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SUPERIOR COURT, STATE OF CALIFORNIA

COUNTY OF SANTA BARBARA

DOUGLAS GILLIES, Plaintiff, v. CALIFORNIA RECONVEYANCE CO., and DOES 1-50 Defendants.	Case No. 1381828 PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO STRIKE COMPLAINT Date: September 29, 2011 Time: 9:30 a.m. Dept. 6 Hon. Denise de Bellefeuille

Plaintiff opposes the motion of Defendant California Reconveyance Co. ("CRC") to strike the Complaint. New facts and new theories are raised in the Complaint, including:

(1) The Deed of Trust does not state the name of the property owner, and therefore there is no connection in the County Records between the recorded chain of title to Plaintiff's real property (Plaintiff's **Exhibit 4**) and Defendant CRC's Deed of Trust, Notice of Default, and Notice of Trustee's Sale (Plaintiff's Exhibit 5);

(2) Plaintiff alleges in the Complaint that no one attempted to contact him to explore alternatives to foreclosure, as required by Civ. Code §2923.5, before CRC filed a Notice of Default.

Neither of these facts or theories were raised in the previous action or addressed by the court. The doctrines of res judicata and collateral estoppel do not apply, and the final judgment rule has no bearing.

Introduction

Plaintiff filed a Complaint against defendant California Reconveyance Co. ("CRC") and JPMorgan Chase Bank ("Chase") in November 2009. He alleged that the Notice of Default ("NOD") was not recorded. Defendants filed a demurrer and attached a copy of a recorded Notice of Default. The court found that the claim of non-recordation was erroneous. Plaintiff said at the demurrer hearing that the name of the trustor was not stated correctly on the NOD and the NOTS, but there was no discussion about this issue at the hearing and it was not raised in the court's Order After Hearing (Defendant's Exhibit 1, pages 140-148). The demurrer was sustained without leave to amend, Plaintiff appealed, and the Court of Appeal affirmed. Plaintiff was not aware of the defects in the Deed of Trust while that case was being decided and so the issue was never mentioned.

The present complaint alleges new facts and different theories for recovery. Plaintiff's Grant Deed, recorded April 30, 1992, is attached hereto as **Exhibit 1**. The Deed of Trust, **Exhibit 6**, upon which defendant CRC claims its authority as Trustee, is recorded under the name of a Grantor/Trustor/Mortgagor that is a fictitious name, as is the Notice of Default, **Exhibit 2**, and the Notice of Trustee's Sale, **Exhibit 3**. CRC's Deed of Trust has no connection to Plaintiff's Grant Deed and the chain of title to Plaintiff's property in the Santa Barbara County Records, as demonstrated by the attached **Exhibit 4** and **Exhibit 5**. Any clerk in the County Recorder's Office can attest to the fact that a document will not turn up in a search of the Grantor/Grantee Index of the County Records if the name of the Grantor or Grantee is misspelled. Therefore, anyone who takes title as a result of CRC's trustee's sale will acquire little more than defective title and protracted

litigation. If there is a defect in title to real property, it cannot be resolved by a demurrer. A dismissal on the pleadings does not quiet title to real property. It only bars the parties and their successors from a lasting result.

On October 3, 2008, Congress created the Congressional Oversight Panel to "review the current state of financial markets and the regulatory system." The Panel was empowered to hold hearings, review official data, and write reports on actions taken by the Treasury Department and financial institutions and their effect on the economy. The Congressional Oversight Panel (COP) Report was published on November 16, 2010, "Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation". It stated:

> If documentation problems prove to be pervasive and, more importantly, throw into doubt the ownership of not only foreclosed properties but also pooled mortgages, the consequences could be severe. Clear and uncontested property rights are the foundation of the housing market. If these rights fall into question, that foundation could collapse. Borrowers may be unable to determine whether they are sending their monthly payments to the right people (COP Report, 11/16/10, pp. 4-5).

1. The failure to state the name of the Trustor on the Deed of Trust raises new issues in the First and Second Causes of Action

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

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

Neither the notice of default nor the notice of trustee's sale include a

statement identifying the deed of trust by stating the name of the trustor. This defect was not alleged in the Complaint in the previous case.

A Deed of Trust dated August 12, 2003, is attached hereto as **Exhibit 6.** It names *Dougles Gillies* as the Grantor/Trustor/Mortgagor on page 1. The signature page (page 14), the acknowledgment page (page 15), and the signature page for the Fixed/Adjustable Rate Rider all state the name of the Grantee as it appears in the Grant Deed (Exhibit 1) – *Douglas Gillies*. The pages that required the trustor's signature correctly state the trustor's name.

