

United States District Court  
For the Northern District of California

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E-FILED on 3/2/12

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DON TIRADO,  
  
Plaintiffs,  
  
v.  
  
US BANK NATIONAL ASSOCIATION AS A  
CALIFORNIA CORPORATION, FCI  
LENDER SERVICES Inc., AGENT, AS A  
CALIFORNIA CORPORATION, DSL  
SERVICE COMPANY, TRUSTEE, AS A  
CALIFORNIA CORPORATION,  
  
And Does 1-10,  
  
Defendants.

No. 12-cv-00122-RMW

ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS WITHOUT LEAVE  
TO AMEND

[Re Docket No. 16]

Plaintiff filed the instant action alleging claims related to the foreclosure of a residential property. Defendants moved to dismiss for failure to state a claim. Plaintiff did not oppose the motion, nor did he appear at oral argument. Having considered the papers submitted, and for the reasons set forth below, the court grants defendants' motion to dismiss without leave to amend.

**I. BACKGROUND**

On June 13, 2007, plaintiff obtained a loan in the sum of \$1,000,000 (“Subject Loan”) secured by a deed of trust (“DOT”) encumbering residential property in Saratoga, California (“Subject Property”). See Dkt. No. 17 (RJN), Ex. 1. The DOT identifies defendant Downey Savings

1 and Loan Association, F.A. (“Downey Savings”) as the lender and beneficiary, defendant DSL  
2 Service Company (“DSL”) as the trustee, and plaintiff as borrower. *See id.* On November 21, 2008,  
3 the Office of Thrift Supervision closed Downey Savings and appointed the Federal Deposit  
4 Insurance Corporation (“FDIC-R”) as receiver for that financial institution. Concurrent with this  
5 appointment, defendant U.S. Bank acquired nearly all of Downey Savings' assets from the FDIC-R.<sup>1</sup>

6 Downey Savings sent a Notice of Intent to Foreclose to plaintiff on April 6, 2009. *See* Dkt.  
7 No. 1, Ex. 1 (compl). One week later, U.S. Bank sent plaintiff a letter stating, “This is to  
8 acknowledge receipt of your correspondence requesting assistance with your loan.” *See id.* On May  
9 11, 2009, plaintiff received a Notice of Default. *See id.* Subsequently, a Notice of Default and  
10 Election to Sell issued in connection with the DOT and was recorded on May 12, 2009 with the  
11 Santa Clara County Recorder’s Office. *See* Dkt. No. 17 (RJN), Ex. 2. A Notice of Trustee’s Sale  
12 (“NOTS”) was recorded on August 18, 2009. *See* Dkt. No. 17 (RJN), Ex. 3. A second NOTS was  
13 recorded on December 6, 2010. *See id.*, Ex. 4. According to the NOTS, the amount of the unpaid  
14 balance and other charges under the DOT was \$1,153,215.93. *See id.*

15 The Subject Property was sold at a trustee’s sale on January 4, 2011, and a Trustee’s Deed  
16 Upon Sale (“TDUS”) was recorded on January 14, 2011. *See id.*, Ex. 5. The TDUS indicates that  
17 U.S. Bank, as successor in interest to the Federal Deposit Insurance Corporation as receiver for  
18 Downey Savings, took record title to the Subject Property. *See id.*

19 On December 21, 2010 plaintiff filed a pro se complaint in Santa Clara County Superior  
20 Court, Case No. 1-10-CV-190289, asserting seventeen different claims arising out of the foreclosure  
21 of the Subject Property. *See* Dkt. No. 17 (RJN), Ex. 6. The action was removed to the United States  
22 District Court for the Northern District of California, Case No. 5:11-CV-00322-EJD (“Previous  
23 Action”). *See* Dkt. No. 17 (RJN), Ex. 7. On January 28, 2011 defendants filed a motion to dismiss  
24 the complaint. *See id.* On April 11, 2011, and again on June 24, 2011, plaintiff filed a motion for  
25 leave to file amended complaint. *See id.* On June 29, 2011, the court denied plaintiff’s motion for  
26 leave to file amended complaint. *See id.* On December 5, 2011, prior to the court’s ruling on

27 <sup>1</sup> This information is taken from the FDIC-R’s official website. The court takes judicial notice of the  
28 information contained on such websites pursuant to Fed. R. Evid. 201(b)(2). *See Higginbottom v. U.S.*  
*Bancorp*, No. 10-CV-04593-LHK, 2011 WL 1558681, at \*3 n. 6 (N.D. Cal. Apr. 25, 2011) (taking  
judicial notice of information from the FDIC’s official website).

