NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1677

FREDERICK W. STRICKLAND AND CHERYL D. STRICKLAND

VERSUS

AMERIQUEST MORTGAGE COMPANY

Judgment Rendered: JUL 18 2012

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket Number 114,109

The Honorable Elizabeth P. Wolfe, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Kuhn, J. concurs & assigns reasons.
Guidry, J. concurs.

WHIPPLE, J.

This matter is again before us on appeal by the defendant/plaintiff-in-reconvention, Ameriquest Mortgage Company (hereinafter "Ameriquest"), from a judgment of the trial court maintaining exceptions of res judicata and no right of action filed by plaintiffs/defendants-in-reconvention, Frederick and Cheryl Strickland ("the Stricklands"), and dismissing Ameriquest's reconventional demand against the Stricklands with prejudice. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

As set forth in our previous opinion rendered in this matter, this case originated as a suit to set aside an invalid mortgage on property owned by Frederick and Cheryl Strickland, which they sought to cancel through this litigation. In March 2005, the Stricklands' son, Stephen Strickland, donated to them an undeveloped tract of land in Livingston Parish ("the Bull Run property"). Thereafter, in June 2005, the Stricklands donated to Stephen a developed lot in Livingston Parish ("Lot 15-A"). The following month, in July 2005, Stephen and his wife, Mary Ellen, borrowed $60,000.00 from Ameriquest, to be secured by a mortgage on Lot 15-A. However, although the body of the mortgage prepared by Ameriquest correctly identified the collateral property for the loan as Lot 15-A, Ameriquest attached the plat signed by Stephen describing the Bull Run property (then owned by the Stricklands) to the mortgage, rather than the plat describing Lot 15-A (then owned by Stephen).

After Ameriquest refused to release the mortgage, the Stricklands filed the instant suit for declaratory judgment, wherein they sought a judicial declaration and judgment ordering that the mortgage placed by Ameriquest on their property was absolutely null, given that: (1) they were not parties to the

loan transaction between their son (and his wife) and Ameriquest and (2) they did not consent to the mortgage. Thus, the Stricklands sought judgment ordering the mortgage erased from the mortgage records as an absolute nullity.

Ameriquest filed an answer and reconventional demand against the Stricklands, and a third-party demand against Stephen and his then-wife, Mary Ellen. Ameriquest acknowledged that while the body of the mortgage expressly described Lot 15-A, the attached plat signed by Stephen described the Stricklands' Bull Run property. However, Ameriquest averred that Stephen and Mary Ellen, upon realizing that the loan to them from Ameriquest was seemingly unsecured, had subsequently confected a sham loan, mortgage and *dation en paiement* of Lot 15-A to the Stricklands, to the detriment of Ameriquest's rights and in an attempt to prevent Ameriquest from seizing Lot 15-A to satisfy the earlier unpaid loan Stephen and Mary Ellen had obtained from Ameriquest.

Specifically, Ameriquest averred that less than six months after Stephen and Mary Ellen borrowed the $60,000.00 sum from Ameriquest, which they had agreed to secure by a mortgage on Lot 15-A, they also purportedly borrowed $50,000.00 from the Stricklands for which they granted the Stricklands a mortgage on Lot 15-A. Ameriquest alleged in its reconventional and third-party demand, however, that the mortgage granted by Stephen and Mary Ellen was an absolute or relative simulation and should be set aside in that it did not express the true intent of the parties. According to Ameriquest, Stephen and Mary Ellen never paid the Stricklands anything on that loan. Further, approximately two months later, on March 6, 2006, Stephen and Mary Ellen made their last loan payment to Ameriquest and did not make any further payments on the commercial loan thereafter. Then, in April of 2006, Stephen and Mary Ellen *dationed* Lot 15-A to the Stricklands in satisfaction of the

purported $50,000.00 loan. According to Ameriquest, on the same day that the *dation en paiement* was recorded (and Lot 15-A consequently was no longer in Stephen's name), the Stricklands' counsel, who was alleged to have supplied the $50,000.00 loan funds given by the Stricklands to Stephen, wrote to Ameriquest and demanded that the mortgage on the Bull Run property be released, contending that Stephen and Mary Ellen had no authority to grant a mortgage on this property, as Stephen did not own it at the time the mortgage in favor of Ameriquest was confected.

In sum, through its reconventional and third party demand, Ameriquest averred that the mortgage on Lot 15-A granted to the Stricklands and the *dation en paiement* transferring Lot 15-A to the Stricklands were absolute or relative simulations and, thus, that Lot 15-A was still owned by Stephen. Accordingly, Ameriquest sought judgment annulling the mortgage and the *dation en paiement* of Lot 15-A to the Stricklands as sham transactions entered into in derogation of Ameriquest's rights and interests.

