ORDERED.

Dated: September 18, 2017

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
MARK ANDREW MACQUARRIE,	)	Case No. 6:14-bk-13112-KSJ
	)	Chapter 7
Debtor.	)	
	)	
	)	
MARK A. MACQUARRIE,	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 6:17-ap-00025-KSJ
	)	
HSBC BANK USA, NATIONAL ASSOCIATION,	)	
	)	
	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS
ADVERSARY PROCEEDING WITH PREJUDICE

Debtor filed this adversary proceeding against HSBC Bank[1] seeking to relitigate issues already resolved by the Florida State Court to remain in his home[2] long after he quit paying the

[1] Doc. No. 1. Defendant's full name is "HSBC Bank USA, National Association, as Trustee for GSMPS Mortgage Loan Trust 2005-RP1 currently serviced by JPMorgan Chas Bank, N.A." but the Court will refer to the Defendant as HSBC Bank.
[2] Debtor's home is located at 4051 Kiawa Drive, Orlando, Florida 32837 (the "Property").

underlying mortgage and the Florida State Court ordered a foreclosure sale. Defendant now seeks to dismiss[3] the Debtor's Amended Complaint.[4] Debtor opposes dismissal.[5] The Court will dismiss this adversary proceeding with prejudice.

In his Amended Complaint, the Debtor asserts six counts against HSBC Bank: Count 1 seeks to determine the extent and validity of HSBC Bank's lien; Count 2 seeks to avoid HSBC Bank's lien; Count 3 seeks criminal relief for alleged false documents recorded by HSBC and for violation of the automatic stay under Sections 105 and Section 362 of the Bankruptcy Code;[6] Count 4 seeks to avoid HSBC Bank's secured interest in the Property under Section 549 of the Bankruptcy Code; Count 5 seeks to establish that HSBC Bank has no standing to assert any claim against the bankruptcy estate; and Count 6 seeks to quiet title to the Property. Each Count either seeks to relitigate issues resolved by the Florida State Court or fails to state a claim upon which relief can be granted.

State Court and Prior Bankruptcy Proceedings

In 2001, the Debtor executed a promissory note payable to Paramount Financial, LLC to finance the purchase of his home.[7] The loan was secured by a mortgage (the "Mortgage") encumbering the Property.[8] Lenders and their servicers have assigned or transferred the Mortgage

[3] Doc No. 24.
[4] Doc. No. 20.
[5] Doc. No. 27.
[6] All references to the Bankruptcy Code are to 11 U.S.C. §§ 101 *et. seq*.
[7] Doc. No. 24, Exh. B**.** *Third Day Capital, Inc. v. Nationstar Mortg., LLC*, No. 616CV1314ORL40TBS, 2017 WL 574481, at *1 n. 2 (M.D. Fla. Jan. 26, 2017), *report and recommendation adopted*, No. 616CV1314ORL40TBS, 2017 WL 565002 (M.D. Fla. Feb. 13, 2017) **(**"In ruling on a motion to dismiss, the Court may take judicial notice of relevant court records[,]" including filings related to a foreclosure action). *See also Odion v. Google Inc.*, 628 F. App'x 635, 638 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1495, 194 L. Ed. 2d 587 (2016) ("The District Court did not err in failing to convert the motions to dismiss into motions for summary judgment based on the defendants' attachment of state-court records because … the court could have taken judicial notice of those records[.]"); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) ("Several courts have employed this rationale and have expressly reviewed matters of public record in ruling on motions to dismiss and have expressly relied on the information contained in those records as a basis for their rulings.").
[8] Doc. No. 24, Exh. B.

several times since 2001. HSBC holds the Mortgage and is the Plaintiff in the underlying Florida State Court foreclosure action.[9]

On October 6, 2005, the Debtor filed his first bankruptcy case.[10] During the First Case, the Debtor entered into a reaffirmation agreement related to the Mortgage, agreeing to repay the debt in full and remain personally liable under the Mortgage.[11] Debtor, however, obtained a discharge of his other debts in the First Case in 2006.[12]

