

FILED: August 07, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

DAVID ALAN GREENE,
Plaintiff-Appellant,

v.

HOMESALES, INC., OF DELAWARE;
NORTHWEST TRUSTEE SERVICES, INC.;
JP MORGAN CHASE BANK, N.A.;
CHASE HOME FINANCE, LLC;
Defendants-Respondents,

and

FIRST AMERICAN TITLE,
Defendant.

Josephine County Circuit Court
10CV0551

A151026

Pat Wolke, Judge.

Submitted on February 01, 2013.

David A. Green filed the briefs *pro se*.

Michael J. Farrell and Martin, Bischoff, Templeton, Langslet & Hoffman, LLC, filed the brief for respondents Homesales, Inc., JPMorgan Chase Bank, N.A., and Chase Home Finance, LLC.

Teresa M. Shill and Routh Crabtree Olsen, P.C., filed the brief for respondent Northwest Trustee Services, Inc.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

HADLOCK, J.

Affirmed.

1 HADLOCK, J.

2 This dispute relates to interests that the parties may have in certain real
3 property located in Josephine County--property that, according to plaintiff's pleadings, is
4 or was his home, and from which one or more of the defendants sought to have him
5 evicted. After giving plaintiff several opportunities to adequately plead his claims for
6 declaratory and injunctive relief against defendants, the trial court granted summary
7 judgment to defendants and entered two limited judgments dismissing plaintiff's claims
8 against them. On plaintiff's appeal from those two limited judgments, we affirm.

9 The significant facts on appeal are procedural and undisputed. In his first
10 amended petition for declaratory judgment and injunctive relief, plaintiff alleged that
11 defendants--JPMorgan Chase Bank, N.A., Chase Home Finance, LLC, and Homesales,
12 Inc., of Delaware (collectively, "the Chase defendants") and Northwest Trustee Services,
13 Inc. (NWTS)¹--were "named on the Note, Deed of Trust, Trustee's Deed, and other
14 documents" pertaining to the property. In association with various pleadings, plaintiff
15 submitted a copy of the pertinent note and trust deed showing that JPMorgan Chase
16 Bank, N.A., had loaned him \$234,000, secured by a trust deed on the real property at
17 issue.

18 After defendants filed motions under ORCP 21, the trial court allowed

¹ An additional defendant, First American Title, is not a party to this appeal, because plaintiff did not timely serve that defendant's attorney with a copy of the notice of appeal. Accordingly, we use the term "defendants" in this opinion to refer only to NWTS and the Chase defendants.

1 plaintiff to replead, resulting in the filing of a pleading titled "second amended petition
2 for declaratory judgment and injunctive relief; constructive trust; expunge mortgage."
3 (Capitalization modified.)² In that petition, plaintiff alleged that Homesales was a
4 necessary party because it had represented itself as the purchaser and present owner of
5 the property; he alleged that the other defendants had "each played a part" in the
6 foreclosure proceedings that he claimed were "wrongful." Most specifically, plaintiff
7 alleged that JPMorgan Chase Bank, N.A., was "the 'Lender' on the Note" and "may have
8 transferred the Note without notice" to plaintiff. Plaintiff sought a declaration of his
9 rights under the "Note and Deed of Trust material to this case" and any other agreements
10 or contracts that defendants might rely upon, and notice as to which parties might
11 "qualify as real parties in interest to the Note and Deeds of Trust. * * *" Plaintiff also
12 sought equitable relief, including a judgment "expunging the mortgage and quieting the
13 title to [his] home. * * *"

14 NWTS and the Chase defendants all filed answers that included the
15 affirmative defense of failure to allege facts stating a claim for relief. Those defendants
16 acknowledged in their answers that JPMorgan Chase Bank, N.A., was the lender on the
17 note, and Homesales admitted in its answer that it was the present owner of the property.

18 NWTS subsequently moved for judgment on the pleadings or, alternatively,
19 for summary judgment. In that motion, NWTS argued, among other things, that
20 plaintiff's complaint did not describe a justiciable controversy because it did not "allege

² We refer to that pleading as plaintiff's second amended complaint.

