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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Anne Ritzenthaler; Richard Lyle Ritzenthaler, Plaintiffs, vs. Bank of America Corporation et al., Defendants.	No. CV 13-00182-PHX-FJM **ORDER**

This action arises out of an allegedly wrongful foreclosure of plaintiffs' property. On August 1, 2011, plaintiffs initiated an action in this court against Bank of America Corporation, Brian T. Moynihan, Bank of New York Mellon, N.A., and ReconTrust Company, N.A., contesting the trustee sale of their property ("Ritzenthaler I"). The amended complaint added Countrywide Home Loans as a defendant and alleged causes of action for quiet title, deceptive trade practices, wrongful foreclosure-set aside trustee sale, conspiracy to commit wrongful conversion, broken chain of custody, injunctive relief, and rescission. See Case No. 2:11-CV-01500-PHX-JAT, Doc. 25. On August 10, 2012 this court dismissed the case with prejudice ("Dismissal Order").

Plaintiffs filed the current action in the Superior Court of Arizona in Maricopa County on December 21, 2012, alleging fraud, theft by deception, unfair business practices, and false/deceptive business practices. Plaintiffs also seek to stay execution and enforcement of

the Dismissal Order. Defendants timely removed the action to this court and filed a motion to dismiss (doc. 6). On March 20, 2013, plaintiffs filed a belated 21 page response (doc. 9).[1] Defendants timely replied (doc. 10) and plaintiffs filed a sur-response (doc. 11). We also have before us plaintiffs' motion for sanctions (doc. 12), defendants' response (doc. 18), plaintiffs' motion to compel a proper accounting (doc. 13), defendants' response (doc. 16), plaintiffs' motion to compel production of documents (doc. 14), defendants' response (doc. 17), and defendants' motion to strike the sur-response (doc. 15).

As an initial matter, we grant defendants' motion to strike plaintiffs' sur-response (doc. 15) because LRCiv 7.2 allows only a motion, a response, and a reply. Nevertheless, the arguments in the sur-response do not change our resolution of defendants' motion to dismiss.

Defendants contend that plaintiffs' claims are barred by the doctrine of claim preclusion, which promotes the final resolution of disputes through court judgments by preventing repetitive actions. See Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). The doctrine applies whenever there is identity of claims, a final judgment on the merits, and privity. Id. To determine whether there is an identity of claims, we look to (1) whether interests established in the prior judgment would be impaired, (2) whether substantially the same evidence is presented in the two actions, (3) whether infringement of the same right is involved, and, most importantly, (4) whether the two actions arise out of the same transactional nucleus of facts. United States v. Liquidators of European Fed. Credit Bank, 630 F. 3d 1139, 1150, 2011 WL 9730, *10 (9th Cir. 2011). Privity exists if there is a sufficient commonality of interest between the parties of the two actions. Tahoe–Sierra, 322 F.3d at 1081.

Plaintiffs' present claims, which are based on the alleged impropriety of a trustee's sale, fall well within the same transactional nucleus of facts as their previous claims in

[1] Because plaintiffs failed to timely respond to the motion to dismiss, we may grant the motion summarily. See LRCiv 7.2(i) ("if . . . counsel does not serve and file the required answering memoranda . . . such non-compliance may be deemed a consent to the denial or granting of the motion and the Court may dispose of the motion summarily"). Nonetheless, we consider the merits of the motion and reach the same conclusion.

Ritzenthaler I. The remaining factors do not weigh against a finding of identity, and plaintiffs do not persuade us otherwise. Moreover, because plaintiffs sued all of the same defendants in both actions, there is privity between the parties.[2] Finally, plaintiffs do not dispute that a dismissal with prejudice is a final judgment on the merits. See Stewart v. U.S. Bancorp, 297 F.3d 953, 957 (9th Cir. 2002). Because the three criteria for claim preclusion are satisfied, plaintiffs are barred from re-litigating their prior action by alleging the present claims. We grant defendants' motion to dismiss, and deny plaintiffs' discovery motions as moot.

Defendants also argue that plaintiffs' attempt to appeal the dismissal judgment is time barred and procedurally incorrect. We agree. We do not have appellate jurisdiction over other district court rulings.

Plaintiffs' motion for sanctions is also procedurally flawed. Under Rule 11(c)(2), Fed. R. Civ. P., a motion for sanctions "must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service." This "safe harbor" provision is strictly enforced. Holgate v. Baldwin, 425 F.3d 671, 678 (9th Cir. 2005). Because plaintiffs did not comply with the "safe harbor" provision, we deny their motion for sanctions.

IT IS ORDERED GRANTING defendants' motion to strike (doc. 15).

IT IS FURTHER ORDERED GRANTING defendants' motion to dismiss with prejudice (doc. 6). The clerk shall enter final judgment.

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[2] Although plaintiffs did not separately name Countrywide Home Loans as a defendant in this action, it is part of this action because it merged with Bank of America, N.A. in April 2009.

IT IS FURTHER ORDERED DENYING plaintiffs' motion to compel a proper accounting (doc. 13) and motion to compel production of documents (doc. 14) as moot, and **DENYING** plaintiffs' motion for sanctions (doc. 12).

DATED this 22nd day of May, 2013.

Frederick J. Martone

Frederick J. Martone
Senior United States District Judge