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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SUSAN SHELDON LEE,

Plaintiff and Appellant,

v.

US BANK NATIONAL ASSOCIATION,

Defendant and Appellant.

A144228

(Alameda County  
Super. Ct. No. RG14743859)

**I.**

**INTRODUCTION**

This appeal is appellant Susan Sheldon Lee’s fifth legal action relating to the deed of trust to property in Oakland, California. Appellant alleges that respondent US Bank National Association (US Bank) improperly attempted to foreclose on the deed of trust because US Bank did not have the power of sale or the ability to assert any rights over the property. The trial court found that the complaint was barred by res judicata based upon three prior actions asserting the same claims brought by appellant in federal court. We affirm the trial court’s dismissal with prejudice.<sup>1</sup>

**II.**

**FACTUAL AND PROCEDURAL BACKGROUND**

In 2007, appellant executed a promissory note with Thornburg Mortgage Home Loans, Inc. (Thornburg) in the amount of \$479,200 for a house in Oakland, California.

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<sup>1</sup> Appellant’s petition for a writ of mandate, which was considered with this appeal, is denied in a separate order (Case No. A144334).

The note listed appellant as the borrower, Thornburg as the lender, Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary, and LandAmerica Commonwealth Title (LandAmerica) as the trustee. The deed of trust provided that the note and deed of trust could be sold without prior notice to the borrower.

In 2011, appellant defaulted on the loan and Quality Loan Service Corporation (Quality), the substituted trustee, initiated a foreclosure action. In 2011, Quality had been substituted as the trustee in place of LandAmerica. In 2012, Thornburg transferred its interest in the note to US Bank as a successor to Bank of America on behalf of the Thornburg Mortgage Securities Trust.

Appellant filed her first complaint in the United States District Court for the Northern District of California (district court) seeking to quiet title and for injunctive and declaratory relief. In that action she sued Bank of America as the current trustee and Quality as the trustee listed on the note. The complaint alleged that the note was improperly transferred or assigned among the various defendants, and therefore it was unclear who properly owned the note. She contended that none of the named parties had the right to proceed with the foreclosure.<sup>2</sup> Appellant voluntarily dismissed the complaint.

Appellant filed a second action in the United States Bankruptcy Court for the Northern District of California. She again sued Bank of America as the representative trustee, Quality as the trustee on the note, and MERS as the beneficiary of the note. The complaint alleged 15 causes of action including declaratory relief and quiet title seeking a declaration that defendants had no interest in the property; negligence in maintaining loan documents and records; breach of the covenant of good faith and fair dealing and of fiduciary duty by attempting to exercise the power of sale in the deed of trust; fraudulent concealment in failing to disclose respondents' alleged lack of proof of ownership of the

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<sup>2</sup> Appellant, who was representing herself, alleged that her loan was securitized and improperly bundled into a trust. "In simplified terms, 'securitization' is the process where (1) many loans are bundled together and transferred to a passive entity, such as a trust, and (2) the trust holds the loans and issues investment securities that are repaid from the mortgage payments made on the loans. [Citation.]" (*Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1082, fn. 1 (*Glaski*)).

subject deed of trust and note; violations of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.); the Truth in Lending Act (15 U.S.C. § 1601 et seq.), and the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. § 1639 et seq.). Appellant again voluntarily dismissed the action.

Two weeks later, appellant filed a third action in Alameda County Superior Court. Appellant sought declaratory relief and alleged wrongful foreclosure, fraud, and promissory estoppel among other allegations. She alleged that her note had been “securitized,” and therefore the note was no longer valid. The named defendants were US Bank as the successor to Bank of America as the trustee, Quality as the trustee on the note, MERS as the beneficiary, and the current servicer of the note, Select Portfolio Servicing, Inc. (SPS). After the court sustained the named defendants’ demurrer to the first amended complaint with leave to amend, appellant filed a second amended complaint but then voluntarily dismissed the action.<sup>3</sup>

A few months after dismissing the superior court action, appellant filed another action in the district court. The complaint alleged nine causes of action including declaratory relief, a claim that the defendants did not have a legal interest in the property, fraud, negligence, violations of the California Business and Professions Code (Bus. & Prof. Code, § 17200 et seq.), violations of the Helping Families Save Their Homes Act of 2009 (15 U.S.C. § 1641(g)), and violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1962 et seq.). The named defendants were again Thornburg, MERS, SPS, Quality, Bank of America, and US Bank. The named defendants moved to dismiss the action as barred by res judicata because appellant had dismissed prior cases raising the same claims.

