

No. S206021
Court of Appeal Nos. B224995 & B237562
Santa Barbara Super. Ct. No. 1381828 (related to No. 1340786)

SUPREME COURT
FILED

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Deputy

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

DOUGLAS GILLIES,

Plaintiff and Appellant,

v.

CALIFORNIA RECONVEYANCE CO.,

Defendant and Respondent

After a Decision By The Court of Appeal Second Appellate District, Division Six

REPLY

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I. INTRODUCTION

A complaint was filed, a demurrer was sustained without leave to amend, and the action was dismissed at the initial hearing in *Gillies I*. The decision resulted from a demurrer, not a nonsuit, a summary judgment, or a directed verdict. Plaintiff's only court appearance resulted in a dismissal. Then the court of appeal in *Gillies II* articulated a new doctrine of res judicata.

On November 8, 2012, CRC recorded a third Notice of Trustee's Sale on Appellant's property. For the third time, CRC deliberately misspelled the Trustor's first name as Dougles instead of Douglas, so that it cannot be located by searching the Santa Barbara County Grantor-Grantee Index. CRC persists in misleading the public, and now acts with the blessing of the Second District Court of Appeal.

II. PROCEDURAL HISTORY

Plaintiff's original complaint alleged that CRC did not record a Notice of Default. Defendants attached a recorded NOD to their demurrer and the judge sustained the demurrer without leave to amend on the grounds that a NOD had been recorded. The Court of Appeal affirmed.

Plaintiff filed a new action alleging that the NOD recorded by

CRC misspelled his name as trustor, such that nobody could find it in the County Grantor-Grantee Index. Once again, the judge sustained defendants' demurrer without leave to amend. The Court of Appeal affirmed, stating, "Res judicata bars re-litigation not only of claims that were determined in the prior action, but claims that could have been raised in the prior action. In so doing, the Second District, Division 6 applied the res judicata standard applicable to nonsuits.

CRC asserts in its Answer to Petition for Review that the trial court "previously provided Plaintiff with leave to amend" in *Gillies I*. That statement is not true. There was only one hearing and one order in *Gillies I*. The demurrer was sustained without leave to amend (CT 209).

With respect to indexing, CRC argues, "this issue was considered in the Court of Appeal's decision in the *Gillies I Action*." That is not true. The Court of Appeal did not address constructive notice and indexing issues raised by the misspelled name on the Deed of Trust, the NOD, and the NOTS in *Gillies I*.

III. THE COURT OF APPEAL HAS SUBSTANTIALLY EXPANDED THE DOCTRINE OF RES JUDICATA

The Court of Appeal's decision in *Gillies I* states, "Gillies points out that the notice of default misspells his first name

Douglas, instead of the correct '*Douglas*.' But no reasonable person would be confused by such a minor error. Gillies last name is spelled correctly and the notice contains the street address of the property as well as the assessor's parcel number. Moreover, Gillies does not contest that he received the notice." (CT 672).

The word *index* was not used, the limitations of the Grantor-Grantee Index were not discussed, and the likelihood that anyone other than the parties could find the Deed of Trust and the three foreclosure notices in the Grantor-Grantee index was not considered.

Appellant argued in his Opening Brief on page 3, "the NOD did not comply with Cal. Civ. Code §2924, which requires that a NOD state the name of the trustor (CT 537:1-13)." The only reference in the Court of Appeal's decision to §2924 in *Gillies I* was this: "The trial court properly sustained the demurrer to Gillies's first cause of action. The complaint alleged the notice of default was not recorded as required by section 2924, subdivision (a)(1). The trial court properly took judicial notice that the notice of default was recorded on August 13, 2009." (CT 669).

Therefore, the Court of Appeal limited its review of §2924 to the fact that a notice of default had been recorded while disregarding the defect raised by Appellant that the notice did not

state the trustor's name.

CRC seems to argue that neglecting to record a Notice of Default raises the same issue as recording a defective Notice of Default and Notice of Trustee's Sale intentionally misrepresenting the name of the Trustor.

