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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

YOLANDA JONES,

Plaintiff and Appellant,

v.

WELLS FARGO BANK N.A.,

Defendant and Respondent.

E056158

(Super.Ct.No. CIVVS1105402)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kirtland L. Mahlum, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Yolanda Jones, in pro. per., for Plaintiff and Appellant.

Wright Finlay & Zak LLP, Jonathan D. Fink, and Magdalena D. Kozinska for Defendant and Respondent.

On November 1, 2011, plaintiff Yolanda Jones filed a complaint for wrongful foreclosure and related causes of action against Wells Fargo Bank N.A. (Wells Fargo).

On December 28, 2011, Wells Fargo filed a demurrer to the complaint.<sup>1</sup> Among other grounds, the demurrer alleged that the complaint is barred by the defense of res judicata.

On March 20, 2012, the trial court heard argument on the demurrer and subsequently sustained the demurrer without leave to amend on res judicata and other grounds.

Plaintiff appeals, contending the trial court erred in sustaining the res judicata defense.

#### THE FIRST ACTION

On August 24, 2010, plaintiff filed an action against Wells Fargo alleging various state and federal law claims arising from a mortgage loan she obtained in 2007 from Wells Fargo. Wells Fargo removed the case to federal court on September 15, 2010. A first amended complaint was filed on December 1, 2010. A second amended complaint was filed on February 15, 2011.<sup>2</sup>

The first amended complaint generally alleges a “fraudulent scheme by the bank (Wells) [which caused] plaintiff to sign an unaffordable loan in concert with the seller . . . .” Plaintiff then alleges the details of the scheme, including forgery and threats

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<sup>1</sup> On January 18, 2013, Wells Fargo filed an extensive request for judicial notice, including the demurrer. By order filed on February 11, 2013, we reserved a ruling for consideration with the appeal. We now grant the request for judicial notice.

<sup>2</sup> The second amended complaint is not in our record. If either party believes it would affect the issues discussed in this opinion, they may submit a request that we take judicial notice of it.

of lawsuits by the Wells Fargo loan officer who pressured her into signing the loan. She further alleges that she did not receive a copy of her loan application until October 2010. She then found several false entries that the Wells Fargo loan officer had allegedly entered on the loan application to inflate her income and assets in order to qualify her for the loan.

The amended complaint then seeks to set aside a foreclosure sale set for December 15, 2010. Plaintiff alleges that “Defendants do not have the right to enforce the deed of trust because the deed of trust was a product of fraud and predatory lending.” In the fraud cause of action, plaintiff specifically alleges that the Wells Fargo loan officer and underwriter fraudulently inflated her income and savings to qualify her for the loan. Wells Fargo failed to give her a copy of the loan application, and she had to write various government agencies in order to obtain it.

Variations on these allegations are alleged in the causes of action for predatory lending and economic duress. Plaintiff then alleges causes of action for violations of various federal statutes relating to mortgage lending, as well as a cause of action under the state unfair competition law. She sought an order cancelling the foreclosure sale and enjoining further statutory violations, as well as economic damages.

On March 3, 2011, the district court filed an order granting defendant's motion to dismiss with prejudice. Plaintiff appealed, and the appeal is presently before the Ninth Circuit Court of Appeals.<sup>3</sup>

The district court's 19-page order states the facts of the case and then considers each of the 10 causes of action. It finds that the causes of action alleging that Wells Fargo violated the Truth in Lending Act and the Real Estate Settlement Procedures Act are barred by the statute of limitations.

The district court then rejected an economic duress cause of action as inadequately pleaded because plaintiff did not demonstrate that "a reasonably prudent person in her position would have had no reasonable alternative but to succumb and accept the loan."

The stated allegations of misrepresentation and fraud were found insufficient because plaintiff failed to allege reliance, i.e., the loan application fraud was apparently intended to deceive other persons, not plaintiff. On the misrepresentations made by Wells Fargo to her, the court found that "her reliance on Wells' alleged misrepresentations regarding her ability to afford the loan was not justifiable." The court further found that this cause of action was barred by the statute of limitations.

A cause of action for predatory lending (Fin. Code, § 4973) failed because the loan was not a "covered loan" within the meaning of that section and Financial Code section 4970, subdivision (b).

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<sup>3</sup> The parties are requested to notify us promptly if the Ninth Circuit decision is filed before this opinion is filed.

