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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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6 In re:) Case No. 12-35648-C-7
7 MARIA VILLARREAL CAMACHO,) Adversary No. 12-2608
8 Debtor(s).) DC No. MDM-1
9 _____)
10 MARIA VILLARREAL CAMACHO,)
11 Plaintiff(s),)
12 v.)
13 GREENPOINT MORTGAGE FUNDING,)
14 INC., BANK OF AMERICA, N.A.;)
15 101 FINANCIAL ENTERPRISES, INC.;)
16 AURORA BANK, FSB fka LEHMAN)
17 BROTHERS BANK, FSB; FIDELITY)
18 NATIONAL TITLE COMPANY; US BANK)
19 NATIONAL ASSOCIATION as Trustee)
for LEHMAN BROTHERS SMALL)
BALANCE COMMERCIAL MORTGAGE)
PASS-THROUGH CERTIFICATES,)
SERIES 2007-3,)
Defendant(s).)
_____)

OPINION

Before Christopher M. Klein
United States Bankruptcy Judge

23 Maria Villarreal Camacho, in propria persona, plaintiff.

24 Sara Firoozeh, Houser & Allison, Irvine, California, for
25 defendant U.S. Bank National Association, as Trustee for Lehman
26 Brothers Small Balance Commercial Mortgage Pass-through
Certificates, Series 2007-3.

27 Caroline R. Djang, Rutan & Tucker, LLP, Costa Mesa, California,
for defendant GreenPoint Mortgage Funding, Inc.

28 Monique D. Jewett-Brewster, Bryan Cave, LLP, San Francisco,
California, for defendant Bank of America, N.A.

1 KLEIN, Bankruptcy Judge:

2 A husband and wife tag team who have used serial adversary
3 proceedings to wrestle with a lender now find themselves pinned
4 by the so-called "two dismissal rule" of Federal Rule of Civil
5 Procedure 41(a)(1)(B). In the course of seven bankruptcy cases,
6 they filed three adversary proceedings asserting the same claim
7 against the same defendants, the first two of which were
8 voluntarily dismissed by notices of dismissal under Rule
9 41(a)(1)(A)(i). The unilateral second dismissal operates "as an
10 adjudication on the merits" that ends the wrestling match in this
11 court. Hence, the third adversary proceeding is DISMISSED.

12 The linchpin of the rationale is that the term "same claim"
13 in Rule 41(a)(1)(B) means "claim" as used in the Restatement
14 (Second) of Judgments § 24. That is, "same claim" is determined
15 under a transactional analysis to include all rights of a
16 plaintiff to remedies against a defendant with respect to all or
17 any part of the transaction, or series of connected transactions,
18 out of which the action arose. Here, all relief sought in the
19 complaints arises out of a common nucleus of operative facts.

20

21 Facts

22 J. Pedro Zarate and Maria Villarreal Camacho are spouses who
23 own, as community property, a small commercial shopping center in
24 the City of San Joaquin, California, with respect to which they
25 obtained what they describe as a "refinancing purchase money
26 loan" through Greenpoint Mortgage Funding, Inc. They contend
27 that this loan was an instance of predatory lending.

28 The Greenpoint loan, which made its way into mortgage-backed

1 securities, is the focus of the dispute being pursued by Zarate
2 and Camacho in which they seek to obtain clear title to the real
3 property, damages, and declaratory and injunctive relief.

4 The couple has chosen to use the bankruptcy court as the
5 forum for pursuing their claim against Greenpoint and other
6 entities involved in the loan throughout its history. Their
7 strategy is serial filing.

8 Zarate has filed six chapter 13 cases in the Eastern
9 District of California: (1) No. 08-34307, filed October 3, 2008,
10 dismissed November 18, 2008; (2) No. 09-40590, filed September
11 24, 2009, dismissed November 10, 2009; (3) No. 11-40715, filed
12 August 25, 2011, dismissed October 12, 2011; (4) No. 11-48088,
13 filed December 1, 2011, dismissed March 28, 2012; (5) No. 12-
14 26252, filed March 30, 2012, dismissed September 11, 2012; and
15 (6) No. 13-22346, filed February 22, 2013, which is still
16 pending.

17 Camacho filed a chapter 7 case, No. 12-35648, on August 28,
18 2012, and has received a chapter 7 discharge.

19 Three adversary proceedings have been filed by the couple
20 thus far against Greenpoint and entities in privity with
21 Greenpoint: (1) Zarate v. Greenpoint Mortgage Funding, Inc., et
22 al., No. 12-02113, filed March 9, 2012, voluntarily dismissed by
23 notice of dismissal filed under Fed. R. Civ. P. 41(a)(1)(A)(i)
24 March 29, 2012; (2) Zarate v. Greenpoint Mortgage Funding, Inc.,
25 et al., No. 12-02206, filed May 3, 2012, voluntarily dismissed by
26 notice of dismissal filed under Fed. R. Civ. P. 41(a)(1)(A)(i)
27 September 11, 2012; and (3) Camacho v. Greenpoint Mortgage
28 Funding, Inc., et al., No. 12-02608, filed October 17, 2012.

