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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ADE O. FAGORALA,

Plaintiff and Appellant,

v.

NATIONSTAR MORTGAGE LLC,

Defendant and Respondent.

A144807

(Contra Costa County
Super. Ct. No. MSC14-00498)

Plaintiff Ade O. Fagorala, acting in propria persona (pro. per.), appeals from a judgment of dismissal entered after the trial court sustained the demurrer of defendant Nationstar Mortgage LLC (Nationstar) to his first amended complaint without leave to amend. The gravamen of Fagorala’s first amended complaint is that Nationstar wrongfully foreclosed on his mortgage and failed to modify his loan—claims that he raised or could have raised in three prior lawsuits. Because we agree with the trial court that Fagorala’s claims are barred as a matter of law on the basis of res judicata, we shall affirm.

FACTUAL AND PROCEDURAL HISTORY

In reviewing an order sustaining a demurrer, we take the factual background from the properly pleaded material allegations of the operative complaint as well as records that are properly the subject of judicial notice. (*Estate of Dito* (2011) 198 Cal.App.4th 791, 795.)

Fagorala borrowed \$705,000 from Nationstar in October 2006 to refinance the mortgage on property he owned in Pittsburg. He secured the promise to repay by

encumbering his property with a deed of trust. The deed of trust identified Nationstar as the lender and beneficiary and designated First American Title Insurance company (First American) as the trustee.

Fagorala defaulted less than one year later. First American recorded several notices of default. Nationstar substituted Quality Loan Service Corporation (Quality) as the new trustee in October 2009. After Quality recorded a notice of trustee's sale, Nationstar purchased Fagorala's Pittsburg property at a trustee's sale in August 2011.

Fagorala filed his first action challenging the foreclosure proceedings in Contra Costa County Superior Court in January 2010. At the time, he sued Nationstar and Quality for alleged violations of the Truth in Lending Act. After Nationstar and Quality removed the action to federal court, they moved to dismiss the complaint. Fagorala attempted to file a first amended complaint. One of the allegations in the proposed amended complaint was that Nationstar improperly increased his escrow payments by \$500 a month when it should have known that Fagorala was separately making the payments that were the subject of the escrow account. The federal district court dismissed Fagorala's lawsuit with prejudice and entered judgment for Nationstar and Quality in June 2010. Fagorala did not appeal.

Fagorala filed a second action against Nationstar and Quality in August 2011. The second suit, which was filed in San Mateo County Superior Court, included the following causes of action: (1) "Lack [of] standing to effect foreclosure, Violation of California Civil Code Section 1708 and to Set Aside Trustee's Sale"; (2) "Intentional Misrepresentation, Fraudulent Concealment, and Violation of Foreclosure Trustee's duties obligation" under Civil Code sections 1572, 1709, and 1710; (3) negligent and intentional misrepresentation; (4) unjust enrichment; (5) breach of contract and breach of the covenant of good faith and fair dealing; (6) violation of Business and Professions Code section 17200 et seq.; (7) violations of Civil Code section 2923.6; and (8) fraudulent concealment.

Among other things, Fagorala alleged in his second action that the defendants evaded his many attempts to secure a loan modification and failed to comply with the

“spirit and intent of loan modification requirements in Cal. Civil Code 2923.5 et seq.” He asserted that the foreclosure was wrongful and complained that the defendants “pil[ed] on illegal and excessive fees or forced policies . . . when the mortgage lenders already had enough insurance protection” The second lawsuit was transferred to Contra Costa County Superior Court, which dismissed the action in June 2012 after sustaining a demurrer to Fagorala’s first amended complaint without leave to amend. Fagorala did not appeal

Fagorala filed a third civil action against Nationstar and Quality in February 2012. He filed the action in Contra Costa County Superior Court. Fagorala asserted claims nearly identical to those in his second civil suit. He again sued Nationstar for wrongful foreclosure and for failure to comply with statutes governing loan modification procedures. He again alleged that defendants added excessive fees or required him to secure additional insurance even though they already had sufficient insurance coverage. The trial court sustained defendants’ demurrer without leave to amend in July 2012. Fagorala filed a premature appeal from the order sustaining the demurrer. This court dismissed the appeal as premature. Judgment was entered following remand to the trial court. Fagorala did not appeal from the judgment.

