IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WAYNE HAGENDORF, AN INDIVIDUAL, Appellant, vs. NATIONSTAR MORTGAGE, LLC; AND METLIFE HOME LOANS, A DIVISION OF METLIFE BANK, N.A., Respondents.	No. 74379-COA

FILED

ORDER OF AFFIRMANCE

Wayne Hagendorf appeals from a district court order granting a motion to dismiss or, alternatively, for summary judgment. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

In purchasing his home, Hagendorf executed a deed of trust on August 19, 2009, with lender respondent MetLife Home Loans, a Division of MetLife Bank, N.A. Hagendorf alleged that during the home loan process he was led to believe that he could terminate his escrow account upon meeting certain requirements. Although MetLife had advised him he could not do so, Hagendorf began paying his property taxes and home insurance directly instead of through his escrow account. Eventually, MetLife informed Hagendorf that he was in default for failing to maintain proper funds in his escrow account, sent his debt to a loss mitigation service, and later initiated foreclosure proceedings against Hagendorf.

In turn, on February 24, 2011, Hagendorf filed a complaint against MetLife for defamation, breach of contract, and breach of the covenant of good faith and fair dealing, requesting punitive damages and injunctive and declaratory relief. During this litigation, MetLife assigned

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its interest in the loan to respondent Nationstar Mortgage, LLC. In a letter dated April 26, 2013, before trial commenced in September 2013, Nationstar alerted Hagendorf that it was the new loan servicer on his mortgage. However, Nationstar was not added as a party to the 2011 lawsuit.

Ultimately, at trial, the jury found for MetLife and awarded Hagendorf no damages.[1] Hagendorf appealed the judgment against him to the Nevada Supreme Court. The supreme court affirmed the jury verdict, concluding that substantial evidence supported it, and later denied rehearing. *Hagendorf v. MetLife Home Loans*, Docket No. 65392 (Order of Affirmance, May 20, 2015; Order Denying Rehearing, September 25, 2015).

In May 2016, Hagendorf filed the instant case against MetLife and Nationstar, largely alleging the same claims as contained in the 2011 lawsuit and again requesting punitive damages and injunctive relief. Hagendorf included two new causes of action in his subsequent complaint, civil conspiracy and fraud, against both parties. Nationstar moved for dismissal of the 2016 complaint or, in the alternative, for summary judgment, arguing that claim preclusion barred Hagendorf from bringing all of his claims against Nationstar because he had already been denied relief in the 2011 action against MetLife, and it was in privity with MetLife. In its motion, Nationstar further argued that the jury verdict in favor of MetLife and affirmed on appeal was a valid judgment, precluding Hagendorf from bringing the identical claims he previously made as well as those that could have been brought in the earlier lawsuit. MetLife joined

[1]Although the jury did find that MetLife violated NRS 106.105, it also found that MetLife was not liable to Hagendorf for any civil penalty due to the violation. NRS 106.105 was later repealed and its terms were added to NRS 100.091. 2013 Nev. Stat., ch. 236, §§ 5-6, at 1016-17.

in Nationstar's motion. Hagendorf opposed, arguing that the judgment rendered in the 2011 case had no preclusive effect on the current action because Nationstar was not a party to that action, and because the current action focused on Nationstar's conduct, not on MetLife's (although MetLife was also named as a party).[2]

The district court granted Nationstar's motion and MetLife's joinder and dismissed all of Hagendorf's claims with prejudice.[3] Applying the doctrine of claim preclusion, the district court found Hagendorf's 2016 claims were barred by a valid judgment rendered in the 2011 action, which included the same or similar claims, and claims that could have been brought in the earlier action. Importantly, the district court also found MetLife and Nationstar to be in privity; thus, Hagendorf could not maintain a new lawsuit against Nationstar based on the same or similar claims. We agree with the district court and affirm

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists

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[2]To the extent that Hagendorf is arguing that his new claims could not have been brought until Nationstar became a party, we find this argument unpersuasive based on the underpinnings of claim preclusion.

[3]Although the district court did not specify whether it was ruling on the motion to dismiss or the alternative motion for summary judgment, the district court considered evidence outside of the pleadings and used the summary judgment standard to analyze the issues before it. Thus, the order may be construed as one granting summary judgment. *See* NRCP 12; *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (providing that summary judgment is proper if the pleadings *and all other evidence on file* demonstrates that no genuine issue of material fact exists).

and that the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

"[C]laim preclusion bars parties and their privies from litigating claims that were or could have been brought in a prior action concerning the same controversy." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014). Claim preclusion applies when

> (1) there has been a valid, final judgment in a previous action; (2) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the instant lawsuit as they were in the previous lawsuit, *or* the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so.

Weddell v. Sharp, 131 Nev. 233, 235, 350 P.3d 80, 81 (2015) (emphasis added).

