UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM S. CARSON, et al.,

Plaintiffs,

v. Case No. 8:10-CV-2362-T-17TGW

WELLS FARGO BANK, N.A.,

Defendant.
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ORDER

THIS CAUSE comes before the Court upon Defendant Wells Fargo Bank, N.A.'s Motion to Lift Stay and Dismiss Remaining TILA Claims (Dkt. 45), and pro se Plaintiff William Carson's "Verified Plaintiff Notice of a State Court Trial Without a Resolution of the TILA Issue; with a Motion to be Allowed to Submit the Now Timely: 'with Leave to Amend'" (Dkt. 47), in which he seeks leave to amend the original complaint. Wells Fargo responds in opposition to the motion for leave to amend. (Dkt. 49). Upon consideration, the motion for leave to amend the complaint (Dkt. 47) is **DENIED** and the motion to lift the stay and dismiss this action (Dkt. 45) is **GRANTED**. For the reasons discussed herein, this action is **DISMISSED WITH PREJUDICE**.

BACKGROUND

This case is one piece in nearly a decade of litigation regarding the mortgaging and subsequent foreclosure of two pieces of property owned by William and Sylvia Carson ("Plaintiffs").[1] On August 30, 2007, Plaintiffs used the property as collateral to

[1] It appears that Sylvia Carson died on or about August 19, 2015. (Dkt. 46-3). The Circuit Court for the Tenth Judicial Circuit of Florida subsequently determined that the property at issue was held by Plaintiffs in in a tenancy by the entirety. (Dkt. 46-3). As such, the property passed to William Carson ("Mr. Carson")

secure a loan with Wells Fargo ("the Mortgage"). (Dkt. 1 at ¶ 9). After payments on the Mortgage stopped, Wells Fargo filed a foreclosure action, on September 30, 2008, in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, which was assigned case number 2008-CA-009216 ("the Foreclosure Action"). (Dkt. 1 at ¶ 8).

On October 21, 2010, Plaintiffs filed this action seeking to void the Mortgage, alleging that, under 42 U.S.C. §1983, Wells Fargo deprived Plaintiffs of their constitutional right to sell their property, and that the Mortgage was rescinded under the Truth in Lending Act (TILA). (Dkt. 1). Wells Fargo moved to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6), or, alternatively, to stay the case in until the conclusion of the Foreclosure Action. (Dkt. 5). On June 20, 2011, the Court granted Wells Fargo's motion, dismissed the section 1983 claim with prejudice, and dismissed the TILA claim without prejudice. (Dkt. 13). Because the TILA claim was also at issue in the foreclosure proceeding, the Court stayed this case pursuant to Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), pending resolution of the Foreclosure Action. (Dkt. 13 at 9–13).

In the time this case has been stayed, Plaintiffs have filed numerous motions seeking to reopen the case and litigate the TILA issue in this Court. (Dkts. 25, 27, 33, 38). In denying Plaintiffs' fourth attempt to reopen the case prior to the conclusion of the Foreclosure Action, the Court observed an "obstructive and dilatory" motion practice both here and in the Foreclosure Action. (Dkt. 41). Plaintiffs also removed the Foreclosure Action to federal bankruptcy court, which then remanded the case back to state court. (Dkt. 28-4). In its order, the bankruptcy court respectfully requested that the court consider

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upon Sylvia Carson's death and until the eventual foreclosure.

the United States Supreme Court's decision in Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015), when addressing Plaintiff's TILA claims. (Dkt. 28-4 at 3).

After more than eight years, the Foreclosure Action went to trial on January 30, 2017 and April 5, 2017. (Dkt. 46-1). Mr. Carson admitted into evidence the TILA rescission notice, sent on December 16, 2008, which allegedly also included a Qualified Written Request ("QWR") under the Real Estate Settlement Procedures Act ("RESPA"). (Dkt. 46-1 at 64). Following the trial, the court entered an order finding that Wells Fargo "had proved its prima facia case of foreclosure" and that "pro se Defendant William S. Carson failed to meet his burden of proof on any of his affirmative defenses both because of a failure to introduce competent, substantial evidence in support of the defenses and because of his inconsistent and sometimes contradictory testimony lacked credibility." (Dkt. 46-3 at 2). The court then entered a uniform final judgment of foreclosure, (Dkt. 46-4), and the property was sold at public auction. (Dkt. 46-8). Mr. Carson is currently appealing the foreclosure, including the "TILA rescission issue" in the Second District Court of Appeal of Florida, in case number 2D17-2474. (Dkt. 52).