Fagorala filed the action giving rise to this appeal in March 2014 in Contra Costa County Superior Court. This lawsuit is the fourth civil action filed by Fagorala against Nationstar and Quality. In the operative first amended complaint, Fagorala alleges the following causes of action: (1) quiet title; (2) fraud; (3) breach of contract; (4) wrongful foreclosure; (5) promissory estoppel; (6) fraud; (7) negligence; (8) negligent misrepresentation; (9) violation of the Rosenthal Fair Debt Collection Practices Act; and (10) violation of Business and Professions Code section 17200 et seq. The primary theories of relief alleged in the first amended complaint are that Nationstar failed to modify Fagorala’s loan and that Nationstar breached its agreement not to foreclose while Fagorala’s loan modification application was pending.

In paragraph 34 of the first amended complaint, Fagorala alleges that he declined Nationstar’s loan modification offer in July 2011 because “the proposal included

payment for Home Owner Association Dues and Flood insurance” even though “the subject property . . . does not have any Homeowner’s association” and “no flood insurance was necessary.” This particular allegation does not appear anywhere else in the first amended complaint and is not cited as the basis for any of the 10 causes of action asserted by Fagorala.

Nationstar demurred to the first amended complaint on various grounds, including that Fagorala’s causes of action are barred under the doctrine of res judicata. Quality appeared as a nominal defendant by filing an uncontested declaration of non-monetary status pursuant to Civil Code section 2924*l*, subdivision (d).

Fagorala opposed the demurrer, arguing that the earlier civil actions “were dismissed for technical reasons and none of them was prosecuted to finality.” He primarily argued that an unlawful detainer judgment secured by Nationstar against him did not have res judicata effect and did not apply to nominal defendant Quality. He did not address the res judicata effect of the three prior civil actions he had filed against Nationstar. Fagorala also argued that the “core of the case” is that Nationstar added unnecessary flood insurance and homeowner’s association fees as part of the proposed loan modification. In a separate declaration submitted to the trial court, Fagorala stated that Nationstar was charging him “129.80 Flood insurance, and \$188.78 [*sic*] for Home Owners Association fee.” He further declared that “[t]his part of Pittsburg is not a Flood zone” and “there is no Homeowners Association fee as well.” Attached to the declaration was a 2011 document prepared by Nationstar relating to a proposed loan modification that listed \$129.08 as “the monthly cost of your hazard *and* flood insurance coverage.” (Italics added.) It also listed \$188.77 as “your monthly homeowner’s or condominium association fee payments, if any”

The trial court sustained the demurrer without leave to amend. The court took judicial notice of the three prior civil actions filed by Fagorala as well as two bankruptcy petitions he had filed. The court reasoned that Fagorala’s causes of action were barred by the operation of res judicata principles. The court noted that Fagorala appeared to address the application of res judicata to an unlawful detainer action but that Nationstar’s

demurrer was based on the application of res judicata to the three prior civil actions filed by Fagorala. The court's order applied to both Nationstar and nominal defendant Quality.

Fagorala filed a premature notice of appeal from the order sustaining the demurrer without leave to amend. A judgment of dismissal was subsequently entered. We will treat the premature notice of appeal as having been filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

DISCUSSION

1. *Procedural Defects*

At the outset, we observe that Fagorala's status as a pro. per. litigant does not exempt him from the rules of appellate procedure or relieve his burden on appeal. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247.) We treat pro. per. litigants like any other party, affording them "the same, but no greater consideration than other litigants and attorneys." (*Ibid.*) The judgment is presumed correct on appeal and it is the burden of the party attacking it, whether represented by counsel or proceeding in pro. per., to "affirmatively demonstrate prejudicial error." (*People v. Garza* (2005) 35 Cal.4th 866, 881.) As an appellate court, we are not required to consider alleged error when the appellant merely complains of error without offering pertinent or intelligible argument to support the appellant's position. (See *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119–1120; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 [court disregards argument for which no authority is furnished].)