1 acts of wrongdoing by NWTS," "show an actual and substantial controversy between
2 Plaintiff and NWTS," or show that plaintiff and NWTS had adverse interests. In
3 addition, and in support of its alternative motion for summary judgment, NWTS
4 submitted evidence that plaintiff had secured payment of the note with the property by
5 granting a trust deed to JPMorgan Chase Bank, N.A.; JPMorgan Chase Bank, N.A. later
6 assigned the beneficial interest in the deed of trust to Chase Home Finance, LLC, (and
7 that assignment was recorded); Chase Home Finance appointed NWTS as successor
8 trustee to the deed of trust (and that assignment was recorded); and, when plaintiff
9 defaulted on the loan, NWTS gave plaintiff notice of its intent to sell the property, and
10 foreclosure culminated in sale of the property to Homesales in March 2008.

11 The Chase defendants also moved for summary judgment, arguing that
12 "there [was] no evidence that the foreclosure of Plaintiff's home was wrongful" and
13 adopting the factual assertions and evidence that NWTS had submitted in support of its
14 own motions. The Chase defendants asserted that plaintiff had made only one claim
15 against any defendant in the case, *i.e.*, that JPMorgan Chase Bank, N.A., might have
16 transferred the note without giving him notice. That assertion could not form a basis for
17 relief, they argued, because no Oregon law entitled plaintiff to notice that an interest in
18 the note was being transferred.

19 Plaintiff opposed the defense motions, asserting that the "real question" was
20 "where's the note and who was the note holder at the time of foreclosure." "Without that
21 being clearly revealed and declared," plaintiff argued, "there was no default and therefore

1 no lawful foreclosure." Plaintiff did not offer any evidence that the note had been
2 transferred to another party, nor any argument tending to establish that any such transfer
3 would have been unlawful. Nonetheless, he argued that he was entitled to a judgment
4 declaring the parties' rights.

5 After a July 2011 hearing, the trial court signed an order granting summary
6 judgment to NWTs. On August 2, 2011, the court entered a limited judgment dismissing
7 plaintiff's claims against NWTs.³ Plaintiff then filed a third amended complaint, largely
8 raising the same claims he had before; as a basis for doing so, plaintiff purported to rely
9 on an oral July 5 order by the trial court allowing him to replead.⁴ In addition, plaintiff
10 requested a declaration of his "rights and status under ORS 86.770, and the
11 Constitutionality thereof."⁵ Plaintiff did not explain what significance ORS 86.770 had

³ Plaintiff timely appealed that limited judgment. This court dismissed the appeal for lack of prosecution.

⁴ Plaintiff captioned that document a "third amended petition for declaratory judgment and injunctive relief; constructive trust; expunge mortgage." (Capitalization modified.) We refer to that pleading as plaintiff's third amended complaint.

⁵ ORS 86.770 provides, in part:

"(1) If, under ORS 86.705 to 86.795, a trustee sells property covered by a trust deed, the trustee's sale forecloses and terminates the interest in the property that belongs to a person to which notice of the sale was given under ORS 86.740 and 86.750 or to a person that claims an interest by, through or under the person to which notice was given. A person whose interest the trustee's sale foreclosed and terminated may not redeem the property from the purchaser at the trustee's sale. A failure to give notice to a person entitled to notice does not affect the validity of the sale as to persons that were notified.

"(2) Except in accordance with subsection (4) of this section, after a

1 to his situation.

2 On September 2, 2011--and still based on what happened at the July
3 hearing--the trial court entered an order granting summary judgment to the Chase
4 defendants. The court entered a limited judgment dismissing plaintiff's claims against
5 those defendants on October 20, 2011.

6 In November 2011, NWTS moved against the third amended complaint,
7 noting that the court already had entered a limited judgment of dismissal of plaintiff's
8 claims against it. NWTS argued that the allegations in the third amended complaint did
9 not differ materially from those in the second amended complaint except for the added
10 request for a declaration about the constitutionality of ORS 86.770 and plaintiff's rights

trustee's sale under ORS 86.705 to 86.795, or after a judicial foreclosure of a residential trust deed, an action for a deficiency may not be brought or a judgment entered against the grantor, the grantor's successor in interest or another person obligated on:

"(a) The note, bond or other obligation secured by the trust deed for the property that was subject to the trustee's sale or the judicial foreclosure;
or

"(b) Any other note, bond or other obligation secured by a residential trust deed for, or mortgage on, the property that was subject to the trustee's sale or the judicial foreclosure when the debt, of which the note, bond or other obligation is evidence:

"(A) Was created on the same day as, and used as part of the same purchase or repurchase transaction as, the note, bond or other obligation secured by the foreclosed residential trust deed; and

"(B) Is owed to or was originated by the beneficiary or an affiliate of the beneficiary in the residential trust deed that was subject to the trustee's sale or the foreclosure."

