GILBERTO ORTEGA etc., et al., Plaintiffs and Appellants,
v.
CAL COAST MORTGAGE CORPORATION et al., Defendants and Respondents.

No. D069795.

Court of Appeals of California, Fourth District, Division One.

Filed February 21, 2017.

APPEAL from a judgment of the Superior Court of San Diego County, Super. Ct. No. 37-2014-00035881-CU-OR-CTL, Joel M. Pressman, Judge. Affirmed.

Ronald H. Freshman for Plaintiff and Appellants.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendants and Respondents.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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IRION, J.

Plaintiffs Gilberto and Josefina Ortega (Plaintiffs) defaulted on a loan secured by a deed of trust on real property in Chula Vista (the Property), and in early 2012 the beneficiary under the deed of trust began nonjudicial foreclosure proceedings. Later in 2012, Mr. Ortega filed for bankruptcy under chapter 7 of the United States Bankruptcy Code (11 U.S.C. § 101 et seq.) and received a discharge in early 2013. In late 2014, Plaintiffs filed the present lawsuit in which they contend defendants Nationstar Mortgage LLC (Nationstar) and U.S. Bank, N.A., as Trustee for Harborview Mortgage Loan Trust 2005-10 (U.S. Bank) (together, Defendants) are not entitled to foreclosure. The trial court sustained without leave to amend Defendants' demurrer to Plaintiffs' second amended complaint, in which Plaintiffs allege claims for declaratory relief and to quiet title related to the Property.

Because Mr. Ortega did not include in his bankruptcy schedules the claims Plaintiffs assert in this action, application of the doctrine of judicial estoppel precludes the present lawsuit. Accordingly, we affirm the trial court's judgment of dismissal.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Our recitation of the facts assumes the truth of the properly pleaded factual allegations, as well as matters which may be judicially noticed, but not contentions, deductions or conclusions of fact or law. (*Yvanova v. New Century Mortgage Corp.*(2016) 62 Cal.4th 919, 924 (*Yvanova*).) Under Evidence Code sections 452, subdivisions (c), (d) and (h), and 453, the trial court properly took judicial notice of the existence and facial contents of six recorded documents that relate to the Property and two filed documents from the chapter 7 bankruptcy case filed October 22, 2012, *In re Gilberto Ortega*, United States Bankruptcy Court, Southern District of California, case No. 12-14179-CL7 (*Ortega* bankruptcy case).[1] (See *Yvanova,* at p. 924, fn. 1.) Accordingly, under Evidence Code section 459, subdivision (a), we too will take notice of the existence and contents of these documents, though not of disputed or disputable facts in them. (*Yvanova,* at p. 924, fn. 1.)

In July 2005, Plaintiffs borrowed $444,500 and secured the loan with a deed of trust on the Property.

In August 2011, the holder of the deed of trust on the Property assigned its interest to U.S. Bank.

By separate documents in January 2012, U.S. Bank, as beneficiary under the deed of trust, substituted the trustee, and the new trustee commenced foreclosure proceedings by recording a notice of default and election to sell the Property under the deed of trust.

In October 2012, Mr. Ortega filed the *Ortega* bankruptcy case. In their opening brief, Plaintiffs "admit[]" that Mr. Ortega "did not list any of the current claims alleged in this action in his bankruptcy schedules," even though he "acknowledged the [then-]pending foreclosure of the [P]roperty in his schedules."[2] The bankruptcy petition is consistent with this admission. In addition, in his statement of financial affairs (attached to the bankruptcy petition) Mr. Ortega expressly represented that he would not be keeping the Property, but rather that he would

surrender it to the secured creditor. Retained counsel prepared the petition, and Mr. Ortega verified under penalty of perjury these disclosures and statements.

Just a few months later in January 2013, Mr. Ortega received a discharge in bankruptcy under section 727 of the Bankruptcy Code (11 U.S.C. § 727).

In mid-2014, U.S. Bank assigned its interest in the deed of trust on the Property to Nationstar.