A discrimination cause of action under the Equal Credit Opportunity Act and the Fair Housing Act was found to be barred by the statute of limitations. “Her assertions that Wells [Fargo] discriminatorily targeted her because of her race and gender are too conclusory and lack factual support making such assertions plausible on their face.”

A negligence cause of action was rejected because, generally, a financial institution does not owe a duty of care to a borrower.

Plaintiff’s claim under California’s Unfair Competition Law (Bus. & Prof. Code, § 17200) was rejected because plaintiff did not demonstrate that another law was violated. The statute does cover fraudulent business practices, including misrepresentations that are likely to deceive members of the public. However, since she was not aware of the misrepresentations at the time they were made, she could not have relied on them.

Based on these decisions, the district court dismissed the entire action with prejudice.

#### THE CURRENT ACTION

The current action was filed on November 1, 2011. The complaint alleges that Wells Fargo fraudulently schemed to initiate “a trustee sale on plaintiff’s home and sell the home while in the middle of a fraudulent lawsuit against Wells Fargo.” This allegation is followed by an allegation that a prior action had been pending for 15 months and a lengthy allegation that the Bank’s loan officer had fraudulently qualified her for a mortgage loan by “enhance[ing] [her] income, invent[ing] a bank account to have \$30,000.00 in it and enhanc[ing] the plaintiff[’s] other bank account from \$10,000.00 to \$70,000.00 to force the plaintiff to qualify for a loan.”

Plaintiff then asserts that she did not read the mortgage documents when she signed them and did not even receive a copy of her loan application until October 2010. A scheduled trustee sale was postponed until March 14, 2011, and cancelled on March 21, 2011. She then alleges that the property was sold to Wells Fargo on September 15, 2011.

A cause of action for wrongful foreclosure alleges various irregularities in the foreclosure process. It specifically alleges that the deed of trust was obtained by fraud, because the loan officer “used fraudulent information to qualify the plaintiff for the loan without the plaintiff[’s] permission.” She asserts that “courts have [the] power to vacate foreclosure sales where the sale is tainted by fraud, and clear fraud[ulent] inducement of loan.”

In addition to the wrongful foreclosure cause of action, the complaint alleges causes of action for (1) fraud; (2) fraudulent concealment; (3) unjust enrichment; (4) Uniform Commercial Code, Article 3; (5) quiet title; (6) intentional infliction of emotional distress; (7) civil conspiracy; and (8) unfair business practice.

#### THE RES JUDICATA DEFENSE

Res judicata is a defense based on the identity of the cause of action and the parties. While it is generally raised in the answer, it may be raised on demurrer if the allegations of the complaint, together with matters judicially noticed, demonstrate a fatal defect. Thus, Code of Civil Procedure section 430.30, subdivision (a) provides: “When any ground for objection to a complaint, cross-complaint, or answer appears on the face

thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading.”

In this case, the complaint asserts that Wells Fargo was scheduling a trustee sale on plaintiff’s home, and intended to sell the home “while in the middle of a fraudulent lawsuit against Wells Fargo.” The foreclosure sale was completed on September 15, 2011.

The necessary facts to support the res judicata defense are supplied by the documents included in the request for judicial notice.

*Elements of the Res Judicata Defense*

“The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation.’

[Citation.] *The doctrine applies when 1) the issues decided in the prior adjudication are identical with those presented in the later action; 2) there was a final judgment on the merits in the prior action; and 3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication.* [Citation.]

Even if these threshold requirements are established, res judicata will not be applied ‘if injustice would result or if the public interest requires that relitigation not be foreclosed. [Citations.]’

[Citation.] To determine whether to sustain a demurrer on res judicata grounds, judicial notice may be taken of a prior judgment and other court records. [Citations.]” (*Citizens*

*for Open Access etc. Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1065, italics added.)

“It is established that the doctrine of res judicata precludes parties or their privities from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. [Citations.] However, the way in which a court defines ‘cause of action’ differs. The federal courts utilize a transactional analysis; i.e., two suits constitute a single cause of action if they both arise from the same ‘transactional nucleus of facts’ [citation] or a single ‘core of operative facts.’ [Citation.] California follows the primary right theory of Pomeroy; i.e., a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty. [Citation.] Thus, two actions constitute a single cause of action if they both affect the same primary right. Where, as here, an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right. [Citation.]”