1 Although the successive complaints allege additional
2 theories of recovery, the factual allegations in each complaint
3 reveal that the factual basis for all such theories is the
4 Greenpoint loan. Thus, Camacho conceded orally on the record on
5 February 26, 2013, that her adversary proceeding No. 12-02608
6 does not materially differ from the two complaints that were
7 filed by her husband and voluntarily dismissed.

8 The voluntary dismissals of Adversary Nos. 12-02113 and
9 12-02206 were by Zarate through counsel, who filed notices of
10 dismissal before a defendant filed an answer or a motion for
11 summary judgment as permitted by Rule 41(a)(1)(A).

12 Camacho filed the instant, third, adversary proceeding on
13 October 17, 2012, following her husband's dismissal of the second
14 adversary proceeding on September 11, 2012.

15
16 Jurisdiction

17 Jurisdiction is founded on 28 U.S.C. § 1334(b). The power
18 of a bankruptcy judge over this adversary proceeding is governed
19 by 28 U.S.C. § 157.

20 The gravamen of the complaint sounds in non-core theories.
21 All defendants expressly consented orally on the record in open
22 court that a bankruptcy judge may hear and determine the matter
23 in its entirety. 28 U.S.C. § 157(c)(2) (non-core); Executive
24 Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency,
25 Inc., 702 F.3d 553, 567-70 (9th Cir. 2012) (core). The plaintiff
26 likewise consented orally on the record, and also consented by
27 conduct in two respects: by filing this lawsuit alleging that it
28 is a core proceeding and by not subsequently questioning this

1 court's authority over the action. Id. Accordingly, this court
2 has the power to "hear and determine" the adversary proceeding in
3 its entirety, regardless of core or non-core status.

4
5 Analysis

6 The "two dismissal rule" in Civil Rule 41(a)(1)(B) is a
7 basic feature of federal civil procedure that applies in
8 bankruptcy adversary proceedings. Fed. R. Civ. P. 41(a)(1)(B),
9 incorporated by Fed. R. Bankr. P. 7041. It limits access to the
10 federal courts for those who file serial lawsuits.

11
12 I

13 The "two dismissal rule" is a limiting principle for the
14 general rule that a plaintiff may at any time before a defendant
15 serves an answer or motion for summary judgment voluntarily
16 dismiss a civil action without a court order either by notice of
17 dismissal or by stipulation by parties who have appeared.¹ Fed.
18 R. Civ. P. 41(a)(1)(A), incorporated by Fed. R. Bankr. P. 7041;
19 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397-98 (1990)
20 (history of rule).

21
22 ¹Rule 41(a)(1)(A) ("Voluntary Dismissal - By the Plaintiff")
provides:

- 23 (A) Without a Court Order. Subject to Rules 23(e), 23.1(c),
24 23.2, and 66 and any applicable federal statute, the
plaintiff may dismiss an action without a court order by
25 filing:
26 (i) a notice of dismissal before the opposing party
serves either an answer or a motion for summary
judgment; or
27 (ii) a stipulation of dismissal signed by all parties
who have appeared.

28 Fed. R. Civ. P. 41(a)(1)(A), incorporated by Fed. R. Bankr. P. 7041.

1 A

2 The effect of a unilateral dismissal depends upon whether
3 the action previously has been dismissed. The first voluntary
4 dismissal by notice or stipulation is presumptively without
5 prejudice unless otherwise stated. A second notice of dismissal,
6 however, operates as an "adjudication on the merits" if the
7 plaintiff has previously dismissed any action in state or federal
8 court based on or including the same claim. Fed. R. Civ. P.
9 41(a)(1)(B), incorporated by Fed. R. Bankr. P. 7041.²

10 Here, there were two Rule 41(a)(1)(a)(i) voluntary
11 dismissals of adversary proceedings in this court by notices of
12 dismissal before the third adversary proceeding was filed.

13
14 B

15 The dismissals are deemed to have been by the same plaintiff
16 as in the third action due to the relationship of the two
17 individual plaintiffs. Zarate and Camacho are spouses in a
18 community property state pursuing community property claims.
19 That is sufficient to warrant treating them as the same
20 plaintiff. They are so closely aligned in interest that each is
21 virtual representative of the other. FDIC v. Alshuler (In re

22
23 ²The formal statement of the "two dismissal rule" is in the
24 second sentence of Rule 41(a)(1)(B):

25 (B) Effect. Unless the notice or stipulation states
26 otherwise, the dismissal is without prejudice. But if the
27 plaintiff previously dismissed any federal- or state-court
action based on or including the same claim, a notice of
dismissal operates as an adjudication on the merits.

