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Court of Appeal, Second District, Division 5, California.

Paul JANOSSY, Plaintiff and Appellant,
v.
WASHINGTON MUTUAL BANK, FA, Defendant and Respondent.

No. B159335.
(Super.Ct.No. BC270583).

Jan. 21, 2003.

Mortgagor sued mortgagee-bank for intentional infliction of emotional distress, interference with business relations, and defamation, all related to bank's collection efforts. The Superior Court, Los Angeles County, No. BC270583, Victor H. Person, J., sustained bank's demurrer and dismissed complaint. Mortgagor appealed. The Court of Appeal, Mosk, J., held that collateral estoppel precluded mortgagor from relitigating issue of whether bank's conduct was unreasonable.

Affirmed.

Mortgagor was precluded from relitigating issue of whether mortgagee-bank used unreasonable collection practices, under doctrine of collateral estoppel, by prior judgment for bank, which warranted dismissal of claims for intentional infliction of emotional distress, interference with business relations, and defamation, even though mortgagor alleged conduct that occurred after first suit; both suits alleged same kind of conduct, parties were same in both suits, same issue was litigated in prior suit, which resulted in final judgment for bank, and issue was essential element of mortgagor's claims.

APPEAL from a judgment of the Superior Court for Los Angeles County, Victor H. Person, Judge. Affirmed.

Paul Janossy, in pro. per., for Plaintiff and Appellant.

Houser & Allison and [Eric D. Houser](#) for Defendant and Respondent.

INTRODUCTION

MOSK, J.

*1 Plaintiff and appellant Paul Janossy (Janossy) appeals from the dismissal of his complaint following the sustaining of a demurrer without leave to amend. One of the grounds upon which the trial court sustained the demurrer was that Janossy's claims against defendant and respondent Washington Mutual Bank, FA (the Bank) were barred by the doctrines of res judicata and collateral estoppel. Although neither res judicata nor collateral estoppel was applicable at the time the trial court sustained the Bank's demurrer because the judgment upon which the court relied was not yet final, that judgment has since become final. We hold that that final judgment bars Janossy's complaint in this action, and affirm the dismissal.

BACKGROUND [\[FN1\]](#)

[FN1](#). Our summary of the facts is based upon the allegations of the complaint, documents from the record in a previous action Janossy brought against the Bank in 1999 (Los Angeles Superior Court Case No.

LC047973), and our decision in the appeal from the judgment in that case (Case No. B157252). The trial court in this case took judicial notice of the complaint and amended complaints in Case No. LC047973, the order granting the Bank's motion for summary judgment in that same case, and Janossy's notice of appeal from the summary judgment. We take judicial notice of those documents as well as our decision affirming the judgment in the same case.

This case arises from a dispute between Janossy and the Bank regarding the Bank's efforts to collect payment on a promissory note secured by a deed of trust on Janossy's home. As a result of this dispute, Janossy and his wife filed a lawsuit against the Bank in 1999, Los Angeles Superior Court Case No. LC047973 (the 1999 lawsuit), alleging claims for, among other things, intentional infliction of emotional distress and defamation. The 1999 lawsuit alleged that the Bank sent Janossy menacing written notices demanding payment on the promissory note and threatening foreclosure on his home, and made statements to credit reporting agencies that Janossy was seriously delinquent in his payments to the Bank. The trial court in that case granted the Bank's motion for summary judgment at a hearing held on February 22, 2002, and entered a written order granting the motion on March 28, 2002. In the written order, the trial court found that Janossy and his wife failed to make every payment timely and in full, and that the Bank acted properly in its collection efforts and in reporting Janossy's delinquency to credit reporting agencies. The trial court entered judgment in favor of the Bank on April 15, 2002. We affirmed the judgment in a decision filed on September 12, 2002 (*Janossy v. Washington Mutual Bank* (Sept. 12, 2002, B157252 [nonpub. opn.] (Janossy 1)), and the California Supreme Court denied review on December 11, 2002 (Case No. S110650).

On March 15, 2002--after the hearing on the Bank's summary judgment motion in the 1999 lawsuit, but before the written order and the judgment were entered-- Janossy filed the complaint in the present action. In this complaint, Janossy alleges claims for defamation, interference with business relations, and intentional infliction of emotional distress based upon the conduct alleged in the 1999 lawsuit, which conduct Janossy alleges the Bank continued to engage in after the 1999 lawsuit was filed. The Bank filed a demurrer and motion to dismiss on several grounds, including that Janossy's claims were barred by res judicata and collateral estoppel. The trial court sustained the demurrer without leave to amend on all of the grounds asserted, and dismissed the complaint. Janossy filed a timely notice of appeal from the dismissal.

DISCUSSION

*2 We conduct a de novo review of a dismissal following the sustaining of a demurrer without leave to amend, treating the demurrer as admitting all material facts properly pleaded, but also considering matters that may be judicially noticed. (*Blank v. Kirwan*, (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.) Although Janossy raises several arguments in his opening brief on appeal, we will address only one--the preclusive effect of the judgment in the 1999 case--because that is dispositive of his appeal. On this issue, Janossy argues that the present lawsuit is not barred by res judicata because his claims are based upon the Bank's conduct after the 1999 lawsuit was filed. But even if Janossy were correct that res judicata does not apply because the claims in the 1999 lawsuit are not the same claims that are alleged here because they are based upon later conduct (an issue we need not decide), we hold that the present lawsuit is barred by collateral estoppel because the judgment in the 1999 lawsuit conclusively determined that the kind of conduct about which Janossy complains (i.e., the Bank's collection practices and reports to credit reporting agencies) was not tortious.