Nationstar argues that Fagorala's appeal is procedurally defective because he has failed to demonstrate error in the trial court's ruling. More specifically, Nationstar claims that Fagorala's brief on appeal neglects to mention the 10 causes of action he alleged in the first amended complaint and does not even attempt to explain why they are supported by properly pleaded facts. It urges that we affirm the judgment on the ground that Fagorala has waived any error by failing to discuss the viability of his claims.

Nationstar's criticism of Fagorala's briefing on appeal is well taken. The cursory legal discussion in Fagorala's opening brief does not address whether he has sufficiently

pleaded his causes of action and relies in part on irrelevant legal authority. Nevertheless, Fagorala did attempt to address whether his claims are barred as a result of the application of the res judicata doctrine. While we might be justified in treating any purported trial court error as waived in light of the lack of pertinent legal argument contained in Fagorala's briefing on appeal, we will proceed to consider Fagorala's limited contentions on their merits.

2. Standard of Review

“We employ two separate standards of review when considering a trial court order sustaining a demurrer without leave to amend. [Citation.] We first review the complaint de novo to determine whether it contains facts sufficient to state a cause of action under any legal theory. [Citation.] ‘ ‘ ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.]” ’ ’ [Citation.] ‘We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale.’ ” (*Estate of Dito, supra*, 198 Cal.App.4th at p. 800.)

“If we determine the facts as pleaded do not state a cause of action, we then consider whether the court abused its discretion in denying leave to amend the complaint. [Citation.] It is an abuse of discretion for the trial court to sustain a demurrer without leave to amend if the plaintiff demonstrates a reasonable possibility that the defect can be cured by amendment.” (*Estate of Dito, supra*, 198 Cal.App.4th at pp. 800–801.)

3. Res Judicata

Fagorala contends it was error to dismiss his first amended complaint on res judicata grounds. His argument is two-fold. First, he contends that res judicata does not apply because his first amended complaint is based upon new facts that were not litigated in the prior actions. Second, he argues that the earlier actions were not decided on the merits. As we explain, Fagorala's contentions lack merit.

“ ‘Res judicata’ describes the preclusive effect of a final judgment on the merits.” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) It “prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.” (*Id.* at p. 897.) Under the doctrine of res judicata, “all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date.” (*Ibid.*)

“The doctrine has two aspects: the first is claim preclusion, otherwise known as res judicata, which ‘prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.’ [Citations.] The second is issue preclusion, or collateral estoppel, which ‘precludes relitigation of issues argued and decided in prior proceedings.’ ” (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1326.)

For the claim preclusion aspect of res judicata to apply, three requirements must be met. “First, the second lawsuit must involve the same ‘cause of action’ as the first lawsuit. [Citation.] Second, there must have been a final judgment on the merits in the prior litigation. [Citation.] Third, the parties in the second lawsuit must be the same (or in privity with) the parties to the first lawsuit.” (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.)

A claim raised in a second suit is “based on the same cause of action” as one asserted in a prior action if they are both premised on the same “primary right.” (See *Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 904.) “The plaintiff’s primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based. [Citation.] The scope of the primary right therefore depends on how the injury is defined. A cause of action comprises the plaintiff’s primary right, the defendant’s corresponding primary duty, and the defendant’s wrongful act in breach of that duty.” (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1202; accord, *Mycogen v. Monsanto Co.*, *supra*, 28 Cal.4th at pp. 904–906.)

Here, Fagorala alleges the same harm in his first amended complaint as he did in his prior actions—namely, that Nationstar wrongfully foreclosed and wrongfully failed to modify his loan. The primary rights at issue have already been the subject of prior cases. Nevertheless, Fagorala attempts to avoid the res judicata effect of the earlier judgments by claiming this lawsuit is based on an entirely new claim. He contends the “core” of the current action is focused on the “forced placed flood insurance fees and the forced placed home owners association fee, [which] were never mentioned in any previous case.”

Fagorala’s argument is unpersuasive for several reasons.