CRC cites *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, in support of the proposition that "a judgment following the sustaining of a general demurrer may be on the merits."

A judgment is on the merits for purposes of res judicata "if the substance of the claim is tried and determined." 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 313, p. 864.

In *Ojavan I*, the trial court sustained the Coastal Commission's demurrers to the complaint on the grounds that Ojavan Investors' suits were barred by the applicable 60-day statute of limitations and the doctrine of waiver. In *Ojavan II*, cross-complaints were filed and answered, summary judgment was entered, and following a trial, the judge issued a permanent injunction. *Ojavan II* did not affirm a general demurrer sustained without leave to amend after the first and only hearing.

A judgment on a general demurrer will have the effect of a bar in a new action in which the complaint states the same facts as those held not to constitute a cause of action on the former demurrer or,

notwithstanding differences in the facts alleged, when the ground on which the demurrer in the former action was sustained is equally applicable to the second one. California Jurisprudence 3d §162.

Since the public records are maintained by name indices, any recorded document that does not identify the name of a person transferring an interest does not impart constructive notice. When a document fails to name the parties, it cannot be indexed, and the document does not give notice if it cannot be found by the appropriate search of the grantor's name in indices. *Rice v. Taylor* (1934) 220 Cal. 629, 633, 32 P.2d 381; *Cady v. Purser* (1901) 131 Cal. 552, 556; *Talbot v. Wake* (1977) 74 Cal.App.3d 428, 434-435; *Dresser v. Superior Court In and For Contra Costa County* (1964) 231 Cal.App.2d 68, 71-72.

CRC argues that a misspelled name on a recorded NOD and a NOTS does not prejudice the Trustor, citing *Debrunner v. Deutsche Bank* (2012) 204 Cal.App.4th 433, 443. In *Debrunner*, the plaintiff alleged that a notice of default was defective because it did not identify the beneficiary, when in fact a page attached to the notice of default identified Deutsche Bank as the creditor. There was no conceivable prejudice in requiring that the plaintiff who received the notice look at the next page.

IV. THE COURT OF APPEAL'S DECISION IS A LICENSE FOR TRUSTEES TO RECORD FRAUDULENT NOTICES

Appellant argued on page 9 of the Opening Brief in *Gillies II*, "There is no connection in the Grantor/Grantee Index between the chain of title dating back fifty years which includes plaintiff's Grant Deed and the little chain consisting of a DOT, NOD, and two NOTS (now three) recorded by CRC. A Grantor-Grantee Index cannot give constructive notice when a recorded document misspells the name of the Grantor or the Grantee. The four documents upon which CRC stakes its claim are a deserted island in the County Records."

CRC, as one of California's most prolific trustees, now seems to be making the astonishing claim that it can complete a nonjudicial sale even if none of its recorded documents have any connection with the chain of title of the subject property, and that property owners will not be prejudiced by such irresponsible behavior. That is a dangerous precedent if real property interests in California are to remain insurable.

V. DAMAGES CAUSED BY FRAUDULENT FORECLOSURE NOTICES ARE COMMON KNOWLEDGE

CRC cites *Ortiz v. Accredited Home Lenders, Inc.* (S.D.Cal. 2009) 639 F.Supp.2d 1159, 1168, which states without reference to any cases

that “recorded foreclosure notices do not affect Plaintiff’s title, ownership, or possession in the Property.” Any property owner can answer this question: “If some bank recorded a fraudulent notice of default and a notice of trustee’s sale against my home, lowering property values in my neighborhood by ten to fifteen percent, would I be prejudiced?” If the property owner does not raise this issue, who will?

The petition for review should be granted.

Dated: November 9, 2012

Respectfully submitted,

Douglas Gillies
Plaintiff and Appellant

CERTIFICATE OF COMPLIANCE

(Cal. Rules of Court, rule 8.204)

The foregoing petition is double spaced and printed in proportionally spaced 13-point Palatino typeface. It contains 1,355 words (excluding tables, this certificate, and proof of service), relying on the word count generated by Microsoft Word.

Executed on November 9, 2012, at Santa Barbara, California

Douglas Gillies