1 defendants' unopposed motion to dismiss, the parties agreed to a stipulated dismissal with prejudice  
2 ("Joint Stipulation"). *See* Dkt. No. 17 (RJN), Ex. 8. On December 5, 2011, the court executed an  
3 order dismissing the case. *See* Dkt. No. (RJN), Ex. 9.

4 Plaintiff, again proceeding pro se, filed the instant action, Case No. 111CV214226, on  
5 December 5, 2011 in San Jose Superior Court. *See* Dkt. No. 1, Ex. 1. The complaint seeks a  
6 Temporary Restraining Order preventing sale of the Subject Property, and essentially alleges claims  
7 for fraud and wrongful foreclosure. *See id.* The action was once again removed to the United States  
8 District Court for the Northern District of California, on January 6, 2012. *See id.* On January 27,  
9 2012 defendants filed a motion to dismiss, along with a supporting request for judicial notice.<sup>2</sup> *See*  
10 Dkt. Nos. 16-17. Plaintiff filed no opposition.

## 11 II. DISCUSSION

### 12 Res Judicata

13 Defendants first argue that the instant action is barred by res judicata. The defense of res  
14 judicata can be raised by a Rule 12(b)(6) motion "when all relevant facts are shown by the court's  
15 own records, of which the court takes notice." *Ezike v. Mittal*, No. C 08-1867 SBA, 2009 WL  
16 506867, at \*6 (N.D. Cal. Feb. 27, 2009) (quoting *Day v. Moscow*, 955 F. 2d. 807, 811 (2nd Cir.  
17 1992); *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (affirming dismissal pursuant to Rule  
18 12(b)(6) on grounds of res judicata because the district court did not consider any disputed facts);  
19 *MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (taking judicial notice of court  
20 documents, i.e., a motion to dismiss filed in a court action).

21 "Res judicata, also known as claim preclusion, bars litigation in a subsequent action of any  
22 claims that were raised or could have been raised in the prior action." *Western Radio Servs. Co. v.*

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24 <sup>2</sup> Pursuant to defendant's request, the court takes judicial notice of the following documents: (1) the  
25 Deed of Trust, recorded on June 22, 2007; (2) the Notice of Default and Election to Sell, recorded on  
26 May 12, 2009; (3) the Notice of Trustee's Sale, recorded on August 18, 2009; (4) the Notice of Trustee's  
27 Sale, recorded on December 6, 2010; (5) the Trustee's Deed Upon Sale, recorded on January 14, 2011;  
28 (6) the civil complaint for Case No. 1-10-CV-190289, filed by plaintiff on or around December 21,  
2010; (7) the docket for Case No. 5:11-CV-00322-EJD; (8) the Stipulation to Dismiss Complaint with  
Prejudice for Case No. 5:11-CV-00322-EJD, filed December 5, 2011; and (9) the Stipulation and Order  
to Dismiss Case with Prejudice for Case No. 5:11-CV-00322-EJD, executed and filed on December 6,  
2011. *See, e.g., Western Federal Sav. & Loan Ass'n v. Heflin Corp.*, 797 F. Supp. 790, 792 (N.D. Cal.  
1992) (courts may take judicial notice of publicly recorded documents, including deeds of trust and  
court filings).

1 *Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997). “The doctrine is applicable whenever there is (1) an  
2 identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.”  
3 *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708 (9th Cir. 2001) (citing *Western Radio*  
4 *Servs. Co.*, 123 F.3d at 1192).

