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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Theodore E. Coit, Jr.,)	No. CV-10-0436-PHX-DGC
Plaintiff,)	ORDER
vs.)	
Sutton Funding LLC, et al.,)	
Defendants.)	

On March 24, 2010, Defendants Sutton Funding LLC and HomEq Servicing Corporation¹ filed a motion to quash *lis pendens*. Dkt. #7. On March 31, 2010, Defendants filed a motion to dismiss Plaintiff Theodore E. Coit, Jr.’s complaint with prejudice. Dkt. #8. On April 26, 2010, Plaintiff filed an amended complaint (Dkt. #25) and on May 3, 2010, Plaintiff filed a response to the motion to quash and the motion to dismiss (Dkt. #27). Plaintiff has also filed a motion for production, inspection and copying. Dkt. #22. For reasons that follow, the Court will strike Plaintiff’s amended complaint (Dkt. #25), grant the motion to quash (Dkt. #7), grant the motion to dismiss (Dkt. #8), and deny the motion for production, inspection and copying (Dkt. #22) as moot.²

¹ Plaintiff sued HomEq Servicing Corporation, but Defendants contend that Plaintiff intended to sue Barclays Capital Real Estate Inc., which does business under the HomEq name. See Dkt. #27 at 1. For purposes of this Order, the Court will refer to this Defendant as HomEq.

² The requests for oral argument are denied. The parties have fully briefed the issues and oral argument will not aid the Court’s decision. See *Lake at Las Vegas Investors Group*,

1 **I. Background.**

2 In June of 2007, Don A. Poulsen executed a Deed of Trust on the property at 11028
3 N. Buffalo Drive, Fountain Hills, AZ 85268. Dkt. #9-1 at 1. In October of 2007, Plaintiff
4 received the property from Poulsen through a Grant Deed. Dkt. #9-2 at 1-2. On July 15,
5 2008, the property was sold at a public auction to Defendant Sutton. Dkt. #9-3 at 1-2.

6 On July 14, 2008, Plaintiff filed an action in Maricopa County Superior Court
7 against Sutton and HomEq over the sale and foreclosure of the property. *See Coit v. Sutton*
8 *Funding LLC*, CV2008-016643. On March 25, 2009, Plaintiff filed an action in this Court
9 against Sutton and HomEq for claims arising out of the sale of the same property (“the 2009
10 action”), which ended in dismissal with prejudice. *See Coit v. Sutton Funding LLC*, No. 09-
11 CV-0597-NVW, Dkt. #1. On February 26, 2010, Plaintiff filed the present action against
12 Sutton and HomEq, alleging violations of the Fair Debt Collection Practices Act (“FDCPA”)
13 and seeking damages of \$773,000. Dkt. #1. Plaintiff recorded a *lis pendens* on the property
14 in the Maricopa County Recorder’s Office on March 1, 2010. Dkt. #7-7 at 2-3. The *lis*
15 *pendens* is the ninth Plaintiff has filed on this property. *See* Dkt. #7 at 8 (listing eight other
16 *lis pendens* filings).

17 **II. The Amended Complaint.**

18 Under Rule 15(a)(1), a party may amend his pleading once as a matter of course
19 within 21 days after serving it or within 21 days after service of a responsive pleading or a
20 motion under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1)(A)-(B).
21 In all other cases, a party may amend his pleading only with the opposing party’s written
22 consent or leave of court. Fed. R. Civ. P. 15(a)(2).

23 In this case, Defendants Sutton and HomEq – the only Defendants named in the
24 original complaint – filed a motion to dismiss pursuant to Rule 12(b) on March 31, 2010.
25 Dkt. #8. This means that Plaintiff had 21 days from March 31, 2010 to amend his pleading
26 as a matter of right. Fed. R. Civ. P. 15(a)(1)(A)-(B). Plaintiff filed his amended complaint

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28 *Inc. v. Pac. Malibu Dev. Corp.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 on April 26, 2010 – 26 days after Defendants filed the motion to dismiss. Dkt. #25. Plaintiff
2 did not receive Defendants’ consent or leave of court before filing the amended complaint.
3 As a result, Plaintiff’s amended complaint was not timely. Fed. R. Civ. P. 15(a)(2).