Less than two years after Mr. Ortega received a discharge in bankruptcy, in October 2014 Plaintiffs filed the present action in the superior court, naming Defendants and others. The operative verified second amended complaint (SAC), like the original and first amended complaints, alleges two causes of action related to the Property — one for declaratory relief and one to quiet title. Without going into detail (because we do not reach the merits of Plaintiffs' substantive claims), in the SAC Plaintiffs allege they are entitled to relief on the basis that "the note, deed of trust and all other documents related to this purported loan are VOID as a matter of law."[3]

Defendants demurred to the SAC, arguing that the complaint and its two causes of action are barred by the doctrine of judicial estoppel and also fail to state a claim. In support, Defendants filed a memorandum of points and authorities and a request for judicial notice of the documents described at footnote 1, *ante*. In opposition, Plaintiffs filed a memorandum of points and authorities and objections to Plaintiffs' request for judicial notice. Plaintiffs filed a reply.

Following oral argument, by written minute order filed in November 2015, the superior court granted Defendants' request for judicial notice and sustained without leave to amend Defendants' demurrer to Plaintiffs' SAC. The court agreed with both of Defendants' arguments: because Mr. Ortega did not disclose the existence of the claims in this action to the bankruptcy court in the *Ortega* bankruptcy case, Plaintiffs are judicially estopped from asserting the claims now; and Plaintiffs cannot allege a wrongful foreclosure (and, thus, the claims for declaratory relief and to quiet title) based on the documentation associated with the securitization of the loan.

The court later filed a formal order sustaining without leave to amend the SAC and a judgment of dismissal as to Defendants. In February 2016, Plaintiffs timely appealed from the judgment.

II.

DISCUSSION

In their opening brief, Plaintiffs argue first that they stated causes of action for declaratory relief and to quiet title, because certain of the documents on which the foreclosure of the Property is based are void. Plaintiffs argue next that they are not judicially estopped from prosecuting their claims in this action, because the claims they are asserting here are not inconsistent with the position taken in the *Ortega* bankruptcy case. We disagree with their second argument; judicial estoppel bars the present action. Accordingly, we will affirm the judgment without reaching, or expressing any opinion on, whether the documentation in support of the foreclosure on the Property may be void and, if so, the relief to which Plaintiffs might be entitled.

A. *Law*

In our review of a judgment of dismissal following the sustaining of a demurrer without leave to amend, "we examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose." (*McCall v. PacifiCare of California, Inc.*(2001) 25 Cal.4th 412, 415 (*McCall*).) We presume the trial court's ruling is correct, and the appellant has the burden of affirmatively establishing reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

The filing of a bankruptcy petition creates a bankruptcy estate that includes "all legal or equitable interests of the debtor in property as of the commencement of the case." (11 U.S.C. § 541(a)(1).) These interests "include choses in action and claims by the debtor against others." (Hist. Notes, 11 U.S.C.A. (2016) foll. § 541, p. 10; see *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 829-830 (*Reichert*)[under § 70(a)(5), (6) of the Bankruptcy Act of **1898, 11 U.S.C. former § 110(a)(5), (6)].)**[4]

"It is a long-standing tenet of bankruptcy law that one seeking the benefits of protection under the bankruptcy law has a concomitant duty to disclose to the creditors all of the debtor's interests and property rights without limitation." (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 351 (*International Engine*).) Indeed, **"the `bankruptcy code place[s] an affirmative duty on [the debtor] to schedule his assets and liabilities'" "`"*carefully, completely, and accurately.*"'"** (*M & M Foods, Inc. v. Pacific American Fish Co., Inc.* (2011) 196 Cal.App.4th 554, 563-564; see 11 U.S.C. § 521(a)(1)(B)(i) [all "assets and liabilities"], (a)(2) ["debts secured by property of

the estate"]; Fed. Rules Bankr. Proc., rule 1007(b).) For this reason, **"`[i]t is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information on which all creditors rely.'"** (*Hamilton v. State Farm Fire & Casualty Co.* (9th Cir. 2001) 270 F.3d 778, 785 (*Hamilton*).)

