeal
6 addressed the argument to determine whether leave to amend was proper following the
7 sustaining of the demurrer. "If there is a reasonable possibility that a plaintiff can amend his
8 complaint to cure the defects, leave to amend must be granted." (Kong v. City of Hawaiian
9 Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1042.) Therefore, in ruling
10 on plaintiff's argument, the Court of Appeal necessarily determined that there was no
11 reasonable possibility that Gillies could have amended his complaint by adding the
12 misspelling facts and argument and thereby state a valid cause of action against the
13 defendants.

14 A second action between the same parties on a different cause of action is not
15 precluded by a former judgment. ... But the first judgment operates as an estoppel or
16 conclusive adjudication as to such issues in the second action as were actually
17 litigated and determined in the first action." (McClain v. Rush (1989) 216 Cal.App.3d
18 18, 28-29, internal quotation marks and citation omitted.) Here, Gillies asserts
19 different causes of action than in Gillies I. Gillies did, nonetheless, actually and fully
20 litigate the effect of the misspelling under the legal theory asserted in this case,
21 namely, that the NOD and NOTS were invalid because the misspelling prevented the
22 proper indexing in the Grantor/Grantee index. (Appellant's Opening Brief, at p. 11
23 [Tannatt decl., exhibit 1].) The Court of Appeal's disposition that the misspelling
24 facts and argument did not raise a reasonable possibility that plaintiff could state a
25 valid cause of action operates as collateral estoppel of that issue here.

26 For the same reasons set forth in the Court OSC's Ruling, CRC's Motion to Strike should be
27 granted as to the First and Third Causes of Action.

28
**B. Plaintiff's Third Cause of Action Should Also Be Stricken Because The Issues
Raised In These Causes Of Action Were Litigated and Determined In Gillies I**

29 In *Gillies I*, the Second cause of action in the *Gillies I* FAC was based on non-compliance
30 with Civil Code § 2923.5. See RJN, Exhibit 1 [*Gillies I* FAC] at ¶¶ 12 -15. In ruling on this issue,
31 the Court of Appeal affirmed the trial court's ruling that Defendants had complied with § 2923.5:

32 The trial court properly sustained the demurrer to the second cause of action. Gillies
33 complained that the declaration made pursuant to section 2923.5, subdivision (b) was
34 defective. The subdivision requires a declaration that the mortgagee, beneficiary or
35 authorized has contacted the borrower to assess the borrower's financial situation and
36 explore options to avoid foreclosure. Gillies objected that the declaration given here
37 was in the disjunctive, and simply tracked the statutory language. Thus it does not
38 specify who contacted the borrower or who made the declaration.

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But the trial court took judicial notice of the notice of default. It shows the declaration was made by Stacey White, Assistant Secretary of CRC.

Moreover, *Mabry v. Superior Court* (2010) 185 Cal. App. 4th 208, concluded that the declaration need do no more than track the statutory language. The court stated: "In light of what we have just about the multiplicity of persons who would necessarily have to sign off on the precise category in section 2923.5, subdivision .that would apply in order to proceed with foreclosure (contact by phone, contact in person, unsuccessful attempt at contact by phone or in person, bankruptcy, borrower hiring a foreclosure consultant, surrender of keys), and the possibility that such persons might be employees of not less than three entities (mortgagee, beneficiary, or authorized agent), there is no way we can divine an intention on the part of the Legislature that each notice of foreclosure be custom drafted. To which we add this important point: By construing the notice requirement of section 2923.5, subdivision (b), to require only that the notice track the language of the statute itself, we avoid the problem of the imposition of costs beyond the minimum costs now required by our reading of the statute." (Id. at p. 235.) The declaration here is sufficient.

In the Court's OSC Ruling at page 3, the Court has acknowledged the Court of Appeal's rejection of the cause of action based on non-compliance with § 2923.5 constitutes a bar to the re-litigating of this same cause of action in the new action:

The Court of Appeal rejected the precise claim asserted by Gillies with respect to Civil Code section 2923.5. That argument is therefore barred by res judicata. (See *Keidatz v. Albany* (1952) 39 Cal.2d 826, 828 ["if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will also be a bar"].))

For these reasons, this second cause of action should be stricken.

C. Plaintiff's Fourth Cause of Action Should Also Be Stricken Because The Issues Raised In These Causes Of Action Were Litigated and Determined In Gillies I

Plaintiff's fourth cause of action for injunctive relief at ¶¶ 38 to 41 does not allege any additional facts in support of this cause of action. Consequently, for the same reasons stated above, this fourth cause of action should also be stricken.


IV. CONCLUSION

For the foregoing reasons, CRC respectfully request that the Court strike each of the causes of action in Plaintiff's Complaint and issue and Order in its favor dismissing this action with prejudice.

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DATED: August 22, 2011

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