The Stricklands filed a motion for summary judgment, seeking cancellation of the Ameriquest mortgage on both properties. Finding that the Stricklands were entitled to judgment in their favor as a matter of law, the trial court rendered judgment, ordering the release of all encumbrances by Ameriquest against both Lot 15-A and the Bull Run property, and dismissed, with prejudice, Ameriquest's reconventional demand against the Stricklands. However, the judgment did not address or dispose of Ameriquest's third-party demand against Stephen and Mary Ellen Strickland.

On Ameriquest's appeal of the trial court's summary judgment, this court affirmed the portion of the summary judgment annulling the mortgage affecting Lot 15-A, but reversed the portion of the judgment dismissing Ameriquest's reconventional demand against the Stricklands. See Strickland v. Ameriquest

Mortgage Company, 2009-0463 (La. App. 1st Cir. 10/23/09)(unpublished opinion).

While the earlier appeal was proceeding, on July 10, 2008, Ameriquest filed a motion for summary judgment against third-party defendant, Stephen Strickland, seeking judgment against him for the outstanding indebtedness in the amount of $77,199.84 as of July 1, 2008, and increasing at the rate of $12.15 per diem, until paid, as well as "any other relief to which Ameriquest may be entitled."[1] The matter was heard before the trial court on September 29, 2008. Stephen did not appear at the hearing personally or through counsel. After Ameriquest presented its case in chief and introduced evidence, the trial court rendered summary judgment in favor of Ameriquest as prayed for in its third-party demand against Stephen. A written judgment in conformity with the trial court's ruling was signed on September 29, 2008, in favor of Ameriquest and against Stephen (alone) in the principal sum of $78,305.49 bearing the contractual interest rate of 7.6% and to accrue at the rate of $12.15 per diem until paid. The judgment further ordered that Stephen was responsible for costs and attorneys fees in the amount of 25% of the principal amount awarded, or $19,576.37, for a total award of $97,881.86, i.e., the entire amount due on the loan, with interest thereafter continuing to accrue at the above stated rate. This judgment was designated as final for purposes of immediate appeal, but Stephen did not appeal. According to Ameriquest's brief, Ameriquest then began collecting on the judgment through a garnishment of Stephen's wages.

Thereafter, on November 12, 2010, the Stricklands filed peremptory exceptions of res judicata and no right of action herein, contending that since the judgment against Stephen was for the full amount of the loan, was designated as

[1]The record and briefs suggest that Stephen and Mary Ellen were divorced at this point in the proceedings. In any event, Ameriquest did not proceed against Mary Ellen Strickland.

"final," (and indeed, had become final when Stephen failed to appeal the judgment), all causes of action or claims that Ameriquest may have had at the time of the final judgment regarding or arising out of the Ameriquest loan transaction "have merged with and have been extinguished by said judgment." The Stricklands further contended that Ameriquest had no right of action against them, in that allowing Ameriquest to satisfy its judgment on the outstanding loan to Stephen by seizing the Lot 15-A property belonging to the Stricklands would allow it to collect on the Ameriquest loan twice, which would constitute an impermissible "double recovery." The Stricklands contended that Ameriquest's claims against them were meritless and that "since the Lot 15-A property would be paramount in the adjudication of that matter, this current dispute [i.e., Ameriquest's reconventional demand against the Stricklands,] regarding the *dation* of that property is null and should be dismissed."

Moreover, in order to prove the allegations against the Stricklands in its reconventional demand, (i.e., that Stephen and Mary Ellen, upon realizing that the loan to Ameriquest was potentially unsecured, had confected a $50,000.00 sham loan, mortgage, and *dation en paiement* of Lot 15-A to the Stricklands, to prevent Ameriquest from seizing Lot 15-A to satisfy the unpaid Ameriquest loan, using funds provided to the Stricklands by their attorney and relative,) Ameriquest propounded discovery to the Stricklands to determine the source of the $50,000.00 funds. When the trial court refused to order the Stricklands to disclose this information, Ameriquest filed a writ application to this court. On July 21, 2010, this court issued a writ action, stating that "relator has adequately explained how the requested information can assist the trier of fact in determining the merit's of relator's theory of recovery," and ordered that Frederick Strickland reply to all outstanding discovery requests. See Strickland v. Ameriquest Mortgage Company, 2010 CW 0624 (La. App. 1st Cir.