As particularly applicable here, **"[C]AUSES OF ACTION ARE SEPARATE ASSETS WHICH MUST BE FORMALLY LISTED."** (*Cusano, supra*, 264 F.3d at p. 947.) Because "`**"[a] debtor is required to disclose *all potential causes of action*,"' "the Bankruptcy Code and the Bankruptcy Rules "`impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*. . . . "`The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . to suggest that [he] may have a possible cause of action, then that is a "known" cause of action such that it must be disclosed.'" . . . "*Any claim with potential must be disclosed*, even if it is `contingent, dependent, or conditional.'"'"** (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 133 (*Gottlieb*).) **"Simply listing the underlying asset [or liability] out of which the cause of action arises is not sufficient."** (*Cusano*, at p. 947.)

"The concept of judicial estoppel prevents a party from asserting a position in a judicial proceeding that is contrary or inconsistent with a position previously asserted in a prior proceeding." (*International Engine, supra*, 64 Cal.App.4th at p. 350.) **"`"`The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies.'"'"** (*People v. Castillo* (2010) 49 Cal.4th 145, 155, italics omitted (*Castillo*).) **Because a debtor who fails to list legal claims on his bankruptcy schedules perpetrates a fraud on both the bankruptcy court and the creditors who rely on the schedules to determine what, if any, action to take in the bankruptcy case, "`courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding.'"** (*Hamilton, supra*, 270 F.3d at p. 785.) Unlike collateral estoppel or equitable estoppel, **"`"[t]he gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the *judicial machinery*."'"** (*Gottlieb, supra*, 141 Cal.App.4th at p. 132.)

Although discretionary, judicial estoppel "`applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial

administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."" (*Castillo, supra*, 49 Cal.4th at p. 155.) **Under this standard, WHERE A DEBTOR OMITS A POTENTIAL CLAIM FROM THE BANKRUPTCY SCHEDULES AND OBTAINS A DISCHARGE, JUDICIAL ESTOPPEL BARS THE DISCHARGED DEBTOR FROM LATER ASSERTING THE CLAIM.** (*International Engine, supra*, 64 Cal.App.4th at p. 354; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1609-1610; *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 137-138; *Ah Quin v. County of Kauai Dept. of Transportation* (9th Cir. 2013) 733 F.3d 267, 271; *Hamilton, supra*, 270 F.3d at pp. 783, 785; *In re Coastal Plains, Inc.* (5th Cir. 1999) 179 F.3d 197, 208; *Hay v. First Interstate Bank* (9th Cir. 1992) 978 F.2d 555, 557; *Oneida Motor Freight, Inc. v. United Jersey Bank* (3d Cir. 1988) 848 F.2d 414, 420.)

Finally, **judicial estoppel may be invoked against a party in the second proceeding that is in privity with the party who successfully asserted the inconsistent position in the first proceeding**. (*Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* (9th Cir. 2012) 692 F.3d 983, 996 (*Milton H. Greene*); *Patriot Manufacturing LLC v. Hartwig, Inc.* (D. Kan. 2014) 996 F.Supp.2d 1120, 1127, fn. 38 [collecting cases from 2d, 7th, 8th, 9th & 10th federal circuits].)

B. *Analysis*

In *Hamilton*, the debtor filed a chapter 7 bankruptcy case in which he scheduled a $160,000 loss, but failed to list on his schedule of assets a claim against his homeowners' insurer for this loss. (*Hamilton, supra*, 270 F.3d at p. 781.) The debtor received his discharge in bankruptcy and then pursued his claim against the insurer in the district court after the dismissal of the bankruptcy case. (*Id.* at pp. 781-782.) The district court granted summary judgment for the insurer, and the Ninth Circuit affirmed. In order to protect the integrity of the bankruptcy process, **the federal appellate court applied the doctrine of judicial estoppel to bar the debtor from pursuing a claim not disclosed in his bankruptcy case**. (*Id.* at pp. 782, 785.)