1 under that statute. Accordingly, NWTs argued, plaintiff's claims "should be dismissed
2 under the doctrine of claim preclusion" or for failure to state a justiciable controversy. In
3 response, plaintiff again argued that he was entitled to a declaration of his rights; he did
4 not provide a meaningful response to NWTs's preclusion argument.

5 The Chase defendants also moved against the third amended complaint on
6 the ground that plaintiff's claims against them had "been fully adjudicated and dismissed
7 on the merits" by the limited judgment entered on October 20, 2011. As in his response
8 to NWTs's motion, plaintiff's response to the Chase defendants' motion simply reiterated
9 his belief that he was entitled to a declaration of his rights; he did not address defendants'
10 assertion that the earlier limited judgment in their favor put an end to the matter.

11 A hearing on defendants' motions occurred in January 2012. On February
12 15, 2012, the trial court entered a limited judgment dismissing the claims against NWTs
13 in plaintiff's third amended complaint. The court granted the Chase defendants' motion to
14 dismiss later that month and entered a limited judgment of dismissal in their favor on
15 March 12, 2012. Plaintiff timely appealed those two limited judgments.

16 On appeal, plaintiff first assigns error to the trial court's dismissal of his
17 third amended complaint. He argues that the dismissal was erroneous because "a
18 declaratory judgment action is *not* the proper subject at a motion to dismiss, except for
19 want of a justiciable controversy." (Emphasis in original.) Plaintiff contends that his
20 third amended complaint "sufficiently alleged a justiciable controversy" and, therefore,
21 could not be dismissed. Plaintiff's second assignment of error, in which he challenges the

1 entry of judgment in defendants' favor, similarly is premised on his view that the trial
2 court erred by dismissing his complaint instead of declaring the rights of the parties.

3 Defendants offer several arguments in response. All of the defendants
4 contend that plaintiff did not plead a justiciable controversy because he sought either an
5 explanation of his "rights regarding past actions," *i.e.*, the foreclosure, or "a declaration of
6 his rights post-foreclosure" and, thus, "was seeking relief in regard to future events or
7 hypothetical issues[,] " which defendants contend is insufficient to present a justiciable
8 claim for declaratory relief. In addition, the Chase defendants assert that plaintiff's
9 reference in the third amended complaint to ORS 86.770 was insufficient to make his
10 declaratory-judgment action justiciable because plaintiff "presented no facts to support a
11 declaration of his 'rights and status' as benefitted by ORS 86.770." Specifically, they
12 contend:

13 "That statute prevents redemption post-foreclosure (ORS 86.770(1)), and
14 also includes the anti-deficiency provision (ORS 86.770(2)), which
15 precludes any lender (including Chase) from suing any borrower (including
16 Plaintiff) for any deficiency post-foreclosure. Plaintiff did not allege facts
17 showing any attempt to redeem the property or any attempt by Chase to
18 seek a deficiency judgment, so his claim is hypothetical. Furthermore,
19 Plaintiff alleges no basis for declaring this statute unconstitutional."

20 Defendants also argue that the doctrine of claim preclusion prohibited
21 plaintiff from relitigating his claims against them, insofar as they already had been
22 resolved by the earlier limited judgments entered in their favor after they moved for
23 summary judgment on plaintiff's second amended complaint, as the third amended
24 complaint raised the same claims. Defendants also assert that the trial court did not give

1 plaintiff leave to amend his complaint after it granted summary judgment to defendants.