Now that the Foreclosure Action has concluded, the Court **LIFTS** the previously entered stay to address the instant motions.

LEGAL STANDARD

A plaintiff seeking leave to amend a complaint following dismissal but prior to the entry of judgment must do so under Federal Rule of Civil Procedure 15(a). United States ex rel. Atkins v. McInteer, 470 F.3d 1350, 1361–62 (11th Cir. 2006). In doing so, the plaintiff must "either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." Long v. Satz, 181 F.3d 1275, 1279 (11th Cir. 1999).

In determining whether to grant leave to amend, Federal Rule of Civil Procedure 15(a) states that leave should be given freely "when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has been clear that this mandate should be heeded unless there is some other reason justifying the denial of leave to amend, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman v. Davis, 371 U.S. 178, 182 (1962). It is not an abuse of discretion, for example, to deny leave to amend "if the amendment would be futile." Pearson v. SE Prop. Holdings, LLC, 534 Fed. App'x 885, 888 (11th Cir. 2013). And an amendment would be futile where, as Wells Fargo alleges here, the proposed amendment would be barred by res judicata. See De Souza v. JPMorgan Chase Home Lending Div., 608 Fed. App'x 776, 781 (11th Cir. 2015).

Res judicata is broad term used to generally describe "the preclusive effect of earlier litigation." Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331 (11th Cir. 2010). More specifically, it may mean "claim preclusion" or "issue preclusion." Id. at 1331–32. Claim preclusion "'bars a subsequent action between the same parties on the same cause of action.'" Id. at 1332 (quoting State v. McBride, 848 So. 2d 287, 290 (Fla. 2003)). Issue preclusion, also referred to as collateral estoppel, prevents "re-litigation of issues that have already been decided between the parties in an earlier lawsuit." Brown, 611 F.3d at 1332.

In either case, federal courts are required to "'give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered.'" Brown, 611 F.3d at 1331 (quoting Kahn v. Smith Barney Shearson Inc., 115

F.3d 930, 933 (11th Cir. 1997)). When a court is asked to give res judicata effect to a prior state court judgment, the state law of res judicata applies. Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1509 (11th Cir. 1985). Wells Fargo asserts res judicata based on a Florida state court judgment. Therefore, Florida law regarding res judicata applies. See Petillo v. World Sav. Bank, FSB, No. 6:08-cv-1255-Orl-19GJK, 2009 WL 2178953, at *3 (M.D. Fla. July 21, 2009).

Under Florida law, res judicata (or claim preclusion) "bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." Topps v. State, 865 So. 2d 1253, 1255 (Fla. 2004). It applies "when four identities are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made." Id. The prior action must also have been decided on the merits. Id.

Collateral estoppel (or issue preclusion) "bars relitigation of the same issues between the same parties in connection with a different cause of action." Id. "The 'essential elements' of issue preclusion under Florida law are 'that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.'" Brown, 611 F.3d at 1332 (quoting Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1235 (Fla. 2006)). Collateral estoppel "precludes relitigation of issues *actually litigated* in a prior proceeding." Dep't of Health and Rehab. Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995) (emphasis in original).

If the elements are met, claim or issue preclusion will apply to a future suit even if an appeal of the first suit is pending. See CCB, LLC v. BankTrust, 552 Fed. App'x 963, 965 (11th Cir. 2014) ("Under Florida law, a judgment entered by a court of competent jurisdiction has preclusive effect notwithstanding a pending appeal."); see also Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 105 (Fla. 2001) ("[A] judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, so long as it remains unreversed." (quoting McGregor v. Provident Trust Co., 162 So. 323, 327 (1935))).