7/21/2010). The Stricklands ultimately answered Ameriquest's interrogatories acknowledging that they obtained the $50,000.00 used to confect the mortgage and loan of Lot 15-A to Stephen and Mary Ellen by borrowing "funds from [their] nephew, Sherman Mack." Ameriquest thereafter subpoenaed Frederick Strickland's bank records, which identified and confirmed the deposit of $50,000.00 from their attorney in January of 2006, from a personal checking account at Community Bank held in the name of the attorney and his wife. However, when Ameriquest then subpoenaed their Community Bank personal records, the attorney and his spouse filed a motion to quash, objecting to Ameriquest's subpoena and subpoena duces tecum of their financial records on the basis that the records were protected from discovery pursuant to the attorney/client privileges set forth in LSA-C.C.P. art. 1424 and LSA-C.E. art. 506.

The Sticklands' peremptory exceptions of res judicata and no right of action, as well as the attorney's motion to quash, were set for hearing before the trial court on February 14, 2011. At the conclusion of the hearing, the trial court maintained the exceptions of res judicata and no right of action and dismissed Ameriquest's claims against the Stricklands. The court then ruled that the motion to quash filed by the attorney and his wife accordingly was moot. On March 10, 2011, a written judgment maintaining the exceptions and dismissing, with prejudice, Ameriquest's reconventional demand against the Stricklands was signed by the trial court. Ameriquest then filed the instant suspensive appeal.[2]

[2]Although a rule to show cause was issued by this court noting that the March 10, 2011 judgment maintaining the exceptions and dismissing Ameriquest's reconventional demand appeared to be a partial judgment without the proper designation of finality required by LSA-C.C.P. 1915, on further review, this court ultimately maintained the appeal, finding that although the judgment dismissed Ameriquest's reconventional demand against Frederick and Cheryl Strickland, the judgment did not dismiss Stephen or Mary Ellen Strickland from the suit. Specifically, because the judgment dismissed the suit as to less than all of the parties, it was deemed to be a partial final judgment subject to an immediate appeal without the need for the trial court's certification of such. See LSA-C.C.P. arts. 1911 and 1915(A)(1).

On appeal, Ameriquest contends that the trial court erred in maintaining the Stricklands' exception of res judicata,[3] and in failing to rule on (and deny) the attorney's motion to quash.[4]

DISCUSISION

Assignment of Error Number One

Res judicata bars relitigation of a subject matter arising from the same transaction or occurrence of a previous suit. Avenue Plaza, L.L.C. v. Falgoust, 96-0173 (La. 7/2/96), 676 So. 2d 1077, 1079; LSA-R.S. 13:4231. It promotes judicial efficiency and final resolution of disputes. Terrebonne Fuel & Lube, Inc. v. Placid Refining Company, 95-0654, 95-0671 (La. 1/16/96), 666 So. 2d 624, 635.

Res judicata is governed by LSA-R.S. 13:4231, which provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.

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[3]The March 10, 2011 judgment before us on appeal maintains the Stricklands' exceptions of res judicata and no right of action. It appears that, in sum, the Stricklands argue that since the September 29, 2008 judgment against Stephen is final, res judicata applies to bar any subsequent claims by Ameriquest, and that Ameriquest has *no right* to proceed. The Stricklands failed, however, to make any separate argument as to the exception of no right of action in their supplemental memorandum given that the underlying basis asserted for both exceptions was the same. Cf. Nelson v. Wiseman, 2006-0048, p. 2, n.1 (La. App. 1st Cir. 11/3/06)(unpublished opinion).

[4]Although a separate judgment was also signed on March 10, 2011, disposing of Ameriquest's motion to quash as moot, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory rulings, such as on motions to quash, which are prejudicial to him or her, in addition to review of the final judgments. Ghassemi v. Ghassemi, 2007-1927 (La. App. 1st Cir. 10/15/08), 998 So. 2d 731, 750 n.36, writs denied, 2008-2674, 2008-2675 (La. 1/16/09).

> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The chief inquiry is whether the second action asserts a cause of action that arises out of the transaction or occurrence that was the subject matter of the first action. Avenue Plaza, L.L.C. v. Falgoust, 676 So. 2d at 1080. However, the Louisiana Supreme Court has also emphasized that all of the following elements must be satisfied in order for res judicata to preclude a second action: (1) the first judgment is valid and final; (2) the parties are the same; (3) the cause or causes of action asserted in the second suit existed at the time of final judgment in the first litigation; and (4) the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation. Burguieres v. Pollingue, 2002-1385 (La. 2/25/03), 843 So. 2d 1049, 1053.

