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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SIRRIUM,¹

No. 2:13-cv-0986-TLN-CMK

Plaintiff,

vs.

FINDING S AND RECOMMENDATIONS

JOSEPH R. TOMKINSON, et al.,

Defendants.

_____/

Plaintiff, proceeding pro se, brings this civil action. Pending before the court is plaintiff's complaint (Doc. 1). The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). The court is also required to screen complaints brought by litigants who have been granted leave to proceed in forma pauperis. See 28 U.S.C. § 1915(e)(2). Under these screening provisions, the court must dismiss a complaint or portion thereof if it: (1) is frivolous or malicious; (2) fails to state a claim upon which relief can be granted; or (3) seeks monetary relief from a defendant who is immune from such relief. See 28 U.S.C. §§ 1915(e)(2)(A), (B)

¹ Plaintiff is an individual. See Compl. at 1. None of the documents filed by plaintiff in this case reflect plaintiff's surname.

1 and 1915A(b)(1), (2). Moreover, pursuant to Federal Rule of Civil Procedure 12(h)(3), this court
2 must dismiss an action if the court determined that it lacks subject matter jurisdiction. Because
3 plaintiff, who is not a prisoner, has been granted leave to proceed in forma pauperis, the court
4 will screen the complaint pursuant to § 1915(e)(2).

5 I. PLAINTIFF'S COMPLAINT

6 Plaintiff brings this action to challenge the foreclosure of her home. She sets forth
7 six specific claims, including fraudulent concealment, breach of contract, violation of the
8 Uniform Electronic Transaction Act, California Civil Code §§ 1633.1-1633.17, slander,
9 fraudulent conveyance, and tax fraud. Plaintiff's complaint is somewhat vague, but it appears
10 that her underlying contention is that the defendants transferred or assigned her mortgage which
11 they had no legal right to do, and that such a transfer or assignment was done in a bundling
12 scheme. The defendants to this action include Joseph R. Tomkinson, CEO of Impac Funding
13 Corporation, Bill Beckmann, Present and CEO of MERS, Brian T. Moynihan, Present and CEO
14 of Bank of America Home Loans Servicing, LP, Recontrust Company, and Seth Waugh,
15 President and CEO of Deutsche Bank National Trust Company.

16 II. DISCUSSION

17 This is plaintiff's second attempt to challenge the foreclosure of her home. In
18 2012, plaintiff filed her first action in case number 2:12cv0543-LKK-CMK.² In the 2012 action,
19 plaintiff filed a complaint against Bank of America, Impac Funding Corporation, Deutsche Bank
20 National Trust Company, Countrywide Home Loans, Inc., and Mortgage Electronic Registration
21 Systems, Inc., alleging a variety of claims including violations of the Truth in Lending Act, the
22 Real Estate Settlement Procedures Act, California's Rosenthal Act, RICO, wrongful foreclosure,
23

24 ² The court may take judicial notice pursuant to Federal Rule of Evidence 201 of
25 matters of public record. See U.S. v. 14.02 Acres of Land, 530 F.3d 883, 894 (9th Cir. 2008).
26 Thus, this court may take judicial notice of state court records, see Kasey v. Molybdenum Corp. of America, 336 F.2d 560, 563 (9th Cir. 1964), as well as its own records, see Chandler v. U.S., 378 F.2d 906, 909 (9th Cir. 1967).

1 and fraud. Plaintiff's first two complaints in that action were dismissed on screening for failure
2 to state a claim, but plaintiff was provided an opportunity to amend the complaint in order to cure
3 the defects on some of the claims therein. On November 14, 2012, plaintiff filed her second
4 amended complaint. Prior to the court screening this complaint, the defendants filed a motion to
5 dismiss. On March 29, 2013, the defendants' motion to dismiss was granted, with no further
6 leave to amend, and the action was dismissed with prejudice.

7 Two months later, plaintiff filed the instant action also challenging the foreclosure
8 of her home. However, instead of the corporate defendants named in the prior case, plaintiff has
9 named the individual presidents and CEOs of the corporations named in her prior action. The
10 claims raised in this action differ to some degree, but the underlying challenge in both cases
11 remain the same: the defendants violated plaintiff's rights in relation to the mortgage and
12 foreclosure of her home. The claims raised in the instant case include fraudulent concealment,
13 breach of contract, slander, fraudulent conveyance, and tax fraud. The relief plaintiff is
14 requesting is to have the foreclosure set aside.