Between the First Case and this case (the "Second Case"), foreclosure proceedings were initiated in the Florida State Court.[13] A foreclosure complaint was filed on April 25, 2013.[14] The Florida State Court issued a final judgment of foreclosure for HSBC Bank on September 2, 2014.[15] A foreclosure sale was scheduled for December 2, 2014.[16]

Debtor filed this bankruptcy case, initially as a Chapter 13 case, on December 1, 2014, the day before the scheduled foreclosure sale.[17] Debtor then filed a Motion to Avoid Judicial Lien of HSBC Bank in the Second Case.[18] On December, 30, 2014, the Court dismissed the Debtor's Second Case because he failed to file needed schedules and statements.[19] Months later, on March 30, 2015, the Debtor sought to reinstate his case and convert it to a Chapter 7 liquidating bankruptcy case.[20]

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[9] Doc. No. 24, Exhs. A, C.
[10] Case No. 6:05-bk-12671-KSJ (the "First Case").
[11] Doc. No. 9 in the First Case.
[12] Doc. No. 15 in the First Case.
[13] Case No. 2013-CA-005680-O, Circuit Court in and for Orange County, Florida.
[14] *Third Day Capital*, 2017 WL 574481 at *1, n. 2; *Odion*, 628 F. App'x at 638; *Avado Brands*, 187 F.3d at 1280.
[15] Doc. No. 24, Exh. A.
[16] Doc. No. 24, Exh. A, p. 3, ¶ 7.
[17] Doc. No. 1 in the Second Case.
[18] Doc. No. 13 in the Second Case.
[19] Doc. No. 15 in the Second Case.
[20] Doc. Nos. 21 and 22.

Debtor also filed a *second* Motion to Avoid Judicial Lien of HSBC Bank,[21] which is not permitted in a Chapter 7 bankruptcy case.[22] The Court erroneously entered and later vacated an order stripping HSBC's Mortgage lien[23] because, if the mistake was not fixed, the Debtor would have received an unjustified windfall by avoiding a valid Mortgage he legally must pay if he wishes to retain the mortgaged real property.[24]

Res Judicata Requires Dismissal of Counts 1, 2, 5, and 6 _with Prejudice_

The Florida State Court already decided all issues raised in Counts 1, 2, 5, and 6 of the Debtor's Amended Complaint. Each seeks to challenge HSBC Bank's lien or interest on the Property. But the Florida State Court already has finally concluded that HSBC Bank's interest is superior to all other interests in the Property. The doctrine of *res judicata* prevents me from revisiting and possibly revising the Florida State Court orders, including their Final Judgment of Foreclosure.

"The general principle of *res judicata* prevents the relitigation of issues and claims already decided by a competent court. 'Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel.' *Res judicata* comes in two forms: claim preclusion (traditional '*res judicata*') and issue preclusion (also known as 'collateral estoppel'). In considering whether to give preclusive effect to state-court judgments under *res judicata* or

[21] Doc. No. 17 in the Second Case.
[22] Debtors in Chapter 13 cases may void junior mortgage liens if the debt owed on a senior mortgage exceeds the value of the property. However, the United States Supreme Court ruled that a "debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral." *Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 2001, 192 L. Ed. 2d 52 (2015). This is important for two reasons: first, HSBC Bank's lien relates to the senior mortgage, and, second, debtors may not use lien stripping in chapter 7 cases (like this one).
[23] Doc. No. 29, 46, and 52 in the Second Case.
[24] Doc. Nos. 46, 52 in the Second Case.

collateral estoppel, the federal court must apply the rendering state's law of preclusion."[25] Here, the Court will apply Florida preclusion law.