5 In this case, the parties to both the instant action and previous federal action are identical. In  
6 addition the court finds an identity of claims. “The central criterion in determining whether there is  
7 an identity of claims between the first and second adjudications is ‘whether the two suits arise out of  
8 the same transactional nucleus of facts.’” *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir.  
9 2000) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).

10 Although the previous action alleged seventeen claims while the instant action alleges, in essence,  
11 only fraud and wrongful foreclosure, both actions “clearly arise from the same transactional nucleus  
12 of facts” as those asserted in the previous action. *Id.* Both sets of claims are predicated on the  
13 foreclosure of the Subject Property and allege misconduct by defendants related to either their  
14 issuance of the subject loan or the manner in which they attempted to serve notice of foreclosure. In  
15 fact, the argument that defendants have failed to show proof of standing was made verbatim in the  
16 previous action. Although the current action also alleges actual fraud, and wrongful foreclosure,  
17 these are “grounds for recovery which could have been asserted, whether they were or not, in a prior  
18 suit between the same parties ... on the same cause of action. *Owens v. Kaiser Foundation Health*  
19 *Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (citing *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th  
20 Cir. 1998)). As defendants correctly note, “these claims all relate to the foreclosure proceedings on  
21 the same property at issue in the previous matter.” *See* Dkt. No. 16.

22 Additionally, none of the events underlying the instant claims took place after entry of  
23 judgment in the previous action. A claim arising after an entry of judgment is barred unless it is  
24 based on facts that occurred after the final judgment. *See Frank*, 216 F.3d 851 (citing *Lawlor v.*  
25 *Nat’l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955)). In *Frank*, the court allowed additional Title VII  
26 claims asserted by the plaintiffs in a second action because they were based on continued policies of  
27 discrimination that remained in place after the initial entry of judgment. By contrast, plaintiff here  
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1 filed the present action on December 5, 2011, the very day the stipulation order in the previous  
2 action was signed, demonstrating that there is no new factual basis for plaintiff's claims.

3 Moreover, res judicata is appropriate although plaintiff now seeks a different remedy.  
4 Plaintiff's present action seeks a temporary restraining order whereas the previous suit requested the  
5 court to release security interests in plaintiff's property and award "treble damages." See Dkt. No. 17  
6 (RJN), Ex. 6. Res judicata bars plaintiff's claim "even though plaintiff is prepared in the second  
7 action to seek remedies or forms of relief not demanded in the first action." Restatement (Second) of  
8 Judgments § 24 (1982); see also *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 868 (9th  
9 Cir. 1995). In *Codispoti*, the court barred a second claim seeking treble damages under RICO for the  
10 same conduct that had prompted an earlier action seeking an injunction. The court is faced with  
11 almost the same situation here. Plaintiff has filed a second action that seeks a different form of relief  
12 based upon the same foreclosure proceedings, the same loan, and the same conduct on behalf of  
13 defendants. Because the claims and form of remedy in the present action could have been raised in  
14 the earlier action, res judicata bars plaintiff's case.

15 Lastly, the stipulation, signed by both plaintiff and defendants, followed by the dismissal  
16 with prejudice constitutes a valid final judgment on the merits for purposes of res judicata. Fed. R.  
17 Civ. P 41 (a)(1)(B) (stipulation of dismissal "operates as an adjudication on the merits");  
18 *Headwaters, Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1052 (9th Cir. 2005); (citing *Concha v.*  
19 *London*, 62 F.3d 1493, 1507-08 (9th Cir. 1995) ("We have held that a stipulated dismissal of an  
20 action with prejudice in a federal district court generally constitutes a final judgment on the merits  
21 and precludes a party from reasserting the same claims in a subsequent action in the same court.")).

22 Accordingly, because the complaint is barred by res judicata, defendants' motion to dismiss  
23 is granted. Given that any amendment would be futile because plaintiff's complaint clearly arises  
24 from the same nucleus of facts as the previous action, dismissal is granted without leave to amend.

### 25 III. ORDER

26 For the foregoing reasons, the court grants defendants' motion to dismiss without leave to  
27 amend. The clerk shall close the file.

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DATED: March 2, 2012

*Ronald M. Whyte*

RONALD M. WHYTE  
United States District Judge