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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DELINDA ROSS,

Plaintiff and Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant and Respondent.

D068528

(Super. Ct. No. CIVDS1412665)

APPEAL from a judgment of the Superior Court of San Bernardino County,  
Pamela P. King, Judge. Affirmed.

Delinda Ross, in pro. per., for Plaintiff and Appellant.

Reed Smith and Kasey J. Curtis for Defendant and Respondent.

In a prior lawsuit, plaintiff Delinda Ross sued Bank of America and others after she unsuccessfully sought to modify the terms of her home loan. She alleged in that lawsuit that Bank of America lacked standing to assert rights under the loan documents because an assignment of the deed of trust securing the loan from its original lender was invalid because it was a "robo-signed" forgery. Ross lost that lawsuit after a bench trial.

In this lawsuit, Ross again attacks the validity of the assignment of the deed of trust, this time on the bases that it was a robo-signed forgery and that the Bank of America affiliate to which it was assigned had merged out of existence by the time of the assignment. The trial court sustained without leave to amend Bank of America's demurrer based on the doctrines of res judicata and collateral estoppel. Ross contends this was error. We conclude res judicata bars relitigation of Ross's claim and affirm the judgment on that basis.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The Loan*

In June 2007, Ross refinanced an existing home loan with a new \$205,000 loan from Nationwide Lending Corporation (Nationwide). The loan was secured by a deed of trust on Ross's residence. The deed of trust identified Ross as the borrower, Nationwide as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and nominee for Nationwide and its successors and assigns. In August 2011, MERS executed an assignment of deed of trust (Assignment), which reflected a transfer of its interest under the deed of trust to BAC Home Loans Servicing, LP (BAC).

### *Ross's First Lawsuit*

Meanwhile, in March 2011, Ross filed a complaint against Bank of America, BAC, Nationwide, and MERS in San Bernardino County Superior Court (*Ross v. Bank of America Corp. et al.* CIVDS1103945) (*Ross I*). Her original complaint asserted 19 causes of action arising from Bank of America's alleged misconduct in denying Ross a loan modification and from alleged improprieties in the secondary mortgage market.

Ross alleged Bank of America's actions were " 'marked by endemic failures to validly assign and properly document the assignments of mortgages,' " as a result of which the defendants lacked standing to foreclose on her residence. Bank of America demurred to Ross's complaint, and the trial court sustained the demurrer with leave to amend.

In June 2011, Ross filed a first amended complaint that included 17 causes of action. Bank of America demurred again. The trial court sustained the demurrer without leave to amend as to 15 causes of action, but granted leave to amend claims for fraud and promissory estoppel.

In March 2012, Ross filed a second amended complaint that included the authorized claims for fraud (which she labeled "deceit") and promissory estoppel, as well as three additional unauthorized claims. Ross's claims focused on Bank of America's alleged misconduct during the loan modification process. The second amended complaint also elaborated on Ross's theory that Bank of America lacked standing under the loan documents because the Assignment was invalid. Specifically, Ross alleged "Bank of America . . . and MERS had fraudulently created an Assignment of Deed of Trust on her home" because "[s]ubstantial evidence indicates that the notarized [Assignment] was fraudulent and invalid." Ross's pleading explained certain discrepancies in the Assignment that led her to believe it was a forgery signed by "a suspected robo-signer." Ross also alleged MERS improperly executed the Assignment because of its allegedly limited role as the lender's nominee.

Bank of America demurred to the second amended complaint. The trial court sustained the demurrer with leave to amend as to the fraud and promissory estoppel causes of action.

In May 2012, Ross filed a third amended complaint that included the authorized causes of action for fraud (again labeled "deceit") and promissory estoppel, as well as additional unauthorized causes of action. The third amended complaint reiterated Ross's theories about Bank of America's misconduct during the loan modification process and about the Assignment's alleged invalidity. Specifically, Ross continued to allege MERS's limited role as nominee and the "[s]ubstantial evidence" indicating the Assignment was a "fake" signed by "a suspected robo-signer."

Bank of America moved to strike the three unauthorized causes of action and demurred to the fraud and promissory estoppel claims. The trial court granted the motion to strike, but concluded Ross alleged facts sufficient to state claims for fraud and promissory estoppel. The court specifically found the allegations regarding MERS's role as nominee and the alleged forgery/robo-signing survived demurrer.

The matter proceeded to a bench trial. After the close of evidence, the trial court allowed Ross to reopen evidence so the court could take judicial notice of the Assignment. The court took the matter under submission and later issued a written ruling. The court found Ross "failed to meet her burden of proof by a preponderance of the evidence," "failed to establish the elements of Deceit," and "failed to establish the elements of Promissory Estoppel." The court also found Ross "failed to submit evidence

of any conduct on behalf of [MERS]." The court entered judgment in favor of Bank of America. Ross did not appeal.

