

2016

**Michael J. Van Leeuwen, Plaintiff/Appellant, v. Bank of America,
n.a., Defendant/Appellee**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL J. VAN LEEUWEN,

Plaintiff / Appellant,

v.

BANK OF AMERICA, N.A.,

Defendant / Appellee.

Court of Appeals Case No. 20150610

District Court Case No. 150902048

ANSWERING BRIEF OF APPELLEE

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
FROM AN ORDER OF DISMISSAL FROM JUDGE LAURA S. SCOTT

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

On June 5, 2015, the Third District Court of Utah entered a final order dismissing plaintiff/appellant Michael J. Van Leeuwen's complaint with prejudice. R. 205. The final order was timely appealed on July 3, 2015. R. 220. The case was transferred by the Supreme Court of Utah to this Court on July 28, 2015. R. 246-47. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(j) (West).

STATEMENT OF THE CASE

This action is the third action brought by Michael J. Van Leeuwen ("Mr. Van Leeuwen") concerning the same loan, property, and foreclosure. Appellant Mr. Van Leeuwen filed this appeal from a final order of the Third District Court granting Defendant Bank of America, N.A.'s ("BANA") motion to dismiss on the basis of res judicata. That order should be affirmed.

In July 2010, Mr. Van Leeuwen filed a complaint ("the 2010 Complaint") in the Third District Court attempting to state claims against the foreclosure process for the same property, loan, and deed of trust. R. 64-90. After removal to federal court, the United States District Court of Utah dismissed the complaint with prejudice on May 9, 2011 and entered final judgment against Mr. Van Leeuwen on August 24, 2011. R. 93-94; 96. Mr. Van Leeuwen then filed a second action in federal court against BANA on July 7, 2014. R. 98-128. On January 26, 2015, Mr. Van Leeuwen voluntarily dismissed BANA from the second action. R. 167.

Mr. Van Leeuwen filed the complaint in this action ("the 2015 Complaint"), his third claim against BANA concerning the same mortgage loan and mortgaged property, on March 27, 2015. In the 2015 Complaint, Mr. Van Leeuwen sought injunctive relief and a declaratory judgment that BANA did not have the right to foreclose on the deed of trust securing his loan against real property located at 4537 South Abinadi Road, Salt Lake City, Utah 84124 ("the Property"). R. 1-5. On

April 6, 2015, BANA moved to dismiss the complaint under Utah R. Civ. P. 12(b)(6) for failure to state a claim. R. 14- 25. The District Court granted the motion to dismiss on June 5, 2015, agreeing that Mr. Van Leeuwen's claims were barred by the doctrine of res judicata. R. 205. On July 15, 2015, the District Court denied Mr. Van Leeuwen's motion to reconsider the order granting dismissal. R. 242. Mr. Van Leeuwen filed a timely appeal on July 3, 2015 to the Utah Court of Appeals. R. 220.

SUMMARY OF THE ARGUMENT

Mr. Van Leeuwen fails to raise any meritorious arguments in his brief, and the district court's judgment should be affirmed. Of the arguments Mr. Van Leeuwen raises on appeal as to why the motion to dismiss should not have been granted, only two were preserved below. First is the argument that the 2010 Complaint concerned different parties and claims than the present action. Second is the argument that Utah law does not permit motions to dismiss against declaratory judgment actions. These arguments misinterpret Utah law and are without merit.

Mr. Van Leeuwen raises another argument against the district court's ruling upon appeal for the first time—that the court should have converted BANA's motion to dismiss into a motion for summary judgment. However, this argument and any other new arguments are waived for failure to raise them below. *See Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968, 972 (“in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue”).

Even if Mr. Van Leeuwen's claims were not barred by res judicata, his claims would still fail as a matter of law. As the holder of the note, BANA is still entitled to enforce the instrument regardless of whether it actually owns the note. Furthermore, the note need not be specifically indorsed to BANA but may be indorsed in blank. Finally the Deed of Trust specifically allows the loan servicer to

perform servicing obligations, including foreclosure, on behalf of the note owner.

Therefore, Mr. Van Leeuwen's complaint would still fail to state a claim and be due to be dismissed even if res judicata did not apply.