The district court found “sufficient identity of claims and identity or privity between the parties in the prior federal actions and this case” and applied the “two-

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<sup>3</sup> We grant respondent’s request to take judicial notice of the docket for appellant’s bankruptcy action (*Lee v. Bank of America, N.A.* (Bankr. No.D.Cal., 2012, No. 12-46666 WJL)) and the first action in the Alameda County Superior Court (*Lee v. US Bank National Assn.* (2012, No. RG12660179)). (See Evid. Code, § 452, subd. (d).)

dismissal rule” (Fed. Rules Civ.Proc., rule 41(a)(1)(B) 28 U.S.C.) as a bar to appellant’s present claims. Therefore, the court dismissed the case with prejudice.

Appellant has appealed the district court’s dismissal to the Ninth Circuit Court of Appeals, where it is currently pending decision.

A little over a week after the district court dismissed her case, appellant filed a fifth action, this case, in the Alameda County Superior Court. The complaint named US Bank in its capacity as trustee and sought to quiet title to the property. Appellant also recorded a lis pendens against the property. Appellant alleged that the named defendants have no legal or equitable interest in the property. After appellant filed a first amended complaint, respondent filed a demurrer and motion to expunge the lis pendens. The court issued a tentative decision dismissing the case as barred by the doctrine of res judicata.

The trial court held a hearing on both the demurrer and motion to expunge. The court stated from its review of the district court case that the causes of action in that case were identical to the causes of action in the present case. The court asked appellant to identify any allegation in the current case that was different from the federal case. Appellant argued in response that the district court applied the two-dismissal rule and never adjudicated the merits of her claims. The court stated it would consider appellant’s argument and look at the cases she cited, particularly *Hardy v. America’s Best Home Loans* (2014) 232 Cal.App.4th 795 (*Hardy*).

The court later issued an order sustaining the demurrer to the first amended complaint without leave to amend. The court found the action was barred by the doctrine of res judicata. “Here, Judgment in favor of [US Bank] has already been entered on the same claim, in the Northern District of California. [Citation.] Thus, the elements of res judicata are satisfied because both in this case and in federal court [appellant] challenges the validity of the deed of trust and the enforceability of the debt and seeks to restrain [US Bank’s] action against the same exact property . . . which now serves to bar this action.”

The court granted US Bank’s motion to expunge the lis pendens, and awarded it attorney fees in the amount of \$3,429.

### III. DISCUSSION

#### A. *Standard of Review*

On review of a demurrer, we examine the complaint to determine whether it alleges facts sufficient to state a cause of action under any legal theory. (*McCall v. PacifiCare of Cal.* (2001) 25 Cal.4th 412, 415.) “ ‘When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.’ [Citations.]” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

Dismissal on res judicata grounds presents a question of law, which we review de novo. (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 10.)

#### B. *Appellant’s Current Complaint Is Barred by Res Judicata*

The doctrine of res judicata prevents parties from relitigating matters resolved against them in a prior action. (*Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.) “Its purpose is ‘to preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation.’ [Citations.]” (*Ibid.*) Res judicata operates to bar a second suit between the same parties on the same cause of action that was adjudicated on the merits in an earlier suit, even if the later suit is prosecuted under a different legal theory. (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.)

Rule 41 of the Federal Rule of Civil Procedure (Rule 41) provides that if a plaintiff dismisses an action in federal court, the dismissal is without prejudice unless the plaintiff has previously dismissed any federal or state court action based on or including the same claim in which case the notice of dismissal operates as an adjudication on the merits. (Rule 41(a)(1)(B).) This is known as the “two-dismissal rule.” (*Commercial*

*Space Management Co. v. Boeing Co.* (9th Cir. 1999) 193 F.3d 1074, 1076 (*Commercial Space*) [a voluntary dismissal of a second action operates as a dismissal on the merits if the plaintiff has previously dismissed an action involving the same claims].)

The district court found the elements of res judicata: “[T]his action involves the same claims litigated in [appellant’s] two prior federal actions” and involved the same defendants. US Bank was sued in its capacity as the successor trustee and “thus is sufficiently identified in interest with Bank of America for purposes of res judicata.” All three actions challenged the validity of the deed of trust. The claims were premised on appellant’s allegations that the attempted transfer of her mortgage to the Thornburg trust was ineffective. “Therefore, despite the fact that the present case utilizes some additional legal theories, the claims brought in the federal cases arise out of the same transactional nucleus of operative facts and involve substantially the same evidence.” The district court then applied the two-dismissal rule and dismissed the case with prejudice.