Under Florida law, "'collateral estoppel applies if (1) an identical issue, (2) has been fully litigated, (3) by the same parties or their privies, and (4) a final decision has been rendered by a court of competent jurisdiction.'"[26] "The doctrine of collateral estoppel … 'bars relitigation of the same issues between the same parties in connection with a different cause of action.' The doctrine comes into play in a case when the 'same parties' attempt to litigate the 'same issues' that were already addressed. The doctrine bars 'the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation.'"[27]

Res judicata prevents parties to an action from re-litigating matters that were or could have been litigated in a previous lawsuit.[28] "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding."[29] "Thus matters that arise from the same facts, occurrences or transactions that were the basis of a prior action may be within the scope of claim prelusion by that action."[30]

The Florida State Court Final Judgment of Foreclosure provides that HSBC Bank holds a lien on the Property that is "prior, paramount[,] and superior" to the rights or interest of the Debtor (and other defendants/parties not at issue here) and states that any interest of the Debtor would be

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[25] *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011) (internal citations omitted).
[26] *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1036-37 (11th Cir. 2014) (internal citations omitted).
[27] *Criner v. State*, 138 So. 3d 557, 558 (Fla. 5th Dist. Ct. App. 2014) (internal citations omitted) (internal quotation marks omitted).
[28] *Shurickv. Boeing Co.*, 623 F.3d 1114, 1116 (11th Cir. 2010).
[29] *Brown v. Felsen*, 442 U.S. 127, 131 (1979).
[30] *Cummings v. Nichols (In re Nichols)*, Adv. No. 3:10-ap-260 (Bankr. M.D. Fla. 2011) (quoting 18 J. Moore, et al., Moore's Federal Practice § 131.10[3][c], p. 131-19 (3d ed. 2011)).

an inferior lien to HSBC Bank's interest.[31] Counts 1, 2, 5, and 6 each seek to challenge the superiority of HSBC Bank's lien or interest on the Property. But the Florida State Court has concluded that HSBC Bank's interest is superior to all other interests in the Property. The Final Judgment of Foreclosure is entitled to *res judicata* effect; I will not revisit or revise the ruling.

Debtor's reference to a Motion for Rehearing in the Florida State Court does not render the Final Judgment of Foreclosure ineffective.[32] *This Court* does not act as an appellate court to the state court.[33] The Final Judgment of Foreclosure is still entitled to *res judicata* effect.

Failure to State a Claim – Counts 3 and 4

Counts 3 and 4 fail to state a claim upon which relief can be granted. Count 3 seeks criminal relief against HSBC. Count 4 seeks to avoid HSBC Bank's secured interest in the Property under § 549 of the Bankruptcy Code. Counts 3 and 4 are dismissed with prejudice.

Rule 12(b)(6) provides that before an answer is filed a defendant may seek dismissal of a complaint if the complaint fails to state a claim.[34] Disposition of a motion to dismiss under Rule 12(b)(6) focuses only upon the allegations in the complaint and whether those allegations state a claim for relief. In reviewing a motion to dismiss, courts must accept the allegations in the

[31] Doc. No. 24, Exh. A.

[32] *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001) (quoting *McGregor v. Provident Trust Co.*, 119 Fla. 718, 162 So. 323, 327 (Fla. 1935) ("'[A] judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit between the same parties or their privies upon the same cause of action, **so long as it remains unreversed**.'") (claim preclusion analysis); *Christo v. Padgett*, 223 F.3d 1324, 1338 (11th Cir. 2000) ("This case, by contrast, involves issue preclusion; the court stated that all the [essential] facts and questions … were decided in the … order," so the order, even though it referenced "preliminary findings," was entitled to issue preclusion effect) ("It is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion.").

[33] Even if the Motion for Rehearing is deemed a basis to make the Final Judgment of Foreclosure "less than final," the Bankruptcy Court will exercise its discretion and allow the Florida State Court to rule on this pending Motion for Rehearing or any future motion relating to the Final Judgment of Foreclosure. Permissive abstention is appropriate when justice, the best interest of the estate, and considerations of comity with sister courts support allowing another court to conclude its work. *In re Peacock*, 455 B.R. 810, 813-14 (Bankr. M.D. Fla. 2011).

