No. 21-6791

In the Supreme Court of the United States

DARYOUSH JAVAHERI,
Petitioner,
v.
U.S. BANK, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

David T. Biderman
Aaron R. Goldstein
Ofunne N. Edoziem
Counsel of Record
PERKINS COIE LLP
1888 Century Park East
Suite 1700
Los Angeles, CA 90067
(310) 788-9900
DBiderman@perkinscoie.com
AGoldstein@perkinscoie.com
OEdoziem@perkinscoie.com

Counsel for Respondent U.S. Bank Trust, N.A., as
Trustee for LSF9 Master Participation Trust

QUESTIONS PRESENTED

The action below is Petitioner Daryoush Javaheri's *seventh* lawsuit against Respondent U.S. Bank, and/or its predecessor beneficiary, based on the same nucleus of facts—a perceived wrongful foreclosure commenced against the subject property more than a decade ago. Two of the prior lawsuits ended in judgments. In the first, filed in 2010, the district court granted U.S. Bank's predecessor beneficiary summary judgment on all counts. That decision was affirmed by the Ninth Circuit. In the second, filed in 2018, the district court dismissed Javaheri's claims against U.S. Bank based on the doctrine of res judicata, and judgment was entered. No appeal was taken. This lawsuit was filed fifteen months later, raising the same foreclosure avoidance claims before the same court. The district court again dismissed based on res judicata. The Ninth Circuit summarily affirmed, and this Petition followed. Under these circumstances, only one question could properly be raised by petition:

Did the Ninth Circuit err when it affirmed the district court's order dismissing the complaint on res judicata grounds?

RULE 29.6 STATEMENT

Respondent U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (erroneously sued as "U.S. Bank N.A., LSF9 Master Participation Trust") is a national banking association whose Articles of Association designate the location of its main office as Wilmington, Delaware. Respondent U.S. Bank is a wholly-owned subsidiary of U.S. Bancorp. No publicly held corporation owns ten percent or more of Respondent U.S. Bank or U.S. Bancorp stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Javaheri has filed several foreclosure avoidance lawsuits throughout the last decade in both state and federal courts. Javaheri has already asserted the same or similar claims, as in the below action, which resulted in two judgments against him.

In October 2010, Javaheri sued JP Morgan Chase Bank N.A. (Case No. 10-cv-08185-ODW (FFM) ("*Javaheri I*")) alleging: (1) wrongful foreclosure; (2) violation of California Civil Code section 2923.5; (3) unjust enrichment; (4) RESPA and TILA violations; (5) no contract; (6) fraud and concealment; (7) quiet title; (8) declaratory and injunctive relief; (9) slander of title; and (10) intentional infliction of emotional distress. On December 11, 2012, the district court granted Chase's motion for summary judgment on all counts. Javaheri appealed and, on February 21, 2014, the Ninth Circuit affirmed the district court's order granting summary judgment.

Four years later, in June 2018, Javaheri sued U.S. Bank, successor beneficiary to Chase (Case No. 2:18-cv-6615-ODW (FFM) ("*Javaheri II*")), alleging: (1) wrongful foreclosure; (2) to set aside trustee's sale; (3) to void or cancel trustee's deed upon sale; (4) to void or cancel assignment of deed of trust; (5) quiet title; and (6) relief for eviction and related relief. Once again, Javaheri pleaded causes of action stemming from an alleged wrongful foreclosure of his same property. The case was removed to the district court, on August 1, 2018. On April 8, 2019, the district granted U.S. Bank's motion to dismiss, with prejudice, based on the doctrine of res judicata, and judgment

was entered on April 15, 2019. (*Javaheri II*, C.D. Cal., Apr. 8, 2019, 2019 WL 1516938). No appeal was taken.

In an effort to upend a lawful nonjudicial foreclosure sale, Javaheri filed this lawsuit a year later, in August 2020, which U.S. Bank removed to federal court. Thereafter, U.S. Bank moved to dismiss all claims which the district court granted, holding all claims barred by the doctrine of res judicata. Judgment was entered in favor of U.S. Bank, on September 24, 2020. Javaheri appealed and the Ninth Circuit affirmed. Javaheri now petitions the Supreme Court for review.

REASONS FOR DENYING THE PETITION

The Court should deny Javaheri's Petition for two reasons. First, the questions presented in the Petition raise issues that were never addressed by the court of appeals or the district court. Second, the only question that properly could be raised—whether res judicata was correctly applied—is not worthy of *certiorari*. The decision below was obviously correct, and reviewing it has no implications beyond the facts of this case. For these reasons, U.S. Bank respectfully requests the Court to deny the Petition.

I. Javaheri's Petition Raises Issues that Were Not Addressed by the Courts Below.

Typically, this Court does not decide questions "not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992). Indeed, it is only in "exceptional" circumstances that questions not addressed below may be reviewed. *Youakim*, 425 U.S. at 234. In this case,

the questions raised in Javaheri's Petition were not addressed below, and no exceptional circumstances exist that would warrant evaluation by this Court.

Javaheri presents questions in his Petition to the Court, such as whether the 'capable-of-repetition' doctrine applies, which were never raised below. Putting aside that it is unclear how this mootness doctrine deals with the bar to his complaint under the principle of res judicata, because the issue presented in the Petition was never addressed below, there is no record on which the Court could review it. For this reason, the Court should deny the Petition without further consideration.

II. The Sole Issue Addressed by the Lower Courts Is Not Worthy of Certiorari.

Even if the Court determines that the issue of res judicata has been properly raised, the Petition should still be denied. The reasoning applied by the courts below was sound, with no repercussions beyond the facts of this case. No constitutional errors are implicated, no conflicts among courts exist, and no novel or complex questions of law are at stake. Rather, the rulings below clearly comprised proper application of the res judicata bar.

