

72606-4

72606-4

NO. 72606-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

MUFG UNION BANK, N.A.,

Respondent,

vs.

DANIEL GLAEFKE,

Appellant.

RESPONDENT MUFG UNION BANK, N.A.'S BRIEF

Averil Rothrock, WSBA #24248
Joel A. Parker, WSBA #44494
Claire L. Rootjes, WSBA #42178
Schwabe, Williamson & Wyatt, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone: 206.622.1711
Facsimile: 206.292.0460
Attorneys for MUFG Union Bank, N.A.

H

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES.....	2
III. STATEMENT OF THE CASE.....	3
A. Union Bank was a secured creditor of Glaefke with a deed of trust recorded on real property owned by Glaefke.....	3
B. In Glaefke's Chapter 7 bankruptcy, Union Bank moved as a secured creditor for relief from stay to enforce its rights in the real property, which motion was unopposed by Glaefke and granted.....	3
C. When Union Bank later realized its deed of trust had been erroneously reconveyed, it filed this equitable action for rescission of the reconveyance and reinstatement of the deed of trust, but has not pursued Glaefke personally.....	4
D. The trial court granted summary judgment to Union Bank, rejecting Glaefke's argument that the action and equitable relief sought were prohibited by Glaefke's bankruptcy discharge.	5
IV. STANDARDS OF REVIEW	5
V. ARGUMENT	6
A. This Court should affirm the summary judgment to Union Bank because Glaefke's bankruptcy discharge does not affect Union Bank's right to rescission and reinstatement.	7
1. Union Bank's equitable right to reinstatement is not a "claim" that was discharged in bankruptcy.	7
2. Discharge of the equitable action did not occur because the parties did not reasonably contemplate the equitable action at the time	

TABLE OF CONTENTS

	Page
of bankruptcy; in contrast, the relief from stay order expressly allowed Union Bank to “enforce” “all of its rights in the real property”.....	12
3. Union Bank’s equitable lien on the property passed through the bankruptcy.....	13
B. Alternatively, Glaefke is judicially estopped from contesting Union Bank’s lien rights in the property in order to seek a windfall at Union Bank’s expense.....	16
VI. CONCLUSION.....	19
 APPENDIX	
1. Bankruptcy order granting relief from stay (CP 79-80)	
2. Bankruptcy discharge order (CP 82-83)	
3. Order Granting Plaintiff’s Motion for Summary Judgment and Judgment (CP 250-252)	

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Hamilton v. State Farm Fire & Cas. Co.</i> , 270 F.3d 778 (9th Cir. 2001)	17
<i>Harris v. Fortin</i> , 183 Wn. App. 522, 333 P.3d 556 (2014)	17, 18
<i>Hexcel Corp. v. Stepan Co. (In re Hexcel Corp.)</i> , 239 B.R. 564 (N.D. Cal. 1999)	12, 13
<i>In re Indian River Estates, Inc.</i> , 293 B.R. 429 (Bankr. N.D. Ohio 2003)	10
<i>In re Jensen</i> , 995 F.2d 925 (9th Cir. 1993)	12
<i>In re Pribonic</i> , 70 B.R. 596 (Bankr. W.D. Pa. 1987)	10
<i>In re Udell</i> , 18 F.3d 403 (7th Cir. 1994)	8, 10
<i>Irizarry v. Schmidt (In re Irizarry)</i> , 171 B.R. 874 (B.A.P. 9th Cir. 1994)	8, 11, 12
<i>Johnson v. Home State Bank</i> , 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991)	8, 15
<i>Kinne v. Kinne</i> , 27 Wn. App. 158, 617 P.2d 442 (1980)	15
<i>Lowther v. Lowther (In re Lowther)</i> , 2002 Bankr. LEXIS 429 (Bankr. 10th Cir. 2002)	15, 16
<i>N. Comm'l Co. v. Hermann Co.</i> , 22 Wn. App. 963, 593 P.2d 1332 (1979)	16
<i>Sheerin v. Davis</i> , 3 F.3d 113 (5th Cir. 1993)	10

<i>Sorenson v. Pyeatt</i> , 158 Wn.2d 523, 146 P.3d 1172 (2006).....	9, 14, 15, 17
<i>Strickrath v. Globalstar, Inc.</i> , 2008 U.S. Dist. LEXIS 105692 (N.D. Cal. 2008)	13
<i>U.S. Nat'l Ass'n v. Oliverio</i> , 109 Wn. App. 68, 3 P.3d 1104 (2001).....	9
<i>Udall v. T.D. Escrow Servs., Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	6
<i>Yan v. Lombard Flats, LLC (In re Lombard Flats, LLC)</i> , 2014 U.S. Dist. LEXIS 113127 (N.D. Cal. 2014)	17

STATUTES

11 U.S.C. § 101(5).....	8
11 U.S.C. § 101(12).....	7
11 U.S.C. § 101(37).....	15
11 U.S.C. § 522(c)(2).....	9
11 U.S.C. § 727(b).....	15

I. INTRODUCTION

This case does not involve enforcement of a discharged claim or debt against a former Chapter 7 bankruptcy debtor, as Daniel Glaefke portrays. MUFG Union Bank, N.A. (“Union Bank”) instead sought equitable relief concerning its interest in real property. The granting of this relief is consistent with bankruptcy law, Washington law and the equities of this dispute.