Hamilton, supra, 270 F.3d 778, is on point. Here, Mr. Ortega received a discharge in bankruptcy based on a chapter 7 petition in which he disclosed: on the schedule of real property, the Property (with a total secured claim against it in the amount of

$549,400); on the schedule of creditors, the identity of the creditor that held the deed of trust on the Property (with the amount of the secured claim of $548,400);[5] on the statement of financial affairs, a pending foreclosure of the Property (evidenced by the recording of a notice of default and a notice of trustee's sale on behalf of the secured creditor); and on the statement of intention, a notice that the Property was not exempt and would be surrendered to the secured party. Mr. Ortega failed to disclose to the bankruptcy court the claims he now asserts based on the documentation related to the loan on the Property.

Plaintiffs tell us that "none" of the elements necessary for the application of judicial estoppel is present. (See *Castillo, supra*, 49 Cal.4th at p. 155, quoted *ante*, part II.A.) However, in their opening brief Plaintiffs focus on only one — namely, that the positions taken in the *Ortega* bankruptcy case and the present action are not totally inconsistent. We disagree. The inconsistency is as follows: Mr. Ortega told the federal court that he (the debtor) had no claims, contingent or otherwise, based on property of the estate (while nonetheless disclosing the outstanding debt secured by property of the estate (i.e., the Property)); yet Plaintiffs are now telling the state court that the debtor in fact did have claims based on the documentation related to a loan secured by property of the bankruptcy estate (i.e., the Property).

In somewhat of a non sequitur, Plaintiffs argue that there is no inconsistency because there is no indication either that the secured creditor relied on the bankruptcy petition and schedules or that Plaintiffs derived an unfair advantage (or imposed an unfair detriment on Defendants) as a result of the discharge. That, however, is not the standard. **The five elements necessary to establish judicial estoppel do not include reliance or unfair advantage.** (*Castillo, supra*, 49 Cal.4th at p. 155, quoted *ante*.) In essence, **all that is necessary is "`"the intentional assertion of an inconsistent position that perverts the *judicial machinery*."'"** (*Gottlieb, supra*,141 Cal.App.4th at p. 132.)

Even though only *Mr. Ortega* asserted the inconsistent position in the first proceeding (i.e., the *Ortega* bankruptcy case), if the doctrine of judicial estoppel applies to Mr. Ortega in this second proceeding, then it applies to *Ms. Ortega* as well because she is in privity with him. (See *Milton H. Greene, supra*, 692 F.3d at p. 996.) For purposes of concluding that she was in privity with him, we note: (1) the deed of trust on the Property identifies the borrower-trustors as "Gilberto Ortega and Josefina Ortega, husband and wife as joint tenants"; (2) Mr. Ortega and Ms. Ortega both executed the deed of trust on the Property; (3) on the bankruptcy petition's schedule of real property, Mr. Ortega listed the Property, describing it as

owned jointly by him and Ms. Ortega; (4) consistently, on the bankruptcy petition's schedule of secured creditors, Mr. Ortega listed the beneficiary of the deed of trust on the Property, describing the creditor's claim as his and Ms. Ortega's joint obligation; and (5) most persuasively, in their brief Defendants expressly argued that judicial estoppel applied to Ms. Ortega because she was in privity with Mr. Ortega for purposes of the position he took in the *Ortega* bankruptcy case, and Plaintiffs did not object or otherwise respond in their reply brief.

