UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GREGORY HOOKER and wife ANN MARIE HOOKER,	§	
Plaintiffs,	§	
vs.	§	
	§	Case No. 3-03-CV-2222-R
COUNTRYWIDE HOME LOAN, INC., WASHINGTON MUTUAL BANK, FA, successor by operation of law to Washington Mutual Home Loans, Inc., successor in interest by merger to FLEET MORTGAGE CORP.	§	
Defendants.	§	

WASHINGTON MUTUAL'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW Washington Mutual Bank, FA, Defendant herein, and files this its brief in support of its motion for summary judgment, stating as follows:

Summary

(1) The Hookers owned a house in Ellis County. They purchased that house with a loan from CTS Mortgage. The note was thereafter assigned to Fleet Mortgage Corp ("Fleet Mortgage"). Washington Mutual Bank, FA, ('WaMu") purchased Fleet Mortgage and merged it with Washington Mutual Home Loans, Inc. ("WaMu Home Loans") WaMu Home Loans was dissolved and WaMu became its successor by operation of law. On July 1, 2001, WaMu sold the Hookers' loan to Countrywide Home Loans, Inc., ("Countrywide"). Appendix at 42 and 43. On September 4, 2001, the property was foreclosed and sold at a trustee's sale. Appendix at 30 (¶¶ 6 - 8).

(2) This suit is barred by the doctrines of res judicata and collateral estoppel. The relevant facts are as follows:

(a) On October 30, 2002, the Hookers filed a pro se action in County Court at Law No. 2 of Ellis County, Texas, styled *Hooker et al. v. Countrywide Home Loans, Inc., Washington Mutual Home Loans, Inc., et al.,* Cause No. 02-C-3500, (the "First Suit"), which alleged that the acceleration of the note and the foreclosure were unlawful. Appendix at 2 and 3 (¶¶ 2 - 6). On February 12, 2003, the presiding judge in that court signed an order entitled "Dismissal with Prejudice and Order for Writ of Possession," which stated that the court "ORDERS this case be dismissed with prejudice from refilling [sic]." Appendix at 27. No motion for new trial was made in that case, and no appeal was taken from that dismissal. Appendix at 42. That judgment is final.

(b) Both Plaintiffs were parties to the First Suit. The caption of case states that the Plaintiffs are Gregory C. Hooker, et al. It is clear that the "et al." includes Ann Marie Hooker because there was a settlement agreement signed in that suit at a mediation, and Plaintiffs filed that agreement with the court. That agreement recites at several points that there are, plural, "Plaintiffs"in the case, Appendix at 16 (¶¶ 4(c), 4(d) and 5); it states that the Plaintiffs are "Gregory C. Hooker and wife, Ann Marie Hooker," Appendix at 15 (¶3(a)); and Mrs. Hooker signed the agreement. Appendix at 17.

[c] On February 24, 2003, twelve days after the County Court dismissed the First Suit with prejudice,[1] the Plaintiffs, rather than filing a motion for new trial or an appeal of that

[1]It is worth noting that the dismissal was an agreed dismissal with prejudice. In their settlement agreement, Plaintiffs had agreed that if they did not tender the funds they agreed to pay, their suit would be dismissed with prejudice. Appendix at 16 (¶4(c)).

dismissal, filed their Petition and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, in a new lawsuit styled *Hooker v. Countrywide Home Loan Inc., and Washington Mutual Home Loans, Inc.* (Second Suit), Cause No. 65368, in the 40th District Court, Ellis County, Texas (although Plaintiffs continued to insist in the caption of their case that it was filed in the 378th Judicial District Court of Ellis County, it was in fact filed in the 40th Judicial District Court). Like the petition in the First Suit, this petition continued to claim that the acceleration of the note was wrongful and the foreclosure of the house was unlawful. Plaintiffs' Second Amended Original Petition in the Second Suit, filed August 21, 2003, the initial pleading with which the Defendants in this action were served, alleged three causes of action – breach of contract; violation of the Texas Deceptive Trade Practices Act; and wrongful foreclosure – but the substance of each cause of action is that the mortgage note on the home previously owned by the Plaintiffs was wrongfully accelerated and the house wrongfully foreclosed. Appendix, pages 30-33 (¶¶ 6 - 14).

THIS ACTION IS BARRED BY
RES JUDICATA AND COLLATERAL ESTOPPEL

It is clear from reading the First Suit that the same issues and the same claims are being relitigated in the Second Suit. The central allegation in both cases is that the foreclosure on the Plaintiffs' home was wrongful. If the claims vary slightly from one suit to the next – the Second Suit requests that the foreclosure be set aside; the First Suit did not – that does not prevent res judicata from applying. As the Texas Supreme Court has stated:

> The doctrine of res judicata in Texas holds that a final judgment in an action bars the parties and their privies from bringing a second suit "'not only on matters actually litigated, but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit.'"

Compania Financiara Libano v. Simmons, 53 S.W.3d 365, 367 (Tex. 2001). Accord, *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 630 (Tex. 1992); *Montana v. United States,* 440 U.S. 147, 153 (1979) Under the related doctrine of collateral estoppel, which is the doctrine of issue preclusion rather than claim preclusion, which is res judicata, see *John and Marie Kenedy Memorial Foundation v. Dewhurst,* 90 S.W.3d 268, 286 (Tex. 2002), once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action or seeking a different remedy involving a party to the prior litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). Here the prior lawsuit established that the acceleration and foreclosure were lawful, preventing any relitigation of that issue.