"In general, collateral estoppel (or as it is sometimes known, issue preclusion) precludes a party from relitigating an issue of fact or law if the issue was litigated and decided in a prior proceeding." (*Lumpkin v. Jordan* (1996) 49 Cal.App.4th 1223, 1229, 57 Cal.Rptr.2d 303.) Issue preclusion applies only "if several threshold questions are met with an affirmative answer. First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was the issue actually litigated in the prior proceeding and was there a final judgment on the merits? Third, was the party against whom preclusion is sought the same as, or in privity with, the party to the former proceeding?" (*Id.* at p. 1230, 57 Cal.Rptr.2d 303, citing, among other cases, *Gikas v. Zolin* (1993) 6 Cal.4th 841, 849, 25 Cal.Rptr.2d 500, 863 P.2d 745.)

We begin our analysis of these questions by noting that the judgment in the 1999 lawsuit was not final when the trial court sustained the Bank's demurrer, because there was an appeal pending. (See, e.g., *National Union Fire Ins. Co. v. Stites Prof. Law Corp.*, (1991) 235 Cal.App.3d 1718, 1726, 1 Cal.Rptr.2d 570.) Thus, the trial court erred when it found that res judicata and collateral estoppel applied at the time it sustained the Bank's demurrer. But the

judgment became final when we affirmed the summary judgment and the Supreme Court denied review (*Janossy v. Washington Mutual Bank* (Dec. 11, 2002, S110650)). In the interest of judicial economy, we take judicial notice of that fact in order to address the three threshold questions for application of issue preclusion. (See [People v. Lamonte \(1997\) 53 Cal.App.4th 544, 551, fn. 11, 61 Cal.Rptr.2d 810](#).) We hold that all three questions must be answered in the affirmative with regard to two issues that are dispositive of all of Janossy's claims--whether the Bank used unreasonable practices in attempting to obtain payment on its loan and whether the Bank's reports of Janossy's delinquencies to credit reporting agencies were false.

*3 First, both the present lawsuit and the 1999 lawsuit present the identical issues, because the conduct that Janossy asserts was unreasonable or defamatory in the present lawsuit--the Bank's sending notices of default and reporting delinquencies to credit reporting agencies--is the same conduct that he asserted in the 1999 lawsuit was unreasonable or defamatory. In fact, the current complaint's allegations regarding the Bank's conduct are in many instances taken verbatim from the complaint in the 1999 lawsuit. Although Janossy contends that some of the conduct alleged in the present lawsuit took place at a different time than that alleged in the 1999 lawsuit, he alleges that the conduct itself is the same. (See, e.g., Complaint at ¶ 11 ["Today the same false statements [sic] are republished, repeated, for which defendant is liable"]; Complaint at ¶ 26 ["Plaintiff states that these facts were started in 1994, and they are committed today as well, but plaintiff is requesting damages for commission of the wrongdoings from February 23, 1999 to present time"].)

Second, the dispositive issues in the present case were actually litigated in the 1999 lawsuit and there is a final judgment on the merits. Although the 1999 lawsuit was resolved by summary judgment, a summary judgment can be a judgment on the merits for the purpose of applying the collateral estoppel doctrine. ([Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc. \(1981\) 120 Cal.App.3d 622, 629, 174 Cal.Rptr. 527](#).) The issues were conclusively decided by our holdings in the 1999 lawsuit that (1) the Bank's efforts to collect on its loan were privileged because "the Bank's collections practices were consistent with acceptable collection practices and were not outrageous or unreasonable means to obtain payment" (*Janossy 1*, at p. 10, 174 Cal.Rptr. 527), and (2) "the Bank's communication [to the credit reporting agencies] was privileged, made without malice, and true" ([id.](#) at p. 13, 174 Cal.Rptr. 527; see also [id.](#) at pp. 11-12, 174 Cal.Rptr. 527).

Third, the party against whom preclusion is sought in the present case was a party to the 1999 lawsuit.

Our holdings in the 1999 lawsuit are dispositive of all of the claims alleged in the present lawsuit. Janossy cannot prevail on his first cause of action for defamation because we held that the statements upon which the cause of action is based were privileged and true. He cannot prevail on his second cause of action for interference with business relations because he alleges the Bank interfered by "continuing the commission of defamatory activities," but we held that those activities were not defamatory. And he cannot prevail on his third cause of action for intentional infliction of emotional distress because we held that the conduct upon which it is based was not outrageous or unreasonable and therefore it was privileged. Accordingly, we affirm the trial court's dismissal of Janossy's complaint. [\[FN2\]](#)

[FN2](#). Janossy asks us to take judicial notice of several documents included in the appellant's appendix. Some of those documents, such as the complaint in this case and its attachments, are properly part of the record on appeal; therefore, judicial notice is not necessary. Other documents, such as letters and certificates that do not appear to have been before the trial court, are not properly subject to judicial notice or are irrelevant to the issues in this appeal. Therefore we deny Janossy's request to take judicial notice of those documents. We do, however, take judicial notice of the February 22, 2002 minute order in the 1999 lawsuit, found at pages 52- 53 of the appellant's appendix.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

We concur: TURNER, P.J., and [GRIGNON](#), J.

- [2002 WL 32146510](#) (Appellate Brief) Respondent's Opening Brief (Aug. 14, 2002)Original Image of this Document (PDF)

- [2002 WL 32146499](#) (Appellate Brief) Appellant's Opening Brief (Jul. 02, 2002)Original Image of this Document with Appendix (PDF)

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