The burden of proving the facts essential to sustaining the objection is on the party pleading the objection. Union Planters Bank v. Commercial Capital Holding Corporation, 2004-0871 (La. App. 1st Cir. 3/24/05), 907 So. 2d 129, 130. If any doubt exists as to its application, the exception raising the objection of res judicata must be overruled and the second lawsuit maintained. Denkmann Associates v. IP Timberlands Operating Company, Limited, 96-2209 (La. App. 1st Cir. 2/20/98), 710 So. 2d 1091, 1096, writ denied, 98-1398 (La. 7/2/98), 724 So. 2d 738. The concept should be rejected when doubt exists as to whether a plaintiff's substantive rights actually have been previously addressed and finally resolved. Patin v. Patin, 2000-0969 (La. App. 1st Cir. 6/22/01), 808 So. 2d 673, 676.

When, as here, an objection of res judicata is raised before the case is submitted and evidence is received on the objection, the standard of review on

appeal is traditionally manifest error. Leray v. Nissan Motor Corporation in U.S.A., 2005-2051 (La. App. 1st Cir. 11/3/06), 950 So. 2d 707, 710. However, the res judicata effect of a prior judgment is a question of law that is reviewed de novo. Pierrotti v. Johnson, 2011-1317 (La. App. 1st Cir. 3/19/12), ___ So. 3d ___, ___. Thus, in the instant case, we are required to conduct a *de novo* review to determine if the trial court was legally correct in sustaining the res judicata exception.

In support of their exception of res judicata, the Stricklands contend that on September 29, 2008, judgment was signed in favor of Ameriquest and against Stephen Strickland for the principal sum due on the defaulted loan. Thus, the Stricklands contend, any and all causes of action Ameriquest may have had at the time of the judgment against Stephen regarding or arising out of the "Ameriquest loan transaction" have merged with and have been extinguished by the September 29, 2008 judgment. The Stricklands further contend that "since the Lot 15-A property would be paramount in the adjudication of that matter, this current dispute regarding the *dation* of that property is null and should be dismissed post haste."[5]

Ameriquest concedes that the first and third elements of res judicata are satisfied. As to the first element, Ameriquest contends that the September 29, 2008 judgment in favor of Ameriquest and against Stephen for the principal sum of the loan is valid and final. Further, as to the third element, Ameriquest does not dispute that the facts giving rise to the present cause of action, i.e., Stephen Strickland's April 14, 2006 transfer (*dation*) of property to his parents, existed at the time that Ameriquest obtained the September 29, 2008 judgment against Stephen.

[5]To the extent that the Stricklands contend that the September 29, 2008 judgment against Stephen has res judicata effect because it was designated as "final" for purposes of an immediate appeal, we reject that argument as meritless.

However, as Ameriquest notes, we must also consider the second and fourth elements of res judicata. The second element of res judicata that must be satisfied for res judicata to preclude a second action is that the parties must be the same. This requirement does not mean that the parties must have the same physical identity, but that the parties must appear in the same capacity in both suits. Burguieres v. Pollingue, 843 So. 2d at 1054. The September 29, 2008 judgment was rendered in favor of Ameriquest and against Stephen Strickland. Undisputedly, Frederick and Cheryl Strickland were not parties to the events giving rise to that judgment, i.e., the obtaining of a loan from Ameriquest by Stephen (and his wife) and Stephen's subsequent failure to pay same, nor were they parties to that judgment. Nonetheless, the Stricklands filed the exception of res judicata in response to the reconventional demand asserted against them by Ameriquest. In sum, the Stricklands are contending that the September 29, 2008 judgment has res judicata effect barring any future claims by Ameriquest, even though they were not named or involved in the prior judgment. On *de novo* review, we are constrained to agree with Ameriquest that the second element of res judicata is not established herein.

We likewise must find that the fourth element of res judicata, i.e., that the cause or causes of action asserted in the second suit arose out of the transaction or occurrence that was the subject matter of the first litigation, such that further litigation of such issues are precluded by the earlier judgment, has not been established. The cause of action now prosecuted by Ameriquest seeks to set aside the April 2006 *dation* of Lot 15-A from Stephen and Mary Ellen to the Stricklands, which Ameriquest alleges is purely a sham. Ameriquest notes that the September 29, 2008 judgment against Stephen on the Ameriquest loan was rendered in Ameriquest's claim or suit on a note, i.e., based on Stephen's execution of a July 15, 2005 promissory note. Thus, Ameriquest argues, two

entirely different underlying transactions are at issue, in that Ameriquest's claims against the Stricklands (and Stephen and Mary Ellen) are for revocation of a subsequent (alleged) sham transacton, i.e., the *dation*. On the record before us, we must agree.