The summary judgment reinstating Union Bank’s deed of trust after it had been erroneously reconveyed correctly enforces Union Bank’s equitable rights in property owned by Glaefke, who received a loan and secured it by granting a deed of trust on his property. Glaefke’s subsequent Chapter 7 bankruptcy and discharge does not require a different result. To the contrary, Union Bank’s equitable rights survived the discharge. These equitable rights are not a “claim” subject to discharge. They also are not dischargeable because they were not reasonably contemplated by the parties during the bankruptcy, as the parties did not discover that the lien had been erroneously reconveyed until after Union Bank obtained relief from stay and after the discharge order was entered. The relief under review is consistent with the unopposed bankruptcy order granting relief from stay that expressly permits Union Bank to enforce “all of its rights in the real property”

according to non-bankruptcy law. Finally, the law demonstrates that equitable rights like Union Bank's pass through bankruptcy unaffected.

Alternatively, Glaefke is judicially estopped from contesting Union Bank's action where he never opposed entry of the bankruptcy court order recognizing Union Bank as a secured creditor and granting it relief from stay to enforce its rights in the property. Glaefke may not seek a windfall by contradicting his prior position in the bankruptcy.

II. STATEMENT OF THE ISSUES

Resolution of any one of these issues in Union Bank's favor should result in affirmance.

1. An equitable action does not qualify as a "claim" dischargeable in bankruptcy unless it rise to a right to payment. Union Bank's equitable action for rescission and reinstatement does not meet this definition. Did the trial court correctly determine that Union Bank's action survived bankruptcy? Yes.

2. A future unknown claim that is not reasonably contemplated by the parties at the time of bankruptcy does not qualify as a "claim" dischargeable in bankruptcy. The bankruptcy court in this case granted relief from stay for Union Bank to foreclose on its deed of trust, demonstrating that the claims for rescission and reinstatement were unknown to the court and the parties at the time of the bankruptcy. Where Union Bank's action meets the definition of a future unknown claim, did it survive bankruptcy? Yes.

3. An equitable lien passes through bankruptcy unaffected. Where Union Bank's claim constituted an equitable lien on the property, did its lien survive bankruptcy? Yes.

4. A party is judicially estopped from asserting an inconsistent position where the new position would cause unfair disadvantage to the

opposing party. Where Glaefke's actions meet these elements, is he judicially estopped from asserting that Union Bank's action was discharged in the bankruptcy? Yes.

III. STATEMENT OF THE CASE

The uncontested facts demonstrate the encumbrance on the property at issue, Glaefke's subsequent Chapter 7 filing, and the unopposed bankruptcy proceeding to grant secured creditor Union Bank relief from stay to enforce its rights in the property. The subsequent discovery that the deed of trust had been erroneously reconveyed led to this action and the judgment reinstating the deed of trust.

A. Union Bank was a secured creditor of Glaefke with a deed of trust recorded on real property owned by Glaefke.

In 2006, as part of a loan transaction, Glaefke executed to Frontier Bank a promissory note ("Note") in the amount of \$60,000. CP 50–51. As part of this transaction, Glaefke executed a deed of trust ("Deed of Trust"), deeding for the benefit of Frontier Bank real estate in Kenmore, WA. CP 53–61. The Deed of Trust properly was recorded on February 8, 2008. CP 53. Union Bank is the successor in interest to Frontier Bank. CP 190.

B. In Glaefke's Chapter 7 bankruptcy, Union Bank moved as a secured creditor for relief from stay to enforce its rights in the real property, which motion was unopposed by Glaefke and granted.

Glaefke filed in March 2013 a Chapter 7 bankruptcy. CP 41.

Glaefke listed Union Bank as a secured creditor in his bankruptcy schedules, holding a Second Mortgage on the Kenmore residence. CP 67. In the bankruptcy, Union Bank moved for relief from automatic stay as to the Kenmore real property. CP 182. Glaefke did not oppose the Motion. *Id.* The court granted Union Bank's motion and allowed it relief from the automatic stay to pursue its legal remedies against the property. CP 185–186. The Order provided that Union Bank “may not enforce, or threaten to enforce, any personal liability against Debtor if Debtor's personal liability is discharged in the bankruptcy case.” CP 186. Glaefke's personal liability under the Note was discharged in the bankruptcy. CP 82–83.

C. **When Union Bank later realized its deed of trust had been erroneously reconveyed, it filed this equitable action for rescission of the reconveyance and reinstatement of the deed of trust, but has not pursued Glaefke personally.**

Prior to the bankruptcy, in January 2012, a Deed of Full Reconveyance was recorded in error. CP 208–209. At the time the Deed of Full Reconveyance was recorded, Glaefke still owed \$41,061.80 in unpaid principal to Union Bank. CP 192. Union Bank was not aware of the erroneous reconveyance until after the bankruptcy. Union Bank requested that Glaefke enter into a consensual rescission of the erroneous reconveyance and reinstatement of the original deed of trust, but he would not agree. CP 192. Union Bank then filed suit in King County Superior

Court seeking (1) rescission of the deed of full reconveyance; and (2) reinstatement of the deed of trust. CP 1–4. Union Bank has taken no action to recover against Glaefke personally.