First, the first amended complaint is not based exclusively on the allegation that Nationstar sought to include escrow charges for flood insurance and homeowners association fees when it proposed a loan modification. Indeed, none of the 10 causes of action in the first amended complaint specifically mentions this allegation. More importantly, the escrow theory is not new. In all of his lawsuits, Fagorala alleged or sought to allege that Nationstar improperly attempted to increase his escrow payments to include improper sums. A contention that Nationstar sought to include escrow charges for flood insurance and homeowners association fees simply constitutes additional factual support for the claim that Nationstar attempted to impose improper charges on Fagorala as a condition to modifying his loan. This claim—and the primary right it seeks to vindicate—has already been litigated in the prior actions.

Moreover, the earlier judgments would still have res judicata effect even if Fagorala had not previously asserted his claims about escrow payments. “Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised.” (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 569; *Warga v. Cooper* (1996) 44 Cal.App.4th 371, 377–378.) Fagorala presented the trial court with a 2011 loan modification denial letter from Nationstar in which he highlights the monthly escrow amounts for property taxes, hazard and flood insurance, and homeowners association fees. Plainly, he could have specifically alleged the facts he claims are the bases for his first amended complaint in his second or third lawsuit against Nationstar because those earlier actions were either filed or dismissed after 2011.

Fagorala next contends that the earlier actions were not decided on the merits. He is mistaken. Each of the earlier actions was dismissed with prejudice. “[F]or purposes of applying the doctrine of res judicata, . . . , a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action.” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793.) Further, an order sustaining a demurrer without leave to amend is on the merits and has a res judicata effect unless the “pleading defects are ‘technical or formal’ and can be corrected by a new pleading” (*Perez v. Roe I* (2006) 146 Cal.App.4th 171, 184.) A judgment will support the application of res judicata where the judgment follows the sustaining of a demurrer “on a ground of substance” or “where the demurrer sets up the failure of the facts alleged to establish a cause of action” (*Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 52.) Based upon the record supplied to this court, the earlier actions were dismissed because Fagorala failed to state a cause of action and not because of some formal or technical defect in the pleading. Accordingly, the previous actions have res judicata effect as final judgments on the merits.

Fagorala attempts to argue that the prior judgments were not decided on the merits because his attorneys abandoned his case without notifying him. Fagorala represented himself in the third lawsuit, so any contention about attorney abandonment is not well-founded. In any event, the contention is irrelevant. Fagorala is “accountable for the acts and omissions of [his] attorneys.” (*Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P’ship* (1993) 507 U.S. 380, 396.) “ ‘Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent’ ” (*Id.* at p. 397.)

Because Fagorala and Nationstar were parties to the prior actions, all three requisites of claim preclusion are satisfied—the current lawsuit involves the same causes of action as the prior lawsuits, there was a final judgment on the merits in the prior actions, and the parties in the current lawsuit are the same as the parties in the prior litigation. (See *City of Oakland v. Oakland Police & Fire Retirement System, supra*, 224 Cal.App.4th at p. 228.) As a consequence, Fagorala’s claims are barred as a matter

of law. It is unnecessary to address any additional grounds offered by Nationstar in support of the court's ruling sustaining the demurrer.¹

As a final matter, we consider whether the trial court acted within its discretion in sustaining the demurrer without leave to amend. Fagorala bears the burden of establishing a reasonable probability that an amendment could cure the defects in his complaint. (See *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44.) Because Fagorala has offered no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, we discern no abuse of discretion in denying leave to amend.

DISPOSITION

The judgment is affirmed. Respondent shall be entitled to recover its costs on appeal.

¹Besides arguing that res judicata is inapplicable, Fagorala's other main contention is that the court erred in not taking judicial notice of his declaration in which he purportedly established that the property at issue was not required to have flood insurance and was not part of a homeowners association. Our resolution of the res judicata issue renders it unnecessary to consider this contention. Because Fagorala's claims are barred as a matter of law, it is irrelevant whether he can marshal evidence to support them. In any event, the court properly refused to consider extrinsic evidence offered to oppose a demurrer. (See generally *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1190, 1192 [in ruling on demurrer, court may only consider complaint and matters that are properly the subject of judicial notice; a demurrer proceeding is not a contested evidentiary dispute].)

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.