The trial court here found that the prior federal court litigation barred appellant’s current quiet title action in state court. In so concluding, the trial court correctly held that the federal court’s dismissal of the action under the two-dismissal rule was an adjudication on the merits. (See *Commercial Space, supra*, 193 F.3d at p. 1076.) The district court’s res judicata holding was properly applied by the trial court. “ ‘A federal judgment “has the same effect in the courts of this state as it would have in a federal court.” . . . ’ [Citation.] The federal rule is that ‘ “a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.” ’ [Citations.]” (*Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1230, fn. omitted; *Levy v. Cohen* (1977) 19 Cal.3d 165, 172-173.) “California follows the rule that the preclusive effect of a prior judgment of a federal court is determined by federal law, at least where the prior judgment was on the basis of federal question jurisdiction. [Citations.]” (*Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1452 (*Butcher*).)

“ ‘It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts, given the basic requirements that state courts honor the

judgments of courts in other states and that federal courts must honor state court judgments.’ . . .” (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 681, quoting 18 Wright et al., *Federal Practice and Procedure* (1981) § 4468, pp. 648–649, fns. omitted.) This remains true even if the matter is pending review by the Ninth Circuit Court of Appeals. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1110 [dismissal of claim with prejudice by federal district court was final for res judicata purposes even though it was subject to a future review on appeal by the Ninth Circuit].)

This division addressed a similar issue in *Boccardo v. Safeway Stores, Inc.* (1982) 134 Cal.App.3d 1037 (*Boccardo*), where the trial court granted a demurrer without leave to amend on res judicata grounds. In federal court, the plaintiffs had alleged antitrust violations under the Clayton Act (15 U.S.C. § 15). The plaintiffs had claimed the defendants engaged in an unlawful conspiracy to fix meat prices. The district court dismissed the action with prejudice for failure to state a claim upon which relief could be granted. (*Boccardo*, at p. 1041.) Plaintiffs then sought to amend their federal complaint to allege violations of the state antitrust act (Bus. & Prof. Code, § 16700 et seq. (Cartwright Act)). (*Ibid.*) The district court denied that motion and the plaintiffs filed a state court complaint alleging violations of the Cartwright Act. (*Ibid.*)

We concluded the federal court dismissal under rule 12(b) of the Federal Rules of Civil Procedure was an adjudication on the merits. (*Boccardo, supra*, 134 Cal.App.3d at p. 1042.) The plaintiffs argued it was a procedural dismissal for lack of standing based on the fact they did not sell cattle directly to the food chains. We disagreed and found that a failure to show antitrust violations was not a standing issue, but a substantive determination of the merits. (*Id.* at pp. 1042-1043.) In determining that res judicata barred the superior court action, we applied the primary rights theory: “[T]he violation of a single primary right constitutes a single cause of action even though it may entitle the injured party to diverse forms of relief. [Citation.]” (*Id.* at p. 1043.) Because the federal action and the state action were based on the same cause of action, we also held that the plaintiffs’ pendant state law claims should be precluded from litigation in state court after the federal dismissal, given the substantial time and energy expended on the federal

litigation by two district courts and the interrelation of facts between the federal and state claims. (*Id.* at p. 1054.)

Appellant raises two arguments in response. First, she asserts the trial court's decision improperly relied on the district court dismissal which violated the federal Rules of Decision Act. (28 U.S.C. § 1652.) Alternatively, appellant contends the federal court's application of the two-dismissal rule violates the Rules of Decision Act because the district court should have applied California law, rather than federal procedural law, to the state law claims alleged in that action.

Appellant's argument is meritless. Title 28, United States Code section 1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (28 U.S.C. § 1652.) Appellant is invoking the *Erie* doctrine, which requires federal courts in diversity actions to apply state law to substantive issues, but allows federal courts to apply federal rules to matters of procedure. (*Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 78-79.)

In the district court action, appellant alleged four causes of action under federal law as well as claims for negligence, fraud, quasi-contract, and an accounting. The district court exercised federal question jurisdiction over the federal claims and supplemental jurisdiction over the state law claims.<sup>4</sup> The district court did not treat this as a diversity case, but even if it was, the district court could properly apply federal procedural rules. "The general rule . . . is that the federal courts are bound by state substantive law, but not by state procedure. [Citations.]" (*Cabrales v. County of Los Angeles* (C.D. Cal. 1986) 644 F.Supp. 1352, 1358; see, e.g., *Harvey's Wagon Wheel, Inc.*

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<sup>4</sup> In her in pro. per. complaint, appellant alleged both federal question and diversity jurisdiction. The district court stated it had federal question jurisdiction over the four federal claims, and supplemental jurisdiction over the state law claims. As explained above, even if the court had exercised diversity jurisdiction, it would not have impacted the district court's application of federal procedural law to dismiss appellant's complaint.