DISCUSSION

In seeking leave to amend his complaint, Mr. Carson seeks to re-allege his previously dismissed claim that he rescinded his mortgage prior to foreclosure. (Dkt. 47). Mr. Carson states that, if allowed to amend, he will "allege and factually support" that:

> (1) the subject TILA Rescission Notice was timely filed made by certified mail within 3-years of the loan transaction and closing; that (2), the loan was made on his principal dwelling at the time of the loan transaction; and (3), that the purpose of the loan was a refinance for personal and family purposes; and (4), that he had the means, methods, and most of all the motivations to tender and perform a full pay off of the entire subject loan in 2008; and (6) [sic], that Wells Fargo did not timely respond to the Carson Notice of Rescission within the statutory 20 days allowed to do so.

(Dkt. 47 at 8). Mr. Carson also alleges several violations of the TILA disclosure requirements. (Dkt. 47 at 7). These allegations loosely track the requirements to state a TILA claim, as discussed by this Court in the order dismissing the first complaint. (Dkt. 13 at 5–9). See also Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790, 791–92 (2015) (discussing the requirements of rescission under 15 U.S.C. §§ 1635(a) and 1635(f)).

Although Mr. Carson has not had a chance to amend his previously dismissed complaint, it is clear that the proposed amendment would be futile. First, collateral estoppel prevents Mr. Carson from re-litigating the TILA rescission issue in this Court. The foreclosure court specifically allowed Mr. Carson to present his "TILA-related arguments at trial," (Dkt. 38-1 at 2) and Mr. Carson did just that. Mr. Carson admitted his TILA rescission letter that he sent as Defendant's Exhibit 3 (Dkt. 46-1 at 64) and argued that the mortgage was rescinded. (Dkt. 46-1 at 80). The foreclosure court then rejected that claim, finding specifically that Mr. Carson did not establish that the Mortgage was rescinded and that Wells Fargo could foreclose on the Mortgage. (Dkt. 46-3). Because the same parties have already litigated this issue and a court of competent jurisdiction entered judgment on the merits (Dkt. 46-4), Mr. Carson is estopped from now attempting to prove a TILA rescission in this Court.

Second, res judicata also precludes Mr. Carson from raising any TILA claims. Identity of the parties is present because the parties in this action are identical to the parties in the Foreclosure Action. For that reason, identity of the quality of the parties is also met since both parties had "the incentive to adequately litigate the claims in the same character or capacity." Stockton v. Lansiquot, 838 F.2d 1545, 1547 (11th Cir. 1988). There is also identity of the thing sued for since the "same loan transaction, mortgage, and residential property" are at issue in both cases. Beepot v. J.P. Morgan Chase Nat'l Corp. Services, Inc., 57 F. Supp. 3d 1358, 1371 (M.D. Fla. 2014).

Identity of the cause of action is present where the "facts essential to the maintenance of this federal action are identical to those facts which were essential to the maintenance of the prior state action." McDonald v. Hillsborough Cty. Sch. Bd., 821 F.2d

1563, 1565 (11th Cir. 1987). The facts essential to the Foreclosure Action necessarily include facts showing the validity of the mortgage and whether it was rescinded, the same facts Mr. Carson attempts to present in this action. Therefore, all four "identities" are present. Because the foreclosure action culminated in an adjudication on the merits, any TILA claims in this action are precluded under res judicata.

Mr. Carson alleges that he no longer seeks to "unwind" the foreclosure, but instead seeks only damages. (Dkt. 47 at 8–9). Although Mr. Carson allegedly seeks a different remedy, this does not prevent application of res judicata when both actions "are based on the same transactions, occurrences and facts." Benline v. City of Deland, 731 F. Supp. 464, 467 (M.D. Fla. 1989); see also Beepot, 57 F. Supp. 3d at 1371–72. Interestingly, however, Mr. Carson is not merely seeking damages for disclosure violations,[2] but instead seeks the "surplus equity" he lost in the "wrongful" foreclosure action. (Dkt. 47 at 8–9). As such, it is apparent that Mr. Carson is still challenging the validity of the mortgage and seeking damages from the foreclosure, despite the foreclosure court's judgments to the contrary. Res judicata cannot allow this. See also Nero v. Mayan Mainstreet Inv 1, LLC, 645 Fed. App'x 864, 867 (11th Cir. 2016) (finding that a second action was precluded where "both his state TILA counterclaim and his federal TILA claim asserted that Mayan wrongfully foreclosed on his property because he had rescinded the mortgage").