We analyze each of the above elements. First, a valid, final judgment is "[a] judgment on the merits by a proper court." *Bissell v. Coll. Dev. Co.*, 89 Nev. 558, 561, 517 P.2d 185, 187 (1973). It is undisputed that a jury verdict was rendered in the 2011 action and that the resulting judgment was affirmed on appeal. Moreover, Hagendorf does not dispute the judgment's validity. Thus, the judgment on the jury's verdict is a valid, final judgment rendered by a proper court.

Second, a subsequent action is barred under the doctrine of claim preclusion if it is "based on the same claims or any part of them that were or could have been brought in the first [action]," and the subsequent action is "based on the same set of facts and circumstances as the [initial action]." *Mendenhall v. Tassinari*, 133 Nev. 614, 620, 403 P.3d 364, 370

(2017) (quoting *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713-714 (2008) (first alteration in original)). In this case, it is undisputed that both the 2011 and 2016 actions arose out of the same set of facts and circumstances, namely Hagendorf's attempt to bypass his escrow account and pay his insurance premiums and property taxes directly. Although Nationstar was not a party to the 2011 action, it is also undisputed that Hagendorf knew well in advance of trial that MetLife had transferred its interest in the property to Nationstar, and therefore, Hagendorf had sufficient opportunity to attempt to add Nationstar as a party as well as to bring any additional claims against Nationstar based on the transfer of interest.

Finally, claim preclusion applies to MetLife because MetLife was in fact a party to the 2011 action (for which a final judgment was rendered). And because MetLife and Nationstar were in privity, Nationstar is also bound by the 2011 judgment. Privity exists when a person has "acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009) (quoting *Paradise Palms v. Paradise Homes*, 89 Nev. 27, 31, 505 P.2d 596, 99 (1973)), *holding modified on other grounds by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013). Privity may also exist under an adequate representation analysis, which "applies only to persons who represent a litigant's interests." *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369 (citing *Alcantara*, 130 Nev. at 260, 321 P.3d at 917 (adopting the Restatement (Second) of Judgments § 41)); *see also* Restatement (Second) of Judgments § 41(1) (1982) (enumerating representatives to include: trustees of an interest to which the person is a beneficiary, someone who the person

vested with authority to represent him, a fiduciary to the person, an official or agency legally authorized to represent the person's interests, and a class representative in a certified class action). Accordingly, "determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case." *Mendenhall*, 133 Nev. at 619, 403 P.3d at 369.

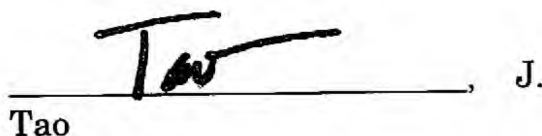
Modern courts conclude that privity also "encompasses a relationship in which 'there is substantial identity between parties, that is, when there is sufficient commonality of interest.'" *Id.* 133 Nev. at 618, 403 P.3d at 369 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003)). Importantly, such a commonality of interest can exist between a mortgage servicer/lender and its successors. *Amina v. WMC Fin. Co.*, 329 F. Supp. 3d 1141, 1159 (D. Haw. 2018); *see, e.g.*, *Janeece Fields v. Bank of N.Y. Mellon*, No. 17-cv-00272-JST, 2017 WL 1549464, at *3 (N.D. Cal. May 1, 2017) (concluding that successor servicer and trustee had privity to lender who was party in the previous action).

Here, when MetLife assigned its interest in the Hagendorf loan to Nationstar, it placed Nationstar, as its successor, in the same position as MetLife during the initial action. Thus, a "substantial identity between parties" existed. Further, it is without question that MetLife and Nationstar, which had acquired its interest from MetLife, were both holders of the deed of trust to the Hagendorf property (prior to the 2013 trial) and both had the same escrow account requirements from which insurance fees and property taxes were to be paid. Therefore, there was "sufficient commonality of interest" between the parties for the district court to consider that MetLife, by litigating the escrow account issues at trial, had adequately protected Nationstar's interests in the same. Based on the

foregoing, we conclude that the district court did not commit reversible error in determining that MetLife and Nationstar were in privity so as to uphold the preclusive effect of the prior judgment in favor of MetLife against Hagendorf.[4] For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Gibbons



_______________, J.
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cc: Hon. Michelle Leavitt, District Judge
Hagendorf Law Firm
Weinstein & Riley, P.S.
Akerman LLP/Las Vegas
Eighth District Court Clerk

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[4]To the extent that Hagendorf asserts other arguments on appeal, we have reviewed the record and find them to be unpersuasive. We specifically decline to address Hagendorf's argument that the district court abused its discretion in failing to grant him leave to amend his complaint. This is because he never moved the district court below to allow him to amend. Therefore, Hagendorf has waived this issue on appeal, and we need not consider it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").