STANDARD OF REVIEW

“[T]he propriety of a 12(b)(6) dismissal is a question of law.” *St. Benedict's Dev. Co. v. St. Benedict's Hosp.*, 811 P.2d 194, 196 (Utah 1991). The appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. *Id.* “In reviewing a dismissal under Rule 12(b)(6) of the Utah Rules of Civil Procedure, [the court] accept[s] the plaintiff's description of facts alleged in the complaint to be true, but . . . need not accept extrinsic facts not pleaded nor . . . accept legal conclusions in contradiction of the pleaded facts.” *Osguthorpe v. Wolf Mountain Resorts, L.C.*, 232 P.3d 999, 1004 (Utah 2010).

ARGUMENT

I. The District Court Correctly Considered The Motion To Dismiss Under Utah R. Civ. P. 12(b)(6).

The District Court's order granting BANA's motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted should be affirmed. The district court correctly took judicial notice of Mr. Van Leeuwen's prior complaints against BANA (and the courts' disposals of those actions) in holding that his most recent action is barred by the doctrine of res judicata.

Mr. Van Leeuwen argues in his brief that the district court should have considered the motion not as a genuine motion to dismiss but "as a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure because it relies on evidence outside the pleadings to support their position such as the res judicata arguments." Appellant's Brief at 6. Although not specified in his brief, Mr. Van Leeuwen appears to contend that the District Court erred by considering his past pleadings and the orders disposing of them in reaching its res judicata holding.

When deciding a motion to dismiss made under 12(b)(6) for failure to state a claim, if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Utah R. Civ.

P. 12. “‘Matters outside the pleading’ include any written or oral evidence ... which ... substantiat[es] ... and does not merely reiterate what is said in the pleadings.” *Oakwood Vill. LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1231 (Utah 2004) (quoting *Moore's Federal Practice* § 56.30[4] (3d ed. 2004)).

An exception exists to the “four corners” rule, however, for documents of which courts may take judicial notice. *See BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 7, 322 P.3d 1172, 1174-75 (“the trial court could take judicial notice of the Note as a public record and properly consider it in ruling on the motion to dismiss”). Utah Rule of Evidence 201(b) states: “The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Utah courts have specifically held that trial courts may take judicial notice of other judicial proceedings under the Utah Rules of Evidence. *See, e.g., Ringwood v. Foreign Auto Works, Inc.*, 786 P.2d 1350, 1357 (Utah Ct. App. 1990), *cert. denied*, 795 P.2d 1138 (Utah 1994) (deciding that the trial court properly took notice of a Utah Supreme Court decision in a related suit); *K.K. v. State of Utah*, 913 P.2d 771, 775 (Utah Ct. App. 1996) (upholding trial court’s judicial notice of proceedings from two related cases); *see also United States v. Garfield Cty.*, 122 F. Supp. 2d 1201,

1204 (D. Utah 2000) (taking judicial notice of court orders and filings from a different case).

In this case, BANA's memorandum accompanying its motion to dismiss requested the trial court to take judicial notice of a set of exhibits that included Mr. Van Leeuwen's 2010 Complaint and the subsequent federal court order dismissing the 2010 Complaint. R. 18 n. 1. Mr. Van Leeuwen's response did not raise any objections to judicial notice of any of those documents, but instead discussed the 2010 Complaint and federal court decision at length in order to argue that they did not preclude his 2015 Complaint. *See* R. 180-184. The District Court's ruling stated, "Having considered the arguments the Court agrees with Defendant that the instant law suit is barred by the doctrine of *res judicata* as the claims in the instant action have all been fully litigated." R. 205. This demonstrates that the court reviewed the filings in the previous action and took implicit judicial notice of them.

The first reason that Mr. Van Leeuwen's argument on this issue fails is that he has waived the opportunity to object to the trial court's judicial notice. At no point before the district court did Mr. Van Leeuwen object to BANA's request for judicial notice or to any other consideration of those filings. *See* R. 174-190. On the contrary, he discussed the substance of the filings in depth. *See* R. 180-84. Mr. Van Leeuwen thus waived the issue of judicial notice of the materials by failing to

raise it before the district court, and cannot now raise it for the first time. *See Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968, 972 (“in order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue”).