To the extent Mr. Carson seeks to make any separate claims, he has failed to set forth the proposed substance of such claims. See Rance v. Winn, 287 Fed. App'x. 840, 842 (11th Cir. 2008) (finding no abuse of discretion in denying leave to amend where it

[2] If Mr. Carson were seeking damages for TILA disclosure violations, the claims would be barred by the one-year statute of limitations. See Iannucci v. Bank of America, NA, No. 2:14–cv–106–FtM–38DNF, 2014 WL 2462978, at *3 (M.D. Fla. June 2, 2014).

appeared an amendment would be futile and the plaintiff failed to offer "any indication of the substance of his proposed amendment"). Further, for the reasons discussed above, it appears that any other claims in this action would be barred by res judicata or otherwise meritless.[3] See Madura v. Countrywide Home Loans, Inc., 344 Fed. App'x 509, 518 (11th Cir. 2009) ("To the extent Mrs. Madura raises slight variations of fraud, usury and TILA violations, she could have, but did not, raise these issues in the state court litigation. These claims involved the 'same cause of action,' that is, the same essential facts underpinning the state court claims."); Beepot, 57 F.Supp.3d at 1374 ("Moreover, to the extent some of the claims here slightly differ from the precise arguments presented to the state court, the Court has no difficulty concluding that they are nevertheless "essentially connected with the subject matter of the first litigation.") (internal quotations omitted).

CONCLUSION

"The idea underlying res judicata is that if a matter has already been decided, the [party] has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in *any court* (except, of course, for appeals by right)." Topps, 865 So. 2d at 1255 (emphasis in original). Mr. Carson had his day in court, and is pursuing his appeal by right. This Court must give proper deference to

[3] For example, although Mr. Carson mentions a RESPA QWR, he does not set forth the substance of a claim for violation of RESPA. See Thomas v. US Bank Nat'l Ass'n, 675 Fed. App'x 892, 899–900 (11th Cir. 2017) (finding that the plaintiffs did not allege "cognizable damages" independent of their own default). Instead, the QWR is mentioned only as it relates to an alleged finance charge disclosure violation that might support rescission under TILA. (Dkt. 47 at 7); see 15 U.S.C. § 1635(i)(2). Therefore, the QWR also falls within the nucleus of operative facts considered in the foreclosure action. Additionally, the evidence presented at the foreclosure hearing showed that the QWR was sent to the wrong address. (Dkt. 46-1 at 19, 32, 37). See Bivens v. Bank of America, N.A., 868 F.3d 915, 919 (11th Cir. 2017) ("If a servicer designates a particular address for receiving QWRs, Regulation X requires a borrower to mail a QWR to that address to trigger the servicer's duty to respond.").

judgments made by the foreclosure court and res judicata prevents Mr. Carson from challenging those judgments here.

As the complaint has already been dismissed and the Court is denying leave to amend, this action is dismissed with prejudice. See Czeremcha v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, 724 F.2d 1552, 1556 (11th Cir. 1984).

Based on the foregoing, it is **ORDERED** that:

(1) The **STAY** entered in this case (Dkt. 13) is **LIFTED**;

(2) Mr. Carson's "Verified Plaintiff Notice of a State Court Trial Without a Resolution of the TILA Issue; with a Motion to be Allowed to Submit the Now Timely: 'with Leave to Amend'" (Dkt. 47) is **DENIED**;

(3) Wells Fargo Bank, N.A.'s Motion to Lift Stay and Dismiss Remaining TILA Claims (Dkt. 45) is **GRANTED**;

(4) This action is **DISMISSED WITH PREJUDICE**;

(5) This case will remain **CLOSED** permanently.

DONE AND ORDERED in Chambers, in Tampa, Florida on this 24th day of January, 2018.

ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Copies to:
Pro se Plaintiffs
Counsel of record