2 Plaintiff contends in his reply brief that the trial court did give him leave to
3 replead at the July 2011 hearing on defendants' summary judgment motions. He also
4 argues that defendants cannot properly rely on the issues having been resolved by the
5 limited judgments granting them summary judgment on plaintiff's second amended
6 complaint because, he contends, they were not entitled to summary judgment. Moreover,
7 plaintiff argues, claim-preclusion principles do not apply because "this case was never
8 allowed to go beyond the pleading stage." Finally, plaintiff contends that his third
9 amended complaint sufficiently alleged a justiciable controversy between the parties.

10 We need not address the parties' disagreement about whether plaintiff had
11 leave to replead because, even if he did, the trial court did not err when it dismissed his
12 third amended complaint. To the extent that plaintiff's third amended complaint repeated
13 the claims that he asserted in his second amended complaint, we agree with defendants
14 that the entry of limited judgments in their favor on the second amended complaint
15 precluded plaintiff from relitigating those claims, although we view the applicable
16 doctrine as "law of the case," not claim preclusion. *See OEA v. Oregon Taxpayers*
17 *United*, 253 Or App 288, 302, 291 P3d 202 (2012) ("Issue preclusion applies 'when the
18 parties to a prior action subsequently, in a different action, again litigate issues actually
19 litigated and determined in the prior action.' In contrast, the law of the case doctrine
20 'precludes relitigation or reconsideration of a point of law decided at an earlier stage of
21 the same case.'" (Citations and emphasis omitted.)). Like other preclusive doctrines,

1 "law of the case" has the purpose "of preventing harassment by successive proceedings,
2 preventing inconsistent adjudications, and promoting economy of resources in the
3 adjudicative process." *Id.* at 300. The principle applies without regard to whether the
4 earlier decisions--here, the 2011 limited judgments granting defendants summary
5 judgment--were correct. Rather, the important points are that (1) those final, appealable
6 judgments were entered and (2) they disposed of the same claims that plaintiff attempted
7 to raise again in his third amended complaint (with one exception, discussed below).
8 Thus, even if the trial court did give plaintiff leave to replead, it could only have been to
9 assert claims that the court had not already decided against him.

10 Our conclusion that the trial court's dismissal of plaintiff's second amended
11 complaint precluded plaintiff from relitigating the claims that were included in that
12 complaint does not entirely resolve the case. Plaintiff arguably attempted to raise one
13 new claim in his third amended complaint, *i.e.*, his contention that he was entitled to a
14 declaration of his "rights and status under ORS 86.770, and the Constitutionality thereof."
15 However, we agree with the Chase defendants' argument that the ORS 86.770 claim is
16 not justiciable. Plaintiff's request to know whether the statute is constitutional is not
17 enough, standing alone, to create a justiciable controversy between him and defendants.
18 *Morgan v. Sisters School District #6*, 353 Or 189, 195, 301 P3d 419 (2013). Nor does
19 plaintiff's expressed desire to ascertain his "rights and status under ORS 86.770" state a
20 justiciable claim for declaratory relief, even when read in conjunction with the other
21 allegations in his third amended complaint. The difficulty is that plaintiff did not plead

1 *facts* tending to show that--through application of ORS 86.770--he has suffered, or will
2 suffer, a cognizable injury that is "real or probable, not hypothetical or speculative."
3 *Morgan*, 353 Or at 195. Relatedly, plaintiff did not plead facts that, if true, would
4 establish a connection "between the rights that [he] seeks to vindicate and the relief
5 requested." *Id.* at 197. That is, the third amended complaint did not include factual
6 allegations that, if proved, would show that--by operation of ORS 86.770--plaintiff was
7 entitled to any of the practical relief he sought: establishment of a constructive trust, a
8 "judgment expunging the mortgage and quieting the title to [the] home[.]" or other,
9 unspecified injunctions against defendants. In other words, the complaint did not include
10 allegations establishing a "real and substantial controversy" between the parties.
11 *Cummings Constr. v. School Dist. No. 9*, 242 Or 106, 110, 408 P2d 80 (1965). Absent
12 such allegations, plaintiff's request for a declaration of his rights under ORS 86.770 did
13 not constitute a justiciable claim for declaratory relief. Accordingly, the trial court did
14 not err when it dismissed his third amended complaint and entered judgment for
15 defendants.

16 Affirmed.