*v. Van Blitter* (9th Cir. 1992) 959 F.2d 153, 154 [in a diversity action, the district court properly applied Rule 41(b) rather than the state code of civil procedure regarding dismissal]; *Olympic Sports Prod. v. Universal Athletic Sales* (9th Cir. 1985) 760 F.2d 910 [in a diversity action, the Federal Rules of Civil Procedure, not California procedural rules, apply to a dismissal for lack of prosecution].)

Moreover “where a prior federal judgment was based on *federal question* jurisdiction, the preclusive effect of the prior judgment of a federal court is determined by federal law. [Citations.]” (*Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1553, original italics; *Butcher, supra*, 77 Cal.App.4th at p. 1452 [California law holds the preclusive effect of a prior judgment in federal court is properly determined by federal law].) The district court properly applied federal procedure, specifically Rule 41(a)(1)(B), in determining the preclusive effect of the prior federal court judgments.

Second, appellant argues the trial court’s decision is contrary to the Fifth District Court of Appeal’s decision in *Hardy*. (*Hardy, supra*, 232 Cal.App.4th 795). Appellant’s reliance on *Hardy* similarly is misplaced. In *Hardy*, the court held that involuntary dismissal of the borrower’s federal district court action against the lender as a sanction for failure to prosecute did not have collateral estoppel effect in the borrower’s subsequent state court action against the lender based on related state law claims. (*Hardy, supra*, 232 Cal.App.4th at p. 803.) *Hardy* argued that collateral estoppel does not apply under California law because the dismissal of the federal action was not a final judgment on the merits. The Fifth District held that the preclusive effect of the district court’s dismissal is determined under California law, and under this state’s law a dismissal for failure to prosecute is not a final judgment on the merits. (*Id.* at pp. 803, 806.) “Even if a dismissal under rule 41(b) supports barring a subsequent claim based on the doctrine of res judicata, a dismissal for failure to prosecute or to obey court orders does not have any collateral estoppel effect because a penalty dismissal does not adjudicate any issues in the case. . . .” (*Hardy*, at pp. 806-807, citing 18A Wright et al., *Federal Practice & Procedure: Jurisdiction* (2d ed. 2002) § 4440, p. 210.)

*Hardy* does not apply here. First, *Hardy* involved the application of collateral estoppel, which requires the claim be “actually litigated,” whereas res judicata requires only that there be a final judgment on the merits. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.)

More importantly, *Hardy* is inapposite procedurally. As noted, in *Hardy* the dismissal of the federal action was involuntary and imposed as a sanction for failure to prosecute under Rule 41(b). The court correctly noted that a dismissal for failure to prosecute is not a dismissal on the merits under California law. (*Ibid.*; see also *Franklin Capital Corp. v. Wilson* (2007) 148 Cal.App.4th 187, 215, fn. 33.)

But here, the dismissal was voluntarily filed by appellant under Rule 41(a), which allows a dismissal to be filed by a plaintiff without leave of court either by stipulation or before the defendant answers or files a motion for summary judgment. However, under Rule 41(a)(1)(B), the plaintiff is on notice that if a voluntary dismissal is entered twice in any federal or state action involving the same claims, the plaintiff does so knowing that the dismissal “operates as an adjudication on the merits.” Therefore, in this case, when appellant entered the second dismissal of her federal action against US Bank and others relating to their foreclosure activities, she voluntarily invoked procedural authority allowing her to dismiss her case that also expressly precluded her from pursuing any future action against the same parties for the same alleged wrong.

Under all of these circumstances and authorities, the court correctly found that the dismissal of the prior federal court action on the merits acted as res judicata to the current state court action.

#### **IV.**

#### **DISPOSITION**

The judgment is affirmed. Our prior stay of enforcement of the judgment is lifted (Order, Apr. 3, 2015, Ruvolo, P. J.) and the automatic stay under Code of Civil Procedure section 405.35 of the trial court order expunging the lis pendens is also lifted upon our summary denial of the related writ petition in Case No. 144334.

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RUVOLO, P. J.

We concur:

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RIVERA, J.

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STREETER, J.

A144228, *Lee v. US Bank National Assn.*