Even if the argument had not been waived for failure to bring before the district court, there was no error in the district court’s judicial notice of the 2010 Complaint and federal court decision. Utah courts have specifically held that trial courts may take judicial notice of other judicial proceedings. *See, e.g., Ringwood*, 786 P.2d at 1357 (deciding that the trial court properly took notice of a Utah Supreme Court decision in a related suit); *K.K.*, 913 P.2d at 775 (upholding trial court’s judicial notice of proceedings from two related cases); *see also United States v. Garfield Cty.*, 122 F. Supp. 2d at 1204 (the District Court of Utah taking judicial notice of court orders and filings from a different case). Furthermore, courts may take judicial notice of judicial proceedings and other items of public record without converting the motion to dismiss into a motion for summary judgment. *Alvarez v. Galetka*, 933 P.2d 987, 990 n.6 (Utah 1997) (holding that habeas court could take notice of a jury instruction given at original trial; the instruction is not “a matter ‘outside the pleadings’ sufficient to convert the motion to one for summary judgment” (citing Wright & Miller, 5A Federal Practice and Procedure § 1357 (2d. ed. 1990))); *BMBT*, 2014 UT App at ¶ 7, 322 P.3d at 1174-

75 (holding that the trial court could take judicial notice of a note “as a public record and properly consider it in ruling on the motion to dismiss”); *accord, e.g., Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008) (upholding District Court of Utah’s decision to judicially notice all materials in a state court’s file on a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6)); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (court “may take notice of proceedings in other courts” that “have a direct relation to matters at issue”); *Coney v. Smith*, 738 F.2d 1199, 1200 (11th Cir. 1984); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir. 1983).¹

Finally, to the extent that Mr. Van Leeuwen argues that the district court erred by taking judicial notice without formally announcing that it was doing so in a separate, stand-alone order, that argument has been expressly rejected by this court. In *Ringwood*, this court held that a trial court had appropriately taken judicial notice of a Utah Supreme Court opinion despite not explicitly stating so. 786 P.2d at 1357. The Court reasoned that the parties’ detailed briefing on that opinion and the trial court’s references to the opinion demonstrated that the trial court had acquired “familiarity with the opinion.” *Id.* Based on those facts, “there

¹ Fed. R. Civ. Pro. 12(b)(6) is identical to Utah R. Civ. Pro. 12(b)(6). Therefore, decisions applying the federal rule are persuasive in interpreting the Utah counterpart. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, 104 P.3d 1226, 1233 (“When, as here, there is almost no case law interpreting the Utah rule and the Utah and federal rules are identical, we ‘freely resort to federal law as a useful guide’” (citing *Plumb v. State*, 809 P.2d 734, 741 n. 9 (Utah 1990))).

was no error in utilizing the opinion only to determine the applicability of res judicata.” *Id.* As in *Ringwood*, in this case the trial court also received briefing from both parties on the prior judicial proceedings before taking implicit judicial notice of them.

By failing to object to BANA’s request for the district court to take judicial notice of the 2010 Complaint and district court ruling, Mr. Van Leeuwen did not preserve this issue for appeal. Even had he preserved the issue, however, his argument would still be without merit. The district court appropriately took judicial notice of the filings under the Utah Rules of Civil Procedure. Therefore, the court did not err by considering them when ruling on BANA’s motion to dismiss, and was not obligated to convert the motion to dismiss into a motion for summary judgment under Rule 56 of the Utah Rules of Civil Procedure.²

² Alternatively, if this court does not agree that the district court took judicial notice of the 2010 Complaint and District Court of Utah decision, BANA requests that this court now take notice. Since the complaint and decision are publicly available court documents, they satisfy the language of Utah Rule of Evidence 201(b) that: “The court may judicially notice a fact that is not subject to reasonable dispute because it . . . (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Mr. Van Leeuwen did not object to their submission along with BANA’s motion to dismiss, *see* R. 176-190, but instead chose to discuss their contents at length in order to argue that they did not preclude the claims of his 2015 Complaint. *See* R. 180-184. Therefore, judicial notice is appropriate.

II. The District Court's Dismissal Must Be Affirmed Because Mr. Van Leeuwen's Claims Are Barred By Res Judicata.

On the merits, the District Court's order of dismissal should be affirmed because the doctrine of res judicata bars Mr. Van Leeuwen from bringing this present action. Claim preclusion has three requirements: "(1) The subsequent action must involve the same parties, their privies, or their assigns as the first action, (2) the claim to be barred must have been brought or have been available in the first action, and (3) the first action must have produced a final judgment on the merits of the claim." *State, ex rel. D.A.*, 2009 UT 83, ¶ 33, 222 P.3d 1172, 1179 (Utah 2009).