In their reply brief, Plaintiffs contend that judicial estoppel does not apply because we should *infer* that the failure to schedule the claims against Defendants in the *Ortega* bankruptcy case was unintentional and, thus, not the "`"result of ignorance, fraud or mistake."'" (See *Castillo, supra*, 49 Cal.4th at p. 155.) We disagree. Procedurally, Plaintiffs forfeited consideration of this argument by failing to raise it in their opening brief in this court. (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP*(2016) 3 Cal.App.5th 1240, 1247, fn. 2.) Substantively, Plaintiffs have not explained how or why they are entitled to such an inference. Quoting from *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, Plaintiffs suggest that we must "infer that [Mr. Ortega's] failure to list [Plaintiffs'] claim[s] against [Defendants] in his bankruptcy case was unintentional." (*Id.* at p. 599.) However, *Kelsey* was an appeal from the grant of a defense summary judgment, where the standard of review required the appellate court to "draw all reasonable inferences from *the evidence* in favor of [the plaintiff]." (*Ibid.*, italics added.) The standard in this appeal following the sustaining of a demurrer is different. As introduced *ante*, we assume the truth of the properly pleaded facts (*McCall, supra*,25 Cal.4th at p. 415; see *Yvanova, supra*, 62 Cal.4th at p. 924), but the SAC does not contain any facts regarding either the *Ortega* bankruptcy case generally or an unintentional error in one of the schedules specifically.

Evidence and inferences from evidence are not involved in demurrer proceedings. Rather, if Plaintiffs believed that Mr. Ortega unintentionally failed to schedule the affirmative claims against Defendants (or their predecessors) in the *Ortega* bankruptcy case, then Plaintiffs' remedy was to have asked for leave to amend — either in the trial court or now on appeal for the first time. (Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746-747.) In either event, the burden of requesting leave and showing a reasonable possibility of a curing amendment "`is squarely on the plaintiff.'" (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 520, fn. 16.) Here, Plaintiffs have neither requested leave to amend nor attempted to show how they might amend the SAC in good faith.

For the foregoing reasons, Plaintiffs did not meet their burden of establishing that the trial court erred in ruling that the doctrine of judicial estoppel bars the claims in Plaintiffs' SAC. Accordingly, we do not reach, and thus express no opinion on, the other issues that Plaintiffs raise in this appeal.

III.

DISPOSITION

The judgment of dismissal is affirmed. Defendants are entitled to their costs on appeal.

BENKE, Acting P. J. and NARES, J., concurs.

[1] The superior court granted Defendants' request for judicial notice of the following documents: (1) a deed of trust recorded July 25, 2005; (2) an assignment of deed of trust recorded August 31, 2011; (3) a substitution of trustee recorded January 9, 2012; (4) a notice of default and election to sell under deed of trust recorded January 9, 2012; (5) a voluntary chapter 7 bankruptcy petition filed October 22, 2012; (6) an order discharging the debtor filed January 28, 2013; (7) a notice of trustee's sale recorded July 3, 2013; and (8) a corporate assignment of deed of trust recorded June 13, 2014.

[2] Actually, the acknowledgement of the foreclosure is part of the statement of financial affairs, not part of any schedule to the petition.

[3] In their opening brief filed in October 2016, Plaintiffs tell us that the foreclosure, which is based on these documents, still has not taken place.

[4] **Because property of the bankruptcy estate includes all of a debtor's causes of action, upon the filing of the bankruptcy petition, each such cause of action belongs to the estate, not to the debtor.** (11 U.S.C. § 541(a)(1).) For this reason, **"a chapter 7 debtor may not prosecute on his or her own a cause of action belonging to the bankruptcy estate unless the claim has been abandoned by the trustee."** (*Bostanian v. Liberty Savings Bank* (1997) 52 Cal.App.4th 1075, 1081; accord, *Reichert, supra*, 68 Cal. 2d at pp. 829-830 [under Bankruptcy Act of 1898, a chapter VII debtor is not vested with the right to assert legal claims belonging to bankruptcy estate].) Without a statutorily authorized abandonment under 11 United States Code section 554, however, **the estate's legal claim remains property of the bankruptcy estate even after the debtor receives a discharge in bankruptcy.** (11 U.S.C. § 554(d); *Cusano v. Klein* (9th Cir. 2001) 264 F.3d 936, 948 (*Cusano*).) Because we do not know whether the claims at issue here were abandoned in the *Ortega* bankruptcy case, our decision is not based on, and we express no opinion, whether Plaintiffs have standing to prosecute the present lawsuit under *Reichert* and *Bostanian.*

[5] On the same schedule of creditors, Mr. Ortega also listed the Property's homeowners' association as holding a $1,000 claim secured by the Property.