4 Although courts liberally grant leave to amend pursuant to Rule 15, the policy in favor
5 of amendments is subject to limitations. The United States Supreme Court has established
6 that motions to amend should not be granted if there has been (1) undue delay, (2) bad faith
7 or dilatory motives on the part of the movant, (3) repeated failure to cure deficiencies by
8 previous amendments, (4) undue prejudice to the opposing party, or (5) futility of the
9 proposed amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Several of these factors
10 weigh against granting Plaintiff leave to amend. This is Plaintiff’s third lawsuit based on the
11 sale and foreclosure of the property. Plaintiff has recorded nine separate *lis pendens* on the
12 property. Dkt. #7 at 3. Defendants have been required to defend themselves in three separate
13 actions and against three different complaints, all arising from the same operative facts.
14 Currently, the property is set to be purchased by a buyer, “but the closing has been delayed”
15 and is still being delayed “because of Plaintiff’s recorded *lis pendens*.” Dkt. #7 at 2. Any
16 further delay is prejudicial to Defendants as it may cause the potential buyer to walk away.
17 Moreover, it seems likely that Plaintiff’s claims have been brought to cause delay. The Court
18 concludes that leave to amend should be denied because of undue delay, dilatory motives,
19 and undue prejudice to Defendants. Because Plaintiff’s amended complaint was untimely
20 and leave to amend will not be granted, the operative complaint in this case is the original
21 complaint against Sutton and HomeEq for violation of the FDCPA.

22 **III. Motion to Dismiss.**

23 Defendants have filed a motion to dismiss on the ground that Plaintiff’s claims are
24 barred by the doctrine of res judicata. “Res judicata is applicable whenever there is (1) an
25 identity of claims, (2) a final judgment on the merits, and (3) a privity between parties.”
26 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064,
27 1077 (9th Cir. 2003) (internal quotation and citation omitted). Defendants argue that all three
28 requirements are met here.

1 An identity of claims exists when two suits arise from the same transactional nucleus
2 of facts. *Id.* “Newly articulated claims based on the same nucleus of facts may still be
3 subject to a res judicata finding if the claims could have been brought in the earlier action.”
4 *Id.* at 1078. “It is immaterial whether the claims asserted subsequent to the judgment were
5 actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether
6 they could have been brought.” *Id.* (quoting *U.S. ex rel. Barajas v. Northrop Corp.*, 147 F.3d
7 905, 909 (9th Cir. 1998)). This case arises out of the same nucleus of facts as the 2009 action
8 – “facts surrounding foreclosure of the property[.]” Dkt. #8 at 3-4. As a result, Plaintiff’s
9 claim for violation of the FDCPA could have been brought in the 2009 action.

10 As to the second element, the Ninth Circuit has held that “a dismissal with prejudice
11 has a res judicata effect” because it is “on the merits.” *In re Marino*, 181 F.3d 1142, 1144
12 (9th Cir. 1999) (internal quotations and citations omitted). Defendants argue that the 2009
13 action has res judicata effect because it was dismissed with prejudice on June 15, 2009. *Coit*,
14 No. 09-CV-0597-NVW, Dkt. #14. The Court agrees and finds this element satisfied.

15 The third element of privity exists when “several parties in both actions are
16 identical[.]” *Tahoe-Sierra*, 322 F.3d at 1081. The parties in this case – Sutton, HomEq, and
17 Plaintiff – are identical to the parties in the 2009 action.

18 Plaintiff argues that res judicata does not apply because he “never was allowed to have
19 his day in court to completely adjudicate the merits of Plaintiff’s claim for relief.” Dkt. #27
20 at 3. He also argues that res judicata is inappropriate because “[t]here are parties in this
21 action that were not involved in the previous action.” *Id.* at 4.