The first element is clearly met in this case. Mr. Van Leeuwen is the plaintiff in both actions. R. 64-91. BAC Home Loans Servicing, L.P., ("BACHSL") one of the named defendants in the 2010 Complaint, merged into and with BANA, the defendant in this present action. R. 170.³ Furthermore, the United States District Court for the District of Utah, in its decision affirming the Bankruptcy Court's order granting BANA relief from the automatic stay to enforce the mortgage at

³ This merger is demonstrated by a certificate of merger issued by the Secretary of State of Texas on June 28, 2011. R. 170. As a public record, the certificate is an appropriate subject of judicial notice under Utah R. Evid. 201(B)(2). *See BMBT*, 2014 UT App at ¶ 7, 322 P.3d at 1174 (holding that a note and a deed are public records that may receive judicial notice under the Utah rule). The chain of events by which BANA acquired the note by merger with BACHLS is further laid out by Judge Shelby in a ruling on Mr. Van Leeuwen's related bankruptcy appeal. *See In re Michael J. Van Leeuwen*, 2:14-cv-00703-RJS (D. Utah Sept. 24, 2015), ECF No. 16 at 4-5.

issue in this case, held that BANA is the party entitled to enforce the note as its possessor. *In re Michael J. Van Leeuwen v. Bank of America N.A.*, 2:14-cv-00703-RJS (D. Utah Sept. 24, 2015), ECF No. 16 at 4-5.

The previous action also named Meridian Title Company and Recontrust Company, N.A. as former trustees under the same deed of trust. R. 64-91. The former trustees, BACHLS, and BANA all represent the same legal interest of BACHLS/BANA as beneficiary of the same deed of trust, thereby meeting the privity requirement. *See Hansen v. Bank of New York Mellon*, 2013 UT App 132, ¶ 7, 303 P.3d 1025, 1027 (the bank and trustee represent “the same legal interest and are therefore in privity” in suits over same foreclosure proceedings); *Brunson v. Bank of N.Y. Mellon*, 2012 UT App 222, ¶ 4, 286 P.3d 934 (per curiam) (when the first lawsuit was litigated against the trustee under the trust deed and the second action was brought against both the trustee and the beneficiary of the trust deed, the second lawsuit was “against parties who were in privity with” the parties in the first action).⁴

The second element of res judicata is that the claim to be barred must have been brought or have been available in the first action. “Claims or causes of action

⁴ Mr. Van Leeuwen argues that privity cannot exist because BANA is a servicer and not a “creditor/owner.” (Appellant’s Brief at 13-14). He cites no law for this proposition, which is contradicted by the cases cited above. *See Hansen v.*, 2013 UT App 132 at ¶ 7, 303 P.3d at 1027; *see also Brunson v. Bank of N.Y. Mellon*, 2012 UT App 222, ¶ 4, 286 P.3d 934 (per curiam).

are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction.” *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 30, 221 P.3d 194 (citing Restatement (Second) of Judgments § 24 (1982)). Mr. Van Leeuwen's current complaint is barred because all of the claims relate to the right to foreclose the same property, under the same deed of trust, as a result of his default on the same note.

In the current case, Mr. Van Leeuwen's complaint does not even include any true causes of action; the styled “First Cause of Action” is “Declaratory Judgment” and the “Second Cause of Action” is “Injunctive Relief.” R. 304. These are requests for types of relief, not causes of action. *See Hoverman v. CitiMortgage, Inc.*, 2:11-CV-00118-DAK, 2011 WL 3421406, at *10 (D. Utah Aug. 4, 2011) (“Requests for declaratory or injunctive relief are actually remedies for other alleged causes of action and do not qualify as causes of action on their own.” (citing *Bryner v. Utah*, 2010 WL 1253974, at *3 (D. Utah March 24, 2010))). However, the substance of the 2015 Complaint's claims is that the defendant-appellees lack the right to foreclose on the Property. *See* R. 3-4 at ¶ 22-23. Although the 2010 Complaint styled its causes of action differently (as “quiet title,” “equitable relief,” and “for declaratory relief”), the claims challenged the same foreclosure of the same property based on Mr. Van Leeuwen's default on the

same loan and the same deed of trust. R. 73-90. The 2015 Complaint also sought the same relief—a declaratory judgment and an injunction against foreclosure on the Property. *Id.* The claims in this present case already have or could have been brought in the 2015 Complaint.