Since filing Washington Mutual's answer in this action in early October, the undersigned counsel has repeatedly pointed out to Plaintiffs' counsel, Mr. Peacock, the preclusive effect of the earlier litigation and has asked him to dismiss the lawsuit. Appendix at 44 to50. After months of dallying, after being provided with copies of court documents that he was apparently unwilling to acquire from the Ellis County courts on his own, finally on January 7, Mr. Peacock wrote to say:

> This letter is to advise you that I have conferred with my clients and I will be filing a Motion to Dismiss the above-styled cause. Therefore, there is not need for you to go to the trouble to file a motion for summary judgment.

Appendix at 51. In a slightly later letter he admitted that

> If I had known about the prior case in County Court at Law and that this case was dismissed with prejudice in the County Court at Law, I certainly never would have pursued this case in the District Court.

Appendix at 54. But when the moment of truth came, when both Defendants had provided him with stipulations of dismissals to carry out his avowed intent, he filed a motion for voluntary dismissal – not at all the dismissal with prejudice that Defendants' counsel had sought and expected – and only

on behalf of Mr. Hooker, stating that he had

> noticed for the first time that Mrs. Hooker was not a party [to the First Suit] . . . . I guess that you may as well go ahead and plan on filing [your motions for summary judgment]

Appendix at 56.[2]

The facts listed above in 2(b) above indicate quite clearly that Mrs. Hooker was in fact a party, and Mr. Peacock's position is wholly without merit. But even if one were to conclude that she had not been a party to the First Suit, she is still bound. As the Texas Supreme Court has said

> Generally people are not bound by a judgment in a suit to which they are not parties. . . . The doctrine of res judicata creates an exception to this rule by forbidding a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit. . . . .
>
> People can be in privity in at least three ways [one of which is that] their interests can be represented by a party to the action.

Amstadt v. U.S. Brass Corp, 919 S.W.2d 644, 653 (Tex. 1996). In addition, privity may be found where there is "an identity of interest in the legal right actually litigated." *Texas Real Estate Commission v. Nagle*, 767 S.W.2d 691, 694 (Tex. 1989); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). There can be no question in this case but that Mrs. Hooker was in privity with her husband. If he was the sole plaintiff, he was clearly representing her interests: this is conclusively shown by her participating in mediation and signing the settlement agreement at mediation. Moreover, there is clearly "an identity of interest in the legal right actually litigated." between the two parties; holding this property as part of the marital community, the Plaintiffs were

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[2]Although he claims to have noticed for the first time in January, 2004, that Ms. Hooker was not a party, in his letter of November 20, 2003, he asked "Who is 'et al.'?" Appendix at 47. One should not necessarily conclude that Mr. Peacock has been lying behind the log, but his discoveries do seem to come at convenient times.

joint owners of this property which was their joint homestead. The rights of one are identical in every respect to the rights of the other. If she were not a party, she was clearly in privity with her husband and is bound as he is bound by the judgment in that case.

Mr. Peacock, counsel for Plaintiffs, at one time also argued that the County Court at Law did not have jurisdiction over a lawsuit seeking recovery of title to land and that its dismissal was without jurisdiction and, hence, a nullity. Appendix at 46. While he has not advocated that position in more recent correspondence, it is important to make clear, in case he raises the argument again, that it does not hold water. The general jurisdictional statute for county courts does indeed bar county court jurisdiction in "a suit for the enforcement of a lien of land" and in "a suit for the recovery of land," Tex. Gov't Code § 26.043 (2) and (8). But a new statute has lifted that restriction with respect to Ellis County. The new statute, section 25.0722(c) of the Texas Government Code, enacted in the 77th Session of the Texas Legislature and effective September 1, 2001, see Tex. Gen. Laws 461, 2001 HB 200, § 2, provides that "the county courts of law of Ellis County have concurrent jurisdiction with the district court in civil cases regardless of the amount in controversy." The statute thus exempts the county courts at law of Ellis County from the ancient limitations embodied in §26.043 and now, in civil cases, those courts have the same jurisdiction as the Ellis County district courts, the Texas courts of general jurisdiction. Moreover, Plaintiffs' claim that the First Suit was a case "seeking the recovery of title to land," is simply not the case. The petition in that case is solely an action for damages, an action indisputably within the competence of the County Court.[3]

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[3]The dismissal did order that a writ of possession be issued, but whether that portion of the order was within the court's jurisdiction is immaterial since it is the dismissal which precludes relitigation, not the issuance of the writ of possession. Issuing an order beyond the jurisdiction of the county court does not deprive the court of jurisdiction over the other aspects of the case. *Matherne v. Carre,* 7 S.W.3d 903, 906 (Tex. App.– Beaumont 1999, pet'n denied).

Conclusion

This court should dismiss all claims against Washington Mutual Bank, FA, with prejudice.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that he served the attached document on counsel in this case this ____day of _____ 2004, by US Postal Service at the following addresses:

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