

KESLER V. U.S. BANK

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**PERRY A. KESLER,
Plaintiff-Appellant,
v.
U.S. BANK, NATIONAL ASSOCIATION,
Defendant-Appellee.**

NO. 34,884

COURT OF APPEALS OF NEW MEXICO

July 18, 2017

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY, Gerald E. Baca,
District Judge

COUNSEL

Perry A. Kesler, Rowe, NM, Pro Se Appellant

Keleher & McLeod, P.A., Thomas C. Bird, Deron Knoner, Justin Breen, Albuquerque,
NM, for Appellee

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, JULIE J. VARGAS, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Plaintiff Perry A. Kesler appeals from an order granting the motion to dismiss of Defendant U.S. Bank, National Association and an order denying Kesler's motion to file a supplemental pleading. The district court granted the motion to dismiss on the basis

that Kesler's complaint was barred by the doctrine of res judicata. Kesler's requested supplemental pleading was in further response to U.S. Bank's motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

{2} In *U.S. Bank, National Ass'n v. Kesler*, D-412-CV-2012-00254 (Fourth Judicial District Court), U.S. Bank, as assignee of a promissory note and mortgage executed by Kesler, sought to foreclose on Kesler's residential property that secured the mortgage (the foreclosure action). Kesler counterclaimed, asserting in part U.S. Bank's failure to properly post mortgage payments. Kesler subsequently clarified that his claim was based on the New Mexico Home Loan Protection Act (the HLP A). The district court in the foreclosure action (the foreclosure court) granted U.S. Bank summary judgment on U.S. Bank's claims and Kesler's counterclaims. Kesler appealed.

{3} After filing his notice of appeal in the foreclosure action, Kesler brought this action in district court, seeking relief from U.S. Bank for violating the HLP A by failing to accept partial payments from him. The district court granted U.S. Bank's motion to dismiss on res judicata grounds based on the foreclosure action.

{4} This Court has decided Kesler's appeal in the foreclosure action. *U.S. Bank v. Kesler*, No. 35,165, mem. op. (N.M. Ct. App. July 18, 2017) (non-precedential). We determined in part that the foreclosure court erred in granting summary judgment with respect to Kesler's HLP A and related Unfair Practices Act claim. *Id.* ¶¶ 9, 24. We remanded for the foreclosure court to address those claims. *Id.* ¶¶ 9, 29.

{5} In this appeal, Kesler argues that (1) there was a violation of the HLP A, (2) the complaint in the HLP A action did not state the same cause of action as the counterclaim in the foreclosure action for res judicata purposes, (3) the foreclosure court's rulings were not on the merits and not final, (4) he did not have the full and fair opportunity to litigate the HLP A claims in the foreclosure action, (5) the district court erred in failing to grant his motion for leave to supplement his response to the motion to dismiss, (6) his HLP A claim was not a compulsory counterclaim in the foreclosure action, and (7) the Legislature intended that homeowners have the right to bring a separate civil action for a HLP A violation.

{6} Because (1) this appeal is based on the district court's determination that the summary judgment in the foreclosure action precluded this action on res judicata grounds, (2) Kesler raises only arguments pertaining to his HLP A claims in this appeal, (3) the merits of Kesler's HLP A claims have yet to be addressed and would not be addressed in this appeal, and (4) we have remanded the HLP A claims to the foreclosure court to address on remand, there is no longer an actual controversy to be resolved in this appeal that will grant Kesler any actual relief. This appeal is therefore moot. *State v. Sergio B.*, 2002-NMCA-070, ¶ 9, 132 N.M. 375, 48 P.3d 764.

{7} We therefore dismiss this appeal.

{8} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

JULIE J. VARGAS, Judge