28 Fed. R. Civ. P. 41(a)(1)(B), incorporated by Fed. R. Bankr. P. 7041
(emphasis supplied).

1 Imperial Corp. of Am.), 92 F.3d 1503, 1506 (9th Cir. 1996);
2 Nordhorn v. Ladish Co., 9 F.3d 1402, 1405 (9th Cir. 1993); Lake
3 at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev. Corp., 933
4 F.2d 724, 727 (9th Cir. 1991); 8 JAMES WM. MOORE ET AL., MOORE'S
5 FEDERAL PRACTICE § 41.33[7][k] (3d ed. 2012) ("MOORE'S").

6
7 II

8 The key question under Rule 41(a)(1)(B) is the meaning of
9 the term "same claim." If the second action asserted a different
10 "claim," then the "two dismissal rule" would not apply.

11
12 A

13 There is little discussion in the cases of what constitutes
14 "the same claim" for purposes of the "two dismissal rule." 9
15 CHAS. A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2368 (3d
16 ed. 2008); MOORE'S, §§ 41.33[7][e] & [f].

17 One must be precise about the meaning of "same claim" in
18 Rule 41(a)(1)(B) because the word "claim" in the Civil Rules is
19 subject to the formal fallacy of ambiguity where one word has
20 different meanings. Since "claim" has multiple meanings in the
21 Civil Rules, the outcome depends upon which meaning applies here.
22 MOORE'S, § 131.10[3][b]; cf. United States v. Memphis Cotton Oil
23 Co., 288 U.S. 62, 67-68 (1933) ("'cause of action' may mean one
24 thing for one purpose and something different for another.").

25 The pleading requirements in Rule 8 use the term "claim for
26 relief" in the sense that can mean a theory for relief based on a
27 "short and plain statement of the claim showing that the pleader
28 is entitled to relief." Fed. R. Civ. P. 8(a). A party may state

1 "as many separate claims" as it has, regardless of whether they
2 are consistent. Fed. R. Civ. P. 8(d)(3).

3 If "same claim" means same grounds or theory of the case or
4 remedies or forms of relief, then the "two dismissal rule" would
5 not necessarily be fatal to the instant adversary proceeding
6 because Camacho added an additional theory for recovery in her
7 complaint even though she concedes that the underlying facts are
8 the same for all of the counts in her complaint.

9 If, however, "same claim" means "claim" in the broader sense
10 of the Restatement (Second) of Judgments – all of plaintiff's
11 rights to remedies against the defendant with respect to all or
12 any part of the transaction, or series of connected transactions,
13 out of which the action arose – then the "two dismissal rule" is
14 fatal. RESTATEMENT (SECOND) OF JUDGMENTS § 24 ("RESTATEMENT").³

15 The Restatement definition of "claim" includes other grounds
16 or theories of the case not presented in the first action, as
17

18 ³Under Restatement § 24:

19 § 24. Dimensions of "Claim" for Purposes of Merger or Bar –
20 General Rule Concerning "Splitting"

21 (1) When a valid and final judgment rendered in an action
22 extinguishes the plaintiff's claim pursuant to the rules of
23 merger or bar (see §§ 18,19), the claim extinguished includes
all rights of the plaintiff to remedies against the defendant
with respect to all or any part of the transaction, or series
of connected transactions, out of which the action arose.

24 (2) What factual grouping constitutes a "transaction", and
25 what groupings constitute a "series", are to be determined
26 pragmatically, giving weight to such considerations as whether
27 the facts are related in time, space, origin, or motivation,
whether they form a convenient trial unit, and whether their
treatment as a unit conforms to the parties' expectations or
business understanding or usage.

28 RESTATEMENT (SECOND) OF JUDGMENTS § 24.

1 well as other forms of relief. RESTATEMENT § 25.⁴ The structure
2 and context of Rule 41(a)(1) answers the question in favor of the
3 broader Restatement version associated with claim preclusion.

4 The structure of Rule 41(a)(1) links the term "same claim"
5 with "adjudication on the merits." This connotes the concept of
6 the "claim" for purposes of the rules of res judicata. For those
7 purposes, "claim" means "all rights of the plaintiff to remedies
8 against the defendant with respect to all or any part of the
9 transaction, or series of connected transactions, out of which
10 the action arose."

11 The context confirms that the Restatement meaning of "claim"
12 controls. What is being dismissed under Rule 41(a) is an entire
13 lawsuit that, if it had gone to judgment in the ordinary course,
14 would have provided the basis for claim preclusion under the
15 Restatement analysis.