*(Gamble v. General Foods Corporation* (1991) 229 Cal.App.3d 893, 898.)

We therefore apply the primary rights theory to determine if the issues are the same in both cases.

#### *The Trial Courts Decision*

The trial court said: “Plaintiff’s earlier action against Defendant, dismissed in the District Court, sought to halt the foreclosure sale of the property in issue based in large

part on loan origination allegations. The only ‘new allegations’ in the present Complaint concern the foreclosure sale of the property after dismissal of Plaintiff’s original complaint in the District Court. Plaintiff alleges that this complaint is different because it alleges that the Defendant’s [*sic*] foreclosed on her property illegally after the dismissal. However, the legality of the proposed foreclosure of the property was the basis of the first action. . . . The argument is indicative of the Complaint which relies on the same claims of wrongdoing as appeared in the District Court case. The only distinguishing claim here is that the notice in advance of the [foreclosure] sale was faulty. Foreclosure is the same primary right in both cases.”

*Plaintiff’s Argument*

Plaintiff argues that the trial court erred in finding the same primary right in both cases because there are two different primary rights. She contends that the primary right in the first case was a contract right, i.e., it deals with the fraudulent loan documents, while the primary right in the present case is a primary right of foreclosure, i.e., the wrong trustee conducted the foreclosure sale. In other words, she contends that the claim of wrongful foreclosure could not have been litigated in the federal case because the foreclosure sale had not yet occurred.

*Wells Fargo’s Argument*

Wells Fargo contends that the legality of the proposed foreclosure was the basis of both actions. It states that “the only significant difference is that between the time of the First Action and this action, the foreclosure sale actually took place.”

### *Application of the Primary Right Theory*

Wells Fargo cites a comprehensive discussion of this issue by our Supreme Court in *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888 (*Mycogen*). In that case, three appeals from two related actions were consolidated. (*Id.* at p. 893.) In the first action, for declaratory relief, the court found defendant owed Mycogen a contractual duty. Mycogen obtained a judgment which included an order for specific performance of that duty. (*Ibid.*) The second action was for breach of the same license agreement. (*Ibid.*) Our Supreme Court found that the second action was barred by the first.

After restating the general principles of res judicata described above, the opinion discusses the primary right theory. It states: “As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: “Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.” [Citation.] The primary right must also be distinguished from the *remedy* sought: “The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.” [Citation.]” (*Mycogen, supra*, 28 Cal.4th at p. 904.)

Under our Supreme Court’s formulation of the primary right theory, the primary right in this case is *neither* the legal theories of recovery *nor* the remedy sought. It is simply the plaintiff’s right to be free from the particular injury suffered.

In this case, the particular injury suffered was the potential and actual allegedly wrongful foreclosure. Thus, the fact that the causes of action, i.e., the legal theories of recovery, were different between the two actions, as were the remedies sought, does not affect the primary right.

We therefore agree with the trial court that the primary right, to be free from wrongful foreclosure, was the same in both cases.

The complaint in the first action clearly states that “Plaintiff is seeking to set aside the non-judicial foreclosure.” It sought cancellation of the trustee’s sale and restitution of the property to the plaintiff.

The complaint in the second action is for wrongful foreclosure. The allegations include an allegation that the deed of trust was obtained by fraud. The specific fraud allegations are the same as those in the first action. The two actions are based on the same primary right, and plaintiff has merely split her cause of action. Accordingly, we find that the issues decided in the first action were identical with the issues decided in the second action because the primary right is the same.

*Other Elements of Res Judicata*

As noted above, a finding of res judicata also requires the court to find that there was a final judgment on the merits in the prior action, and that the parties are the same. The latter element is indisputable here.

Although not directly raised by plaintiff, there is a question of whether the federal district court action is not final because it is on appeal. However, the question is answered by *Manco Contracting Co. (W.L.L.) v. Bezdikian* (2008) 45 Cal.4th 192. The

court said: “While in California a judgment is not final and conclusive between the parties when it is on appeal, or for as long as it remains subject to appeal, the federal rule is contrary. [Citations.]” (*Id.* at p. 202.) Accordingly, the first action, the district court case, is final even though it is on appeal.

We therefore conclude that the three elements of the res judicata defense have been established, and the present action is therefore barred.

DISPOSITION

The judgment is affirmed. Wells Fargo to recover costs on appeal.

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

CODRINGTON  
J.