An Adjustable Rate Note dated August 12, 2003, is attached hereto as **Exhibit 7.** It is the mortgage contract and it defines the procedure 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."

In California, an obligation arises either from the contract of the parties or by operation of law. Cal. Civ. Code § 1428; Cal. Code Civ. Proc. § 26.

A mortgage is a contract. Cal. Civ. Code § 2920(a).

A power of sale is conferred on the mortgagee, trustee, or other person *by the mortgage*. Cal. Civ. Code § 2924.

The mortgage contract in this case, Exhibit 7, explicitly spells out the procedure to correct clerical mistakes. Trustor must receive notice from the Note Holder requesting that he reexecute the loan documents. Until then, clear title cannot be transferred to a bona fide purchaser in a trustee's sale.

If CRC is conducting this trustee's sale on the authority of the note holder, why does CRC persist in going ahead with a defective trustee's sale? If CRC is not acting as the agent for the note holder, why is it asking the court's approval to rob a homeowner of his Property? They can't possibly sell it. Until a court resolves the title issues on the merits, the CRC's chain of title in the County Recorder's Office (Exhibit 5) consists entirely of one Deed of Trust, one Notice of Default, and two Notices of Trustee's Sale. None of them are linked to Plaintiff's real property.

2. The former judgment is not res judicata barring the current action

Defendant argues that an issue that was never raised in the pleadings of the earlier case and was not addressed by the court has nevertheless been silently and conclusively resolved by a 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. *Keidatz v. Albany* (1952) 39 Cal. 2d. 826, 828.

If a demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will be a bar. *Robinson v. Howard*, 5 Cal. 428, 429; *Goddard v. Security Title Ins. & Guar. Co.* (1939) 14 Cal.2d 47, 52. On the other hand, if 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. *Goddard v. Security Title Ins. & Guar. Co.*, supra; *Newhall v. Hatch*, 134 Cal. 269, 272; *Heilig v. Parlin*, 134 Cal. 99, 101-102; *Morrell v. Morgan*, 65 Cal. 575, 576-577; *City of Los Angeles v. Mellus*, 59 Cal. 444, 453; *Rose v. Ames*, 68 Cal.App.2d 444, 448; *Dyment v. Board of Medical Examiners*, 93 Cal.App. 65, 71; *Takekawa v. Hole*, 17 Cal.App. 653, 656 (prior judgment on the pleadings was not bar to new action alleging entirely different facts); *See v.*

Joughin, 18 Cal.2d 603, 606; *Campenella v. Campenella*, 204 Cal. 515, 521; *Erganian v. Brightman*, 13 Cal.App.2d 696, 700.

Code of Civil Procedure § 581c was amended to state that a judgment of nonsuit operates as an adjudication upon the merits unless the court otherwise specifies. This is not the case when a demurrer is sustained, because 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. 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, 828.

A judgment on 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.*, supra, 14 Cal.2d 47, 52.

In *Goddard*, a federal district court sustained a general demurrer and the judgment against the plaintiff was affirmed on appeal. In the new action, the record was examined, and it appeared from the minute order of the trial judge and the opinion of the appellate court that the fatal defect was in the form of the action – the complaint was framed on a theory of conversion rather than case. "The court's determination amounted to nothing more than that the plaintiff had failed, in the two respects mentioned above, 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." 14 C.2d 53.

In *Lunsford v. Kosanke* (1956) 140 C.A.2d 623, 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. (140 CA2d 628).

Defendant CRC cites *Ricard v. Grobstein, Goldman, Stevenson, Seigel, LeVine & Mangel* (1992) 6 Cal.App.4th 157, where the court of appeal found that the factual allegations in the first action were identical to the second. "With almost frightening candor appellants acknowledge that the present suit was filed solely to circumvent the court's prior adverse ruling." 6 Cal.App.4th at 162. Here, new facts were discovered and new legal theories arose in published decisions.

The First and Second Causes of Action in the present Complaint allege new facts that were unknown to Plaintiff when the first case was argued–that the Deed of Trust was defective, CRC's chain of title has no beginning and no end, and that CRC is proceeding with a trustee's sale fully aware of the title defects.

3. Plaintiff's Third Cause of Action raises an issue under Civil Code §2923.5 that was not raised or considered in the previous action.