22 As to his first argument, Plaintiff was given his day in court in the 2009 action and yet
23 failed to respond to the motion to dismiss in a timely fashion. If Plaintiff lacked his day in
24 court, it was only because he chose not to litigate his case. As to Plaintiff’s second argument,
25 there are no parties in this action that were not involved in the 2009 action. The only two
26 parties named in the complaint are Sutton and HomEq, both of which were named in the
27 2009 action. *See* CV09-00597-PHX-NVW, Dkt. #1. Plaintiff sought to add two additional
28 parties in his amended complaint, but these proposed Defendants are not part of the pending

1 action as the amended complaint is not operative.³ Because Plaintiff’s claims are barred by
2 res judicata, the Court will dismiss this action.

3 **IV. Dismissal with Prejudice.**

4 Defendants ask the Court to dismiss this action with prejudice. “Dismissal with
5 prejudice and without leave to amend is not appropriate unless it is clear . . . that the
6 complaint could not be saved by amendment.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316
7 F.3d 1048, 1052 (9th Cir. 2003). In making a determination whether to dismiss with
8 prejudice, the Court should consider the following factors: “undue delay, bad faith or dilatory
9 motive on the part of the movant, repeated failure to cure deficiencies by amendments
10 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
11 amendment, futility of the amendment, etc.” *Id.* These factors are essentially the same as
12 those considered above for denying leave to amend. For reasons explained above, the Court
13 concludes that several of these factors are present, including undue delay, dilatory motives,
14 and undue prejudice to Defendants. The Court accordingly finds that dismissal with
15 prejudice is appropriate.

16 Moreover, Plaintiff’s claims are barred by res judicata. That doctrine would apply to
17 any claims Plaintiff might assert against Defendants arising out of the 2008 sales transaction.
18 Defects in the complaint could not be cured by amendment.

19 **IV. Motion to Quash.**

20 Defendants argue that the Court should quash the *lis pendens* on the property which
21 Plaintiff filed in this case. *See* Dkt. #5. Under Arizona law, a notice of *lis pendens* may be
22 recorded “[i]n an action affecting title to real property[.] A.R.S. § 12-1191. Because the
23 Court is dismissing the pending action with prejudice, it will also quash the *lis pendens*.

24 Defendants also ask the Court to impose “statutory sanctions” against Plaintiff
25 pursuant to A.R.S. § 33-420(A), which states that “[a] person purporting to claim an interest

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27 ³ Moreover, the two parties that Plaintiff sought to add are (1) Barclays, which,
28 according to Defendants, is HomEq’s proper name, and (2) Equifirst Corporation, which
Plaintiff believes is the owner of Sutton. Dkt. #25 at 1-2. Thus, even if these entities were
in the case, there likely would be an identity of parties.

1 in, or a lien or encumbrance against, real property, who causes a document asserting such
2 claim to be recorded in the office of the county recorder, knowing or having reason to know
3 that the document is forged, groundless, contains a material misstatement or false claim or
4 is otherwise invalid is liable to the owner or beneficial title holder of the real property for the
5 sum of not less than five thousand dollars[.]” Defendants have not filed a counterclaim
6 against Plaintiff pursuant to A.R.S. § 33-420(A), and the statute does not provide for
7 sanctions. As a result, the Court will deny the request for “statutory sanctions.”

8 **V. Motion for Production, Inspection and Copying.**

9 Because the Court will dismiss this action with prejudice, the Court will deny
10 Plaintiff’s motion for production, inspection and copying. Dkt. #22.

11 **IT IS ORDERED:**

- 12 1. Defendants’ motion to quash *lis pendens* (Dkt. #7) is **granted**.
- 13 2. Defendants’ motion to dismiss with prejudice (Dkt. #8) is **granted**.
- 14 3. Plaintiff’s motion for production, inspection, and copying (Dkt. #22) is
15 **denied**.
- 16 4. Plaintiff’s amended complaint (Dkt. #25) is **stricken**.
- 17 5. The Clerk of Court shall terminate this action.

18 DATED this 21st day of May, 2010.

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23 David G. Campbell
24 United States District Judge
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