16
17 B

18 The question then becomes: what consequence follows from
19 the proposition that the second dismissal, in the words of Rule
20 41(a)(1)(B), "operates as an adjudication on the merits"?

21 _____
22 ⁴Under Restatement § 25:

23 § 25. Exemplification of General Rule Concerning Splitting

24 The rule of § 24 applies to extinguish a claim by the
25 plaintiff against the defendant even though the plaintiff is
26 prepared in the second action

27 (1) To present evidence or grounds or theories of the case not
presented in the first action; or

(2) To seek remedies or forms of relief not demanded in the
first action.

28 RESTATEMENT (SECOND) OF JUDGMENTS § 25 ("Exemplification of General Rule
Concerning Splitting").

1 The Supreme Court has answered that question: "adjudication
2 upon the merits" in Rule 41 is the opposite of dismissal "without
3 prejudice." Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S.
4 497, 505 (2001) ("Semtek").

5 Dismissal "without prejudice," in turn, means dismissal
6 without barring the plaintiff from returning to the federal court
7 with the same claim. Id.

8 Conversely, a dismissal that is an "adjudication upon the
9 merits," is a dismissal that does bar the plaintiff from
10 returning to the federal court with the same claim.

11 An "adjudication on the merits" is a necessary condition,
12 but is not always a sufficient condition, for claim-preclusive
13 effect in other courts. Id. at 505-06.

14 Thus, Semtek teaches that the unilateral second dismissal of
15 the Zarate/Camacho claim operated as Rule 41(a)(1)(B)
16 "adjudication on the merits" that barred refiling of the "same
17 claim," determined in accordance with Restatement § 24, in a
18 federal court. Thus, Camacho's adversary proceeding is barred.

19
20 C

21 One final nit. As Semtek was decided under the version of
22 Civil Rule 41 that applied until the restyling of the Civil Rules
23 in 2007, it is appropriate to confirm that the restyling did not
24 introduce an inadvertent substantive change in Rule 41(a)(1).

25 Although the language of Rule 41(a)(1) was revised in 2007,
26 both the previous version and the current version of the rule

1 link the term "same claim" with "adjudication on the merits."⁵

2 Hence, the 2007 restyling did not materially alter Rule
3 41(a)(1). The issue of the meaning of "same claim" in Rule
4 41(a)(1)(B) has been inherent in the rule since its inception.
5 The linked terms "same claim" and "adjudication on the merits"
6 were in the former rule, as well as in the restyled rule.

7 Hence, Semtek continues to control the construction of Rule
8 41 in the post-2007 restyled rules.

9
10 Conclusion

11 The adversary proceeding filed by Camacho following the
12 unilateral second dismissal of an adversary proceeding by her
13 spouse, Zarate, is barred by virtue of the Rule 41(a)(1)(B) "two
14 dismissal rule." It presents the same claim, determined under
15

16 ⁵Before the 2007 restyling amendments, the relevant part of
17 Rule 41(a)(1) provided:

18 Unless otherwise stated in the notice of dismissal or
19 stipulation, the dismissal is without prejudice, except that
20 a notice of dismissal operates as an adjudication upon the
merits when filed by a plaintiff who has once dismissed in any
court of the United States or of any state an action based on
or including the same claim.

21 Fed. R. Civ. P. 41(a)(1) (second sentence), repealed 2007.

22 After 2007, the rule provides:

23 (B) Effect. Unless the notice or stipulation states
24 otherwise, the dismissal is without prejudice. But if the
25 plaintiff previously dismissed any federal- or state-court
action based on or including the same claim, a notice of
dismissal operates as an adjudication on the merits.


26 Fed. R. Civ. P. 41(a)(1)(B), incorporated by Fed. R. Bankr. P. 7041.

27 The Advisory Committee note to the 2007 amendment explains,
28 "the changes are intended to be stylistic only." Fed. R. Civ. P.
41(a)(1), advisory committee note 2007.

1 Restatement (Second) of Judgments § 24, asserted by plaintiffs
2 who are virtual representatives of each other as spouses in a
3 community property state asserting a community property claim.
4 The federal forum wrestling match is over. A rematch, if any
5 would be permitted, would have to occur in a state court of
6 competent jurisdiction.

7 This adversary proceeding is DISMISSED.

8 Dated: March 18, 2013

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11 _____
12 United States Bankruptcy Judge
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1 **CERTIFICATE OF SERVICE**

2 On the date indicated below, I served a true and correct copy(ies) of the attached document
3 by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed
4 and by depositing said envelope in the United States mail or by placing said copy(ies) into an
5 interoffice delivery receptacle located in the Clerk's Office.

6 Maria Camacho
7 8192 Creek Estates Way
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12 Monique D. Jewett-Brewster
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15 Caroline R. Djang
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17 Costa Mesa CA 92626

18 Dated:

19 _____
20 DEPUTY CLERK
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