[34] Fed. R. Civ. P. 12(b)(6).

complaint as true and construe them in the light most favorable to the plaintiff.[35] Under Rule 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[36] Rule 8(a)(3) requires a "demand for the relief sought."[37] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[38]

For a complaint to survive a motion to dismiss, it must contain enough factual matter to "state a claim to relief that is plausible on its face."[39] Facial plausibility is present "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[40] Courts routinely allow amendments to complaints dismissed for failure to state a claim, particularly for *pro se* parties; however, when amendment is futile, dismissal with prejudice is merited.[41]

Taken all the allegations in the complaint as true, the Debtor has failed to state a claim upon which relief could be granted in Counts 3 and 4. Dismissal of these counts with prejudice is warranted.

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[35] *Brophy v. Jiangbo Pharm., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015) (quoting *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 769 F.3d 1291, 1293 (11th Cir. 2014) (quoting *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003))).
[36] Rule (8)(a) is made applicable in adversary proceedings by virtue of Bankruptcy Rule 7008(a).
[37] Fed. R. Civ. P. 8(a)(3).
[38] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted).
[39] *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).
[40] *Id.*
[41] *Dragash v. Fed. Nat'l Mortg. Ass'n*, No. 16-12123, 2017 WL 2859508, at *6 (11th Cir. July 5, 2017) ("Nor do we find error in the denial of leave to amend based on futility. While leave to amend ordinarily should be freely given, a district court need not grant even a *pro se* plaintiff leave to amend where amendment would be futile."); *LaCroix v. W. Dist. of Kentucky*, 627 F. App'x 816, 819 (11th Cir. 2015), *cert. dismissed sub nom. LaCroix v. U.S. Dist. Court for W. Dist. of Kentucky*, 136 S. Ct. 996, 194 L. Ed. 2d 2 (2016) (the court "need not allow amendment where a more carefully drafted complaint could not state a claim and is, therefore, futile").

Count 3 cites Florida Statutes §§ 831.02 and 817.535 and seeks criminal relief against HSBC for allegedly recording false documents in violation of these statutes. The Bankruptcy Court has no authority to hold HSBC Bank guilty for violating any criminal statute. Nor has Debtor stated any violation under the automatic stay imposed by § 362 of the Bankruptcy Code. Similar to Count 4, discussed in more depth below, the Debtor's alleged violation of the automatic stay in Count 3 is the post-petition assignment of the Mortgage. The post-petition assignment of the Mortgage cannot violate the automatic stay because it was not collection action against the Debtor and did not involve property of the estate. Count 3 is fatally flawed, cannot be restated, and is dismissed with prejudice because it fails to state a claim upon which relief can be granted.

In Count 4, Debtor challenges the post-petition assignment of the Mortgage from Chase to HSBC, asserting that under § 549 of the Bankruptcy Code a Chapter 7 Trustee can avoid a transfer of property of the estate executed post-petition and not authorized by the Court. Bankruptcy Judge Delano ruled on a similar issue in *In re Aum Shree of Tampa, LLC*,[42] and found "that the assignment of a perfected mortgage is not a transfer of property of the estate under Section 541 of the Bankruptcy Code, and therefore the Debtor is not authorized under the Bankruptcy Code to avoid transfers under [Sections] 548, 547, or 549." Similarly, the Eleventh Circuit Court of Appeals has ruled that an assignment of a perfected mortgage does not "not involve the transfer of any property belonging to the debtor or to the debtor's estate. … the assignment was merely the transfer of one mortgagee's interest to a successor mortgagee."[43] Debtor cannot object if a lender assigns its interest in a mortgage to another party. Count 4 fails to state a claim upon which relief can be granted and is dismissed with prejudice.

Accordingly, it is

[42] 449 B.R. 584, 592 (Bankr. M.D. Fla. 2011).
[43] *In re Halabi*, 184 F.3d 1335, 1337 (11th Cir. 1999)

ORDERED:

1. The Motion to Dismiss is **GRANTED**.

2. Counts 1 – 6 are dismissed with prejudice.

3. The Clerk shall close this adversary proceeding in 21 days.

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Attorney, Fernando Menendez, is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.