Res judicata bars all claims that were brought or could have been brought in a previous action. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Claim preclusion does not mean that the claims alleged must be identical; rather, the claims in the later action must arise from the same transaction as the claims in the prior action. *Id*. In determining whether two claims are sufficiently similar for the purposes of claim preclusion, courts assess whether the claims arise out of the same

nucleus of operative facts or if a single core of operative facts forms the basis for both lawsuits. *See Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987, 989 (9th Cir. 2005) (holding that res judicata bars the subsequent filing of claims denied with leave to amend). In addition, a party cannot defeat the application of res judicata by simply offering a new legal theory. *See Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992) (cert. denied, 113 S. Ct. 98 (1992)).

Res judicata applies where there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002)). All three elements are satisfied here.

A. Javaheri Asserts the Same Claims That Were Asserted in Both Prior Actions

To determine whether claims from a prior suit are identical to a subsequent suit, the court considers the following four factors: (1) whether rights or interest established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039 (9th Cir. 2017). Of the four factors, the fourth—whether the claims arise out of the same nucleus of facts—is the most important as it is "outcome determinative." *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855

(9th Cir. 2016) (quoting *ProShopLine Inc. v. Aspen Infrastructure LTD*, 609 F.3d 960, 968 (9th Cir. 2010)).

Here, Javaheri's underlying claims and conclusory allegations remain virtually identical to the claims in *Javaheri I* and *Javaheri II*. First, allowing him to reassert them here would essentially undermine the two prior judgments. Second, the evidence in this case, *Javaheri I*, and *Javaheri II*, regarding foreclosure on the subject property would be substantially the same, if not identical. Third, both cases involve infringement of the same right, namely the right to enforce a debt, process a foreclosure, and damages stemming from the foreclosure. Fourth, and most importantly, the two prior cases arise out of the same nucleus of facts as the instant matter alleges nothing new that was not or could not have been part of first case.

In *Adams v. Cal. Dept. of Health Servs.*, 487 F.3d 684, 691 (9th Cir. 2007), the Ninth Circuit held that "in the claim preclusion context, the most significant factor is that the causes of action arise from a common transactional nucleus of facts." Here, the transactional nucleus is the same regarding the purported wrongful foreclosure of Javaheri's property. An identity of claims does not mean preclusion is avoided by attaching a different legal label to an issue that has, or could have, been litigated. *Arduini v. Hart*, 774 F.3d 622, 630 (9th Cir. 2014). Javaheri's underlying suit is based on the same failed arguments raised in the prior two lawsuits, despite the subterfuge of newly styled claims. The first element of res judicata is thus easily satisfied.

B. Final Judgment on the Merits Was Reached in *Javaheri I* and *Javaheri II*

The Judgment in *Javaheri I* summarily adjudicating Javaheri's claims in favor of Chase constitutes a "final order" for purposes of res judicata. *See Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005) ("a summary judgment dismissal ... is considered a decision on the merits for res judicata purposes."). There was clearly such a final judgment, here. Indeed, Javaheri appealed the order and this Court *affirmed* the district court judgment.

Further, the judgment in *Javaheri II*, dismissing Javaheri's claims with prejudice based on res judicata, also constitutes a "final order" for purposes of res judicata. Accordingly, final judgments on the merits were entered in both *Javaheri I* and *Javaheri II*. The second element of res judicata is also easily met.

C. The Parties Are The Same or in Privity With Each Other

Javaheri was a party to the prior lawsuits. Likewise, Chase, the prior assign to U.S. Bank, was a defendant in *Javaheri I*. Res judicata applies not only to parties but to those in privity with the parties as well. *In re Schimmels*, 127 F.3d 875, 881–882 (9th Cir. 1997).

Parties are in privity when their relationship is "sufficiently close." *In re Schimmels*, 127 F.3d at 881. A relationship is sufficiently close when a non-party has succeeded a party's interest in property from prior litigation. *Id*. Traditionally, courts have recognized privity, or closeness in relationship, in which two parties have identical or transferred rights with respect to a particular legal interest, including assignors and assignees and successors in interest. *Headwaters Inc. v. U.S. Forest Service*,

399 F.3d 1047, 1053 (9th Cir. 2005) (emphasis added). Courts may also find privity where there is "virtual representation" or an "identity of interests and adequate representation." *Id.* (internal citations omitted); *Arias v. Super. Ct.*, 46 Cal.4th 969, 986 (2009).

Here, the underlying Complaint and record make it clear that U.S. Bank was in privity as successor beneficiary to Chase following assignment of the beneficial interest in the deed of trust. U.S. Bank acquired Chase's identical, transferred rights under the deed of trust. Javaheri recognizes this in his allegations that U.S. Bank acted as the agents, employees and co-conspirators with prior beneficiaries of the Loan. Those are precisely the sort of agency relationships in which there is a sufficiently close relationship to find privity. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082 (9th Cir. 2003).

* * *

Based on these authorities, it is clear that Ninth Circuit and district court below properly applied the doctrine of res judicata to the facts of this case. As already adjudicated by the district court in *Javaheri II*, the adjudication on the merits of *Javaheri I* operates as res judicata, as the Complaint in the action below alleges nothing new that was not or could not have been part of first case (or second case). Javaheri's Petition has failed to demonstrate that the doctrine of res judicata was not properly applied below and there are no issues of significance that warrant certiorari. Thus, for these reasons, the Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Ofunne N. Edoziem
Counsel of Record
PERKINS COIE LLP

Counsel for Respondent U.S. Bank Trust, N.A.,
as Trustee for LSF9 Master Participation Trust

February 9, 2022