In his brief, Mr. Van Leeuwen argues that the second element is not met here, on the grounds that “the declaratory judgment argument in the 2015 Complaint was not (and could not have been) raised in the 2010 Complaint because the FDCPA compliance letter establishing [BANA’s] status as a ‘servicer’ had not even been thought of much less [Mr. Van Leeuwen] having any knowledge of its content at the time he filed the 2010 Complaint.” Appellant’s Brief at 14-15.

The letter referenced by Mr. Van Leeuwen, however, is irrelevant to the claims in his 2015 Complaint. The 2015 Complaint challenges the ongoing foreclosure proceedings on the Property and disputes the standing of the servicer of the loan (now BANA) to foreclose, just as his prior action did against BACHLS, the previous servicer and predecessor-in-interest of BANA.

Under Utah law, subsequent action is barred where it “arise[s] from the same operative facts, or in other words from the same transaction” as the prior action. *Gillmor v. Family Link, LLC*, 2010 UT App. 2, ¶ 12, 224 P.3d 741 (internal citations omitted). “Accordingly, ‘*res judicata* ... turn[s] on the essential similarity of the underlying events giving rise to the various legal claims.” *Id.* The

transaction, or series of related transactions, at issue in both this action and the first action were the same. *Massey v. Board of Trustees of Ogden Area Community Action Committee, Inc.*, 2004 UT App. 27, ¶ 11, 86 P.3d 120.

Mr. Van Leeuwen argues that he could not have brought these claims in the prior action because the February 2011 letter established BANA's status as servicer, rather than owner, of the loan, and BANA cannot foreclose because it does not own the loan. Appellant's Brief at 14-15. What he fails to note, however, is that this February 2011 letter simply notified him that the servicing of the loan was being transferred from BACHLS to BANA. R. 7. As the letter states, BANA became servicer of the loan as successor to BACHLS when BACHLS merged with and into BANA effective July 1, 2011. In other words, Mr. Van Leeuwen most certainly could have brought his challenge to the ability of the loan servicer to foreclose in the prior action by bringing the current claims against BACHLS, BANA's predecessor-in-interest. Therefore, the claims alleged in this action arise from the same factual circumstances as the prior action and could have been brought in the prior case.

Mr. Van Leeuwen does not dispute the third element of res judicata—that the first action resulted in a final judgment of the claims. The order dismissing the 2010 Complaint stated that the court had reviewed Mr. Van Leeuwen's arguments and found there to be "no meaningful distinction between this cause of action and

the numerous actions the court has previously dismissed.” R. 93. The final judgment entered subsequently stated that the dismissal was with prejudice. R. 96. Therefore, as with the first two elements, the third element of res judicata is present in this case.

Mr. Van Leeuwen attempts to avoid the preclusive effects of the District Court of Utah’s dismissal and final judgment of his 2010 Complaint by arguing that Utah law does not permit objections to a declaratory judgment action, and so it was procedurally improper for the district court to grant BANA’s motion to dismiss. R. 16-18. Mr. Van Leeuwen’s argument cites a portion of the Utah Code granting jurisdiction to district courts to issue declaratory judgments. Utah Code Ann. § 78B-6-401(1) (West). His interpretation of this code section as a prohibition on motions to dismiss against declaratory judgment action is flawed, as evidenced by Utah courts’ routine granting of such motions in declaratory judgment actions. *See, e.g., Miller v. Weaver*, 2003 UT 12, ¶ 30, 66 P.3d 592, 601 (affirming dismissal of complaint seeking declaratory judgment); *Hercules, Inc. v. Utah State Tax Comm’n*, 1999 UT 12, ¶ 10, 974 P.2d 286, 288 (same).

The district court did not err in finding the present action to be precluded by res judicata, and the Court should affirm dismissal.

III. Mr. Van Leeuwen's Argument That Bank of America, N.A. Must Produce Evidence Of Its Right To Foreclose Is Contrary To Utah Law.