The Complaint also alleges new facts and a new theory under Civ. Code §2923.5. In the previous action, the form of the declaration in CRC's Notice of Default was challenged. Two months after defendants' demurrer was granted in the previous action, *Mabry v. Aurora Loan Services* (2010) 185 Cal.App.4th 208 rejected this argument and held that the NOD satisfies the requirements of Cal.

Civil Code §2923.5 if it recites the form language of the statute, regardless of whether or not it includes a declaration under penalty of perjury.

The form of CRC's declaration has no bearing on the third cause of action of the present complaint. Plaintiff alleges that he was not contacted, and §2923.5 requires contact with the borrower, not form language stapled to a form. If the party filing the Notice of Default does not attach a declaration under penalty of perjury, the NOD has no evidentiary value in proving compliance with the notice requirements.

Cal. Civ. Code § 2923.5

> (a) (1) A mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to Section 2924 until 30 days after contact is made as required by paragraph (2) or 30 days after satisfying the due diligence requirements as described in subdivision (g).
>
> (2) A mortgagee, beneficiary, or authorized agent shall contact the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, the mortgagee, beneficiary, or authorized agent shall advise the borrower that he or she has the right to request a subsequent meeting and, if requested, the mortgagee, beneficiary, or authorized agent shall schedule the meeting to occur within 14 days. The assessment of the borrower's financial situation and discussion of options may occur during the first contact, or at the subsequent meeting scheduled for that purpose. In either case, the borrower shall be provided the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency. Any meeting may occur telephonically.
>
> (b) A notice of default filed pursuant to Section 2924 shall include a declaration from the mortgagee, beneficiary, or authorized agent that it has contacted the borrower, tried with due diligence to contact the borrower as required by this section, or the borrower has surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent. (c) – (j) omitted.

The Court of Appeal ruled in *Mabry* that the declaration specified in §2923.5 does not have to be signed under penalty of perjury, but that attempts to

contact the borrower must be made prior to filing a Notice of Default.

On remand from the Court of Appeal, the *Mabry* trial court found on November 23, 2010, that the Notice of Default did contain the statutorily required form language stating that the lender contacted the borrower, tried with due diligence to contact the borrower, etc. However, the declaration on the Notice of Default was not signed under penalty of perjury, and so it had no evidentiary value in proving whether or not the defendants satisfied the notice requirements of § 2923.5. After considering the declarations of the parties in an evidentiary hearing, the court found that defendant did not make the necessary contacts as required by §2923.5 and granted Mabry's application for a preliminary injunction to stay foreclosure proceedings until the defendant complied with the contact requirements of Civil Code §2923.5.

Mabry has been followed by various federal district courts in California. In *Argueta v. Chase*, 2011 U.S. Dist. LEXIS 41300 (E.D. Cal. Apr. 11, 2011), the District Court refused to grant a motion to dismiss where borrower alleged in the Complaint that defendants did not contact him:

> A notice of default may be filed only thirty days after the initial contact with the borrower or satisfying the due diligence requirements. Civ. Code § 2923.5(a)(1). A notice of default must be accompanied by a declaration stating that the buyer has been contacted or could not be reached despite due diligence. Id. § 2923.5(b). The only remedy for violation of this statute is postponement of a foreclosure sale until there has been compliance with the statute. *Paik v. Wells Fargo Bank, N.A.*, No. C 10-04016, 2011 U.S. Dist. LEXIS 3979, 2011 WL 109482, at *3 (N.D. Cal. Jan. 13, 2011); *Mabry v. Super. Ct.*, 185 Cal. App. 4th 208, 223, 110 Cal. Rptr. 3d 201 (4th Dist. 2010) ("If section 2923.5 is not complied with, then there is no valid notice of default, and without a valid notice of default, a foreclosure sale cannot proceed. The available, existing remedy is . . . to postpone the sale until there has been compliance with section 2923.5.").
>
> Plaintiff alleges that all defendants failed "to assess the financial situation and explore options for plaintiff to avoid foreclosure, thirty days prior to filing the Default." (Compl. ¶ 96.) Plaintiff allegedly received "no phone calls, phone messages, or letters via first class or certified mail either

before or after the Notice of Default was recorded." (Id. ¶ 100.)