### *This Lawsuit*

In August 2014, Ross filed this action against Bank of America, alleging causes of action for fraud, breach of the implied covenant of good faith and fair dealing, cancelation of instrument, and accounting. The case was assigned to the same judge who presided over the trial in *Ross I*.

Ross's fraud and cancelation of instrument claims were based primarily on Bank of America's alleged misrepresentation regarding ownership of Ross's loan, which Ross contended was false in light of the fact the Assignment was a forgery signed by a robo-signer.

Bank of America demurred on the basis Ross's new action was barred by res judicata and collateral estoppel in light of the final judgment in *Ross I*. The trial court agreed. The court found "the issues in this case were previously before the court in another case and fully adjudicated to judgment." The court observed, "this complaint [is] on point with what res judicata is intended to preclude." Although the court indicated, "quite frankly," that it doubted plaintiff would be able to plead around the res judicata bar, the court nonetheless granted plaintiff leave to amend.

In March 2015, Ross filed a first amended complaint in which she asserted claims for fraud, negligent misrepresentation, cancelation of instrument, violation of the Unfair Competition Law (UCL; Bus. & Prof. Code, § 17200 et seq.), and accounting. The gravamen of all of Ross's substantive claims was that Bank of America had

misrepresented that it held the beneficial interest under the deed of trust because the Assignment was void. In this regard, Ross reiterated her theory that the Assignment was a fraudulent document because the signatures on it "were fraudulently executed." However, she added a new theory of invalidity: that the August 2011 Assignment from MERS to BAC was executed two months after BAC merged out of existence into Bank of America in June 2011. In other words, the Assignment "is a void document . . . because at the time [it] was executed BAC ceased to exist as a corporation."

Bank of America demurred to Ross's first amended complaint on the bases it was barred by res judicata and collateral estoppel, or in the alternative, that the claims were inadequately pleaded.

The trial court sustained the demurrer without leave to amend. The court explained that Ross's claims were barred by res judicata and collateral estoppel because the claims "were either asserted or could have been asserted in [Ross]'s prior action against [Bank of America] and were decided adversely to [Ross] in the final judgment." The court entered a judgment of dismissal, and Ross appealed.

## DISCUSSION

Ross contends the trial court erred by finding her claims in this action are barred by res judicata and collateral estoppel because her claims in this case are different than

those she asserted in *Ross I*. We disagree. Ross's claims in this action were, or could have been, litigated in *Ross I* and are thus barred by res judicata.<sup>1</sup>

### I. *Standard of Review*

" 'On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 813.) "We may consider matters that are properly judicially noticed." (*Ibid.*) We review for an abuse of discretion the trial court's denial of leave to amend. (*Ibid.*)

"Whether the doctrine of res judicata applies in a particular case is a question of law which we review de novo." (*City of Oakland v. Oakland Police & Fire Retirement System* (2014) 224 Cal.App.4th 210, 228.)

### II. *The Res Judicata Doctrine*

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*)). "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61

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<sup>1</sup> Based on this conclusion, we need not determine whether Ross's claims are also barred by collateral estoppel.

Cal.4th 813, 824.) "If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*Ibid.*)

"To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.' " (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*); see *Mycogen, supra*, 28 Cal.4th at p. 904.) This theory " 'provides that a "cause of action" is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.' " (*Mycogen*, at p. 904.)

" 'In California the phrase "cause of action" is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action . . . .' [Citation.] But for purposes of applying the doctrine of res judicata, the phrase 'cause of action' has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." (*Boeken, supra*, 48 Cal.4th at p. 798.)

"A clear and predictable res judicata doctrine promotes judicial economy. Under this doctrine, 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." (*Mycogen, supra*, 28 Cal.4th at p. 897; *Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp.* (2013) 214 Cal.App.4th 1520, 1527 ["Res judicata bars a cause of action that was

*or could have been litigated in a prior proceeding*"], italics added; *Mycogen*, at p. 897 [" ' "Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief." ' "].) " If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions.' " (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)

### III. *Analysis*

The elements of res judicata are satisfied here. It is undisputed that Ross and Bank of America were both parties to *Ross I*, which was tried to a final judgment that Ross did not appeal. The only dispute is whether Ross's causes of action in this case were, or could have been, litigated in *Ross I*. We conclude they were.