Moreover, as pointed out by Ameriquest, the rendition of the earlier judgment in favor of Ameriquest and against Stephen Strickland on his indebtedness can have no res judicata effect on Ameriquest's reconventional demand against the Stricklands as anteriority of the debt and insolvency of the debtor are prerequisites to the revocatory action. LSA-C.C. art. 2036, Comment (f). Thus, Ameriquest correctly contends that the September 28, 2008 judgment on the July 15, 2006 promissory note does not bar Ameriquest from attacking the April 2006 transfer (*dation*) of property and has no res judicata effect on the instant claims. Instead, if we followed the Stricklands' argument to its logical conclusion, any creditor who obtained a money judgment against a debtor would be thereafter precluded from attacking the debtor's efforts to put his assets out of reach of that creditor. Such a result is not warranted in law. Thus, on review, the fourth element of res judicata likewise is not satisfied herein.

Accordingly, we find merit to Ameriquest's first assignment of error.

Assignment of Error Number Two

Ameriquest next contends that the trial court erred in finding that the motion to quash filed by the Stricklands' attorney was rendered moot by the court's other rulings. Ameriquest requests that this court consider the merits of the motion to quash and render judgment denying it.

In oral reasons for judgment, the trial court stated:

> I'm going to grant the peremptory exception of res judicata and no right of action. That will make your motion to quash the subpoena moot.

* * * * *

> [The motion to quash is] moot. That would be moot as the peremptory exception and no right of action was granted.

As a reviewing court, we are not inclined to render judgment where the trial court has not addressed the merits of a motion or issue. Accordingly, we vacate the trial court's determination that the motion to quash was rendered moot and remand this matter for further proceedings, including a ruling by the trial court on the merits of the motion.

CONCLUSION

For the above and foregoing reasons, the March 10, 2011 judgment of the trial court, dismissing Ameriquest's reconventional demand against the Stricklands and pretermitting disposition of the motion to quash, is hereby reversed, and the matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against the plaintiffs/defendants-in-reconvention/appellees, Frederick and Cheryl Strickland.

REVERSED AND REMANDED.

FREDRICK W. STRICKLAND AND CHERYL D. STRICKLAND

VERSUS

AMERIQUEST MORTGAGE COMPANY

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011 CA 1677

KUHN, J., concurring.

While I agree with the majority's opinion, I write separately to point out that the record is devoid of evidence to support many of the statements made in the brief. Specifically, this record contains no deposition testimony of Stephen's ex-wife. And a sworn statement of Stephen's ex-wife, which was taken without notice to Stephen or plaintiffs, is hearsay, of questionable reliability, and was never filed into evidence. Nevertheless, references to comments by the ex-wife are set forth in brief. Although there has been no evidence adduced on the merits of the alleged simulation, *i.e.*, no witnesses have been called or cross-examined, a reading of the briefs suggests differently. Additionally, the parties have cluttered the record with memoranda discussing facts for which there is no testimony or duly-adduced evidentiary support. Thus, I believe the parties have violated La. URCA Rule 2-12.4, which provides in relevant part:

> The brief of the appellant or relator shall set forth the jurisdiction of the court, a concise statement of the case, the ruling or action of the trial court thereon, a specification or assignment of alleged errors relied upon, the issues presented for review, *an argument confined strictly to the issues of the case*, free from unnecessary repetition, giving accurate citations of the pages of the record and the authorities cited, and a short conclusion stating the precise relief sought. ...
>
> *The argument* on a specification or assignment of error in a brief *shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error.* The court may disregard the argument on that error in the event suitable reference to the record is not made. ...

> *The language used in the brief shall be courteous, free from vile, obscene, obnoxious, or offensive expressions, and free from insulting, abusive, discourteous, or irrelevant matter or criticism of any person, class of persons or association of persons, or any court, or judge or other officer thereof, or of any institution.* Any violation of this Rule shall subject the author, or authors, of the brief to punishment for contempt of court, and to having such brief returned. (Emphasis added.)

The obvious acrimony between the attorneys for the parties is apparent both from briefs and the hostile back-and-forth memoranda. I urge they proceed more cautiously and mindful of the professionalism standards required of attorneys or they could risk more severe sanctions, including those permitted by the Uniform Rules of the Courts of Appeal.