Even if res judicata did not apply to preclude the present action, the present complaint would still fail to state a claim on which relief could be granted. The claims lack both factual and legal basis. Mr. Van Leeuwen alleges that BANA cannot foreclose on the Property because there is no debt owing, and that even if there were debt owing, BANA would not own that debt. (Cplt. ¶ 8). Mr. Van Leeuwen does not deny that he obtained the loan or allege that he repaid the loan in full. (*See gen.* Cplt. at R.1-4). Furthermore, Utah law contradicts his position that he may force defendants to produce evidence proving that BANA is entitled to enforce the note through foreclosure. Utah is a non-judicial foreclosure state. The statutes governing non-judicial foreclosure do not require that the foreclosing party produce the original note or other evidence of standing in order to foreclose. *See* Utah Code Ann. §§ 57-1-19 *et seq.* (West); *see also Wells Fargo Bank v. Stratton Jensen, LLC*, 2012 UT App 40, ¶ 3, 273 P.3d 383 (per curiam).

Mr. Van Leeuwen's brief carries forward his longstanding position throughout this and prior actions that BANA must own his loan in order to enforce the note through foreclosure on the Property. Appellant's Brief at 9, 11. His position here has already been rejected twice by the United States District

Court in separate actions: Judge Stewart's dismissal⁵ of the 2010 Complaint and Judge Shelby's 2015 ruling⁶ on Mr. Van Leeuwen's appeal from a bankruptcy order. State law sets no requirement that a party must own the loan in order to enforce a note. In Utah, "[a] transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." *Commonwealth Property Advocates, LLC v. Mortg. Elec. Registration Sys, Inc.*, 2011 UT App 232, ¶ 13, 263 P.3d 397 (citing Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a (1997)).

Accordingly, this case turns on the question of which entity has the right to enforce the note. Negotiation of a promissory note is accomplished by transfer of possession. See Utah Code Ann. §§ 70A-3-201; 70A-3-203 (West). Transfer of possession of a note indorsed in blank or specifically to the holder gives the holder the right to enforce the instrument. *Id.* § 70A-3-205. "A person may be a person entitled to enforce the instrument even though he is not the owner of the instrument or is in wrongful possession of the instrument." *Id.* § 70A-3-301. Mr. Van

⁵ See R. 93-94 ("each of the causes of action alleged in the Complaint have been repeatedly rejected by this court and rely upon meritless misinterpretation of case law and Utah statutes").

⁶ *In re Michael J. Van Leeuwen v. Bank of America N.A.*, 2:14-cv-00703-RJS (D. Utah Sept. 24, 2015), ECF No. 16 at 4 (rejecting "defense based on a letter Mr. Van Leeuwen received in 2011 explicitly stating Bank of America did not own the note" since "the argument ... assumes that possession of a blank-indorsed note is insufficient to allow a holder to enforce it, an idea unsupported under Utah law).

Leeuwen, as plaintiff in the action, bears the burden of alleging facts to support the conclusion that BANA was not in possession of the note. However he has alleged no facts from which one might conclude that BANA does not have the note. Accordingly, he has failed to state a claim upon which relief may be granted, and the Court should affirm the district court's dismissal of this complaint with prejudice.

CONCLUSION

Mr. Van Leeuwen raises no challenges to the foundations for dismissing this action. His appeal does not address the basic facts that both the claims and parties in this case are the same as in his previously dismissed action, and thus meet all the requirements for preclusion by res judicata. On the merits of his claims, his arguments again fail to recognize that Utah law does not require BANA to own his loan or undergo a judicial foreclosure process in order to foreclose. The district court's dismissal should be affirmed accordingly.

Respectfully submitted this 25th day of January, 2016.

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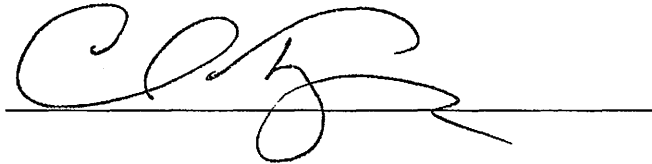
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CERTIFICATE OF SERVICE

I hereby certify that on January 25th, 2016, a copy of the foregoing
ANSWERING BRIEF OF APPELLEE was served via U.S. Mail, postage
prepaid upon:

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I also certify that I have directed the delivery of the original, and seven
copies of the foregoing brief, and an electronic version on compact disc to the
Court's physical address.



CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 4,752 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B)
2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14

DATED this 25th day of January, 2016.