The gravamen of Ross's operative first amended complaint in this case is that Bank of America misrepresented that it held the beneficial interest under Ross's deed of trust. All of Ross's causes of action in this case are premised on two theories of the Assignment's alleged invalidity: (1) it was a "fraudulently executed" forgery, and (2) BAC no longer existed at the time MERS purportedly assigned the deed of trust to BAC. The first predicate was actually alleged and litigated in *Ross I*, and the second predicate could have been.

As to the first predicate, Ross expressly alleged in her operative third amended complaint in *Ross I* that the Assignment was invalid because it was a forgery signed by a MERS robo-signer. Her deceit cause of action expressly incorporated those allegations and asserted them as a basis of the cause of action. At Ross's request, the trial court took judicial notice of the Assignment at trial. However, the trial court found that Ross did not introduce any evidence of conduct by MERS—that is, evidence supporting Ross's forgery/robo-signing theory. The trial court also found Ross failed to carry her burden on her causes of action. Thus, Ross's forgery/robo-signing predicate was actually litigated to a final judgment in *Ross I* and is barred by res judicata from being relitigated here.

As to the second predicate, Ross's nonexistent-assignee theory is consistent with claims she actually asserted in *Ross I* and could have been asserted there. As early as in her original *Ross I* complaint, Ross asserted Bank of America lacked standing under the loan documents because its actions were "marked by endemic failures to validly assign and properly document the assignments of mortgages." As early as in her second *Ross I* amended complaint, Ross asserted the Assignment was invalid due to MERS's limited role as nominee. She reiterated this allegation in her third amended complaint. The primary right allegedly infringed by these invalid-assignment theories is Ross's right to be free from enforcement of the loan documents by a party that lacks standing to enforce them. Ross's nonexistent-assignee theory alleges a violation of this same primary right. Because Ross alleges a violation of the same primary right, she alleges the same "cause of action" for res judicata purposes.

Ross could have litigated her nonexistent-assignee theory in *Ross I*. Her first amended complaint in this action alleges the BAC/Bank of America merger occurred in June 2011 and the Assignment was executed in August 2011. She attached to her pleading documents showing the merger and BAC's status were matters of public record. Ross filed her second amended complaint in *Ross I* in March 2012 and her third amended complaint in May 2012—nine and 11 months, respectively, after the merger. Yet, Ross offers no explanation justifying why she did not expressly allege the nonexistent-assignee theory in *Ross I*. Because it appears from the face of her pleadings that she could have alleged this theory in *Ross I*, res judicata bars her from doing so now.

Ross offers a variety of unpersuasive arguments asserting why res judicata does not apply. First, her argument that "[t]here was no cause of action entitled fraud in the prior proceeding"—she labeled her claim "deceit"—ignores the fact res judicata looks beyond labels to determine the primary right invaded. (See *Boeken, supra*, 48 Cal.4th at p. 798.) And, in any event, "California law uses the words 'fraud' and 'deceit' interchangeably." (*State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 600.)

Second, Ross's suggestion that the *Ross I* trial court did not allow her to allege Assignment-related fraud ignores the fact the trial court expressly granted Ross leave to allege causes of action for fraud and promissory estoppel.

Third, Ross's argument that her *Ross I* pleadings made no reference to fraudulent assignment of the deed of trust is directly contradicted by the pleadings' express

allegations to the contrary—some of which we quoted in our recitation of the factual and procedural background.

Fourth, Ross asserts that "[n]either the causes of action that were tried, [nor] the statement of decision, in [*Ross I*], had anything to do with the *assignment of the deed of trust*." This ignores the fact the trial court expressly found Ross failed to introduce any evidence regarding MERS's conduct, which bears on the validity of the Assignment. It also ignores the fact that res judicata does not require that the claim actually have been litigated; it is sufficient that the claim *could have been* litigated, an issue we have already addressed.

Finally, Ross's suggestion that a new fraud cause of action accrued in 2014 when Bank of America reasserted (allegedly falsely) the validity of the Assignment ignores the fact that she has exhausted her opportunities to litigate the validity of the Assignment.

In sum, because Ross's forgery/robo-signing fraud claim was actually litigated in *Ross I* and the nonexistent-assignee claim could have been litigated there, res judicata bars her relitigation of those claims here. Accordingly, the trial court did not err by sustaining Bank of America's demurrer on this basis. Further, because the trial court properly concluded Ross's claims were legally barred, the court did not abuse its discretion in denying Ross leave to amend.

DISPOSITION

The judgment is affirmed. Bank of America is entitled to its costs on appeal.

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HALLER, Acting P. J.

WE CONCUR:

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O'ROURKE, J.

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IRION, J.