While the moving defendants provided the Notice of Default in which Quality Loan declares that it complied with the statute, the Complaint's allegations to the contrary are sufficient to defeat a motion to dismiss. See *Caravantes v. Cal. Reconveyance Co.*, No. 10-CV-1407, 2010 U.S. Dist. LEXIS 109842, 2010 WL 4055560, at *8 (S.D. Cal. Oct. 14, 2010).

Accordingly, the court will deny the motion to dismiss this claim.

Civ. Code § 2923.5 has been narrowly construed, but where the complaint alleges that the defendants failed to access the financial situation and explore options, didn't call, and didn't write, the complaint will defeat a motion to dismiss.

As an example of a 2923.5 declaration that follows the language and intent of the statute, California Continuing Education for the Bar (CEB) offers the following form for a Notice of Default in its practice guide, *CEB Mortgages, Deeds of Trust, and Foreclosure Litigation*, (4th ed. 2011):

DECLARATION UNDER CC §2923.5

I declare that:

I am _ _[the beneficiary/an authorized agent of the beneficiary]_ _ of the foregoing deed of trust. I initially attempted to contact the borrower (trustor under the deed of trust) by sending a first-class letter that included the toll-free telephone number made available by the United States Department of Housing and Urban Development (HUD) to find a HUD-certified housing counseling agency.

I contacted the borrower _ _[in person/by telephone]_ _ on _ _[date]_ _ to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. During the initial contact, I advised the borrower that he or she had the right to request a subsequent meeting and, if requested, that it would be scheduled within fourteen (14) days. The borrower _ _[did/did not]_ _ request the subsequent meeting. I also gave the borrower the toll-free telephone number made available by HUD to find a HUD-certified housing counseling agency.

I attempted to contact the borrower _ _[in person/by telephone]_ _ on the following dates _ _[list all dates of attempted contact and results of each attempt]_ _. This was done to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure. I exercised due diligence to further contact the borrower as follows: _ _[list all actions taken to contact borrower and results as required by *CC §2923.5(g)*]_ _.

No contact with the borrower was required because the borrower surrendered the property on _ _[date]_ _ to the _ _[trustee/beneficiary/authorized agent]_ _, the borrower contracted with an organization, person, or entity whose primary business is advising how to extend the foreclosure process, or the borrower filed a bankruptcy petition and the bankruptcy court has not entered an order closing or dismissing the bankruptcy case or granting stay relief.

[Signature of declarant]___
[Declarant's typed name]

Compare the CEB recommended form to CRC's declaration on the Notice of Default attached hereto as Exhibit 2:

The beneficiary or its designated agent declares that it has contacted the borrower, tried with due diligence to contact the borrower as required by California Civil Code 2923.5, or the borrower has surrendered the property to the beneficiary or authorized agent, or is otherwise exempt from the requirements of §2923.5.

Defendant cannot satisfy the requirements of § 2923.5 simply by stapling the statutory language to the Notice of Default. If the complaint alleges that the contacts were not made, defendant must prove that it made the contacts required by the statute, and an unsigned or unsworn declaration has no evidentiary value. Therefore, to show compliance with the notice requirements of the statute, an evidentiary hearing is necessary, as in the *Mabry* trial court after remand.

The Complaint which defendant seeks to strike alleges specifically in the paragraphs 31-32 that the contacts were not made. It alleges that Defendant did not contact Plaintiff, either in person or by telephone, to discuss Plaintiff's financial condition and the impending foreclosure. Defendant did not call, did not write, and did not provide a toll-free HUD number to Plaintiff. Defendant did not offer to meet with Plaintiff and did not advise him that he had a right to request a subsequent meeting within 14 days. Furthermore, Defendant did not satisfy the due diligence requirements spelled out in Civil Code § 2923.5(g).

The third cause of action is unrelated to the cause of action that challenged the form of the declaration in the previous lawsuit. The earlier ruling does not settle the issue of whether the necessary contacts were made

thirty days before the notice of default was filed.

Conclusion

Plaintiff respectfully requests that the Court overrule defendant CRC's Motion to Strike the Complaint.

September 14, 2011

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DOUGLAS GILLIES,
Plaintiff

Plaintiff's Exhibits

Exhibit	Description	Recorded
1	Grant Deed	4/30/1992
2	Notice of Default	8/13/2009
3	Notice of Trustee's Sale	6/30/2011
4	Santa Barbara Grantor/Grantee Index – Douglas Gillies	
5	Santa Barbara Grantor/Grantee Index – Dougles Gillies	
6	Deed of Trust	8/27/2003
7	Promissory Note dated August 12, 2003	