15 Two related doctrines of preclusion are grouped under the term "res judicata."
16 See Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 2171 (2008). One of these doctrines –
17 claim preclusion – forecloses "successive litigation of the very same claim, whether or not
18 relitigation of the claim raises the same issues as the earlier suit." Id. Stated another way,
19 "[c]laim preclusion. . . bars any subsequent suit on claims that were raised or could have been
20 raised in a prior action." Cell Therapeutics, Inc. v. Lash Group, Inc., 586 F.3d 1204, 1212 (9th
21 Cir. 2009). "Newly articulated claims based on the same nucleus of facts are also subject to a
22 res judicata finding if the claims could have been brought in the earlier action." Stewart v. U.S.
23 Bancorp, 297 F.3d 953, 956 (9th Cir. 2002). Thus, claim preclusion prevents a plaintiff from
24 later presenting any legal theories arising from the "same transactional nucleus of facts." Hells
25 Canyon Preservation Council v. U.S. Forest Service, 403 F.3d 683, 686 n.2 (9th Cir. 2005).

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1 The party seeking to apply claim preclusion bears the burden of establishing the
2 following: (1) an identity of claims; (2) the existence of a final judgment on the merits; and
3 (3) identity or privity of the parties. See Cell Therapeutics, 586 F.3d at 1212; see also
4 Headwaters, Inc. v. U.S. Forest Service, 399 F.3d 1047, 1052 (9th Cir. 2005). Determining
5 whether there is an identity of claims involves consideration of four factors: (1) whether the two
6 suits arise out of the same transactional nucleus of facts; (2) whether rights or interests
7 established in the prior judgment would be destroyed or impaired by prosecution of the second
8 action; (3) whether the two suits involve infringement of the same right; and (4) whether
9 substantially the same evidence is presented in the two actions. See ProShipLine, Inc. v. Aspen
10 Infrastructure Ltd., 609 F.3d 960, 968 (9th Cir. 2010). Reliance on the first factor is especially
11 appropriate because the factor is “outcome determinative.” Id. (quoting Mpoyo v. Litton Electro-
12 Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005)). As to privity of the parties, “privity . . . [arises]
13 from a limited number of legal relationships in which two parties have identical or transferred
14 rights with respect to a particular legal interest.” Headwaters, Inc. v. U.S. Forest Serv., 399 F.3d
15 1047, 1053 (9th Cir. 2005).

16 Usually, a defendant relying on res judicata or collateral estoppel as a defense
17 must plead it as an affirmative defense. Blonder–Tongue Laboratories, Inc. v. University of Ill.
18 Found., 402 U.S. 313, 350 (1971). However, “if a court is on notice that it has previously
19 decided the issue presented, the court may dismiss the action sua sponte, even though the defense
20 has not been raised,” Arizona v. California, 530 U.S. 392, 416 (2000), provided that the parties
21 have an opportunity to be heard prior to dismissal, Headwaters, Inc., 399 F.3d at 1055. “As a
22 general matter, a court may, sua sponte, dismiss a case on preclusion grounds ‘where the records
23 of that court show that a previous action covering the same subject matter and parties had been
24 dismissed.’ ” Id. at 1054-55 (quoting Evarts v. W. Metal Finishing Co., 253 F.2d 637, 639 n. 1
25 (9th Cir.1958)).

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1 Here, the undersigned finds collateral estoppel applies. As set forth above, this is
2 plaintiff's second action challenging the foreclosure of her home. The prior case was dismissed
3 with prejudice, constituting a final judgment on the merits. The parties are identical, or in privity,
4 as the named individuals in this action are the presidents and/or CEOs of the corporations named
5 in the prior action. The allegations alleged in the complaint in this case do not specify any wrong
6 doing by the individuals named, so it appears the alleged wrongs plaintiff complains about are
7 based on the actions of the companies in general not actually the individual officers. Naming the
8 individuals appears to simply be plaintiff's attempt to avoid the duplication of parties.

9 Finally, the claims alleged in this case arise out of the same transactional nucleus
10 of facts, namely the mortgage on plaintiff's property and the foreclosure thereon. Specifically, in
11 the prior action plaintiff identifies the 2007 refinancing and deed of trust, the 2011 notice of
12 default and trustee sale, the original grant deed recorded in 1993 and re-recorded in 2012.
13 Similarly, in this action plaintiff identifies the same 2007 refinancing and deed of trust, the 2011
14 notice of default and trustee sale, and the 1993/2012 recordings of the grant deed. While the
15 claims raised in the two actions differ in theory only, the underlying facts remain the same and
16 relate to the alleged infringement of the same rights, namely the way plaintiff was treated during
17 the refinancing and foreclosure of her home. This second action is simply plaintiff's attempt to
18 re-litigate claims that were, or could have been, brought in the prior action. In addition,
19 substantially the same evidence would be presented in the two actions, including the 2007
20 refinancing documents and deed of trust, and the 2011 notice of default, foreclosure and trustee
21 sale documentation.

22 Therefore, the undersigned finds this second action to be barred under res
23 judicata. Plaintiff will have an opportunity to be heard and to address this issue in any objections
24 to these findings and recommendation she files.

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1 objections. Failure to file objections within the specified time may waive the right to appeal.

2 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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4 DATED: October 27, 2015

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CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE

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