D. The trial court granted summary judgment to Union Bank, rejecting Glaefke's argument that the action and equitable relief sought were prohibited by Glaefke's bankruptcy discharge.

The parties filed cross motions for summary judgment.¹ CP 28–36; 163–173. Glaefke contended that Union Bank’s claims were barred by his bankruptcy discharge. CP 28–36. The trial court issued written rulings and orders granting Union Bank’s Motion for Summary Judgment, and denying Glaefke’s motion. CP 254–257; 250–253. The trial court ruled that Union Bank’s claims, as equitable claims which did not seek monetary relief, were not discharged by Glaefke’s bankruptcy. *Id.*

IV. STANDARDS OF REVIEW

The parties agree that this appeal presents purely legal issues reviewed *de novo*. *See Op. Br. 3*. Appellate courts review summary judgment orders *de novo*. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 908, 154 P.3d 882 (2007). Glaefke limits his challenge to the legal

¹ Appellant indicates that the hearing took place on September 29, 2014, presumably because the Court’s Orders list the hearing date as September 29th. CP 254–257; 250–253. *Op. Br. 3*. However, such a date would not be possible, as the trial court entered its orders on September 22, 2014. *Id.* The hearing actually took place on September 19, 2014.

issue whether his bankruptcy discharge prevented Union Bank's action. *See Op. Br. 1*. Glaefke raises no dispute regarding the facts, which were uncontested, and does not dispute the trial court's award of equitable relief in the event this Court finds the action could be sustained.

V. ARGUMENT

This Court should deny the appeal. As a matter of law, Union Bank's equitable action could be sustained. It does not constitute a "claim" that was discharged in bankruptcy. It was not contemplated by the parties at the time of the discharge. It constitutes an equitable lien that passed through the bankruptcy. Glaefke's bankruptcy discharge does not prevent the action.

Alternatively, Glaefke is judicially estopped from contesting Union Bank's lien rights in the property. He seeks a windfall contrary to the position he took in the bankruptcy that (1) Union Bank was a secured creditor with rights in the Kenmore real property, and (2) Union Bank was entitled to relief from stay to pursue all of its rights in the property under non-bankruptcy law. Such rights include reinstatement of the deed of trust. He cannot benefit now from taking a position contrary to the one that the bankruptcy court accepted.

A. **This Court should affirm the summary judgment to Union Bank because Glaefke's bankruptcy discharge does not affect Union Bank's right to rescission and reinstatement.**

Three independent legal bases support the judgment. Any one of them is sufficient to result in affirmance.

1. Union Bank's equitable right to reinstatement is not a "claim" that was discharged in bankruptcy.

Union Bank's right to reinstate the Deed of Trust is an equitable remedy that does not arise from a breach of performance nor does the breach give rise to a right to payment. Thus, it is not a "claim" that was discharged in bankruptcy.

A "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). Therefore, the question of whether or not Union Bank's equitable cause of action to rescind its Deed of Full Reconveyance and reinstate the Deed of Trust (hereafter "equitable action") was discharged in bankruptcy depends upon whether it is properly categorized as "liability on a claim." It is not.

A claim is defined by the bankruptcy code as:

"(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

11 U.S.C. § 101(5) (emphasis added).

Glaefke relies upon subsection A, arguing that Union Bank's equitable action gives rise to a "right to payment" and thus qualifies as a claim. *Op. Br.* 6.² Glaefke's argument is unsupportable. Glaefke argues that because (1) the Supreme Court in *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991), determined that a creditor's right to foreclose a mortgage qualifies as a "claim", and (2) Union Bank's equitable action seeks reinstatement of a mortgage (deed of trust), then (3) Union Bank's equitable action also qualifies as a claim discharged in bankruptcy. Glaefke cites no authority supporting this leap in logic. Additionally, Glaefke ignores the fact that "a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Johnson v. Home State Bank*, 501 U.S. at 83. Thus, while a cause of action for foreclosure is a "claim," it is expressly exempted from discharge. 11 U.S.C. § 522(c)(2). A cause of action for reinstatement, if qualifying as a "claim" by virtue of its similarity to a foreclosure action, should fall within the same exception.

² Though Glaefke does not argue this, Union Bank's equitable action also does not fall under the definition of a claim under Section 101(5)(B). The remedy sought is not an "equitable remedy for breach of performance." *In re Udell*, 18 F.3d 403, 407 (7th Cir. 1994); *Irizarry v. Schmidt (In re Irizarry)*, 171 B.R. 874, 878 (B.A.P. 9th Cir. Cal. 1994). There has been no breach of performance here. Union Bank's claim does not fit within 101(5)(B).

Glaefke also cites to the provisions of the deed of trust itself—implying that the deed of trust gives rise to a right of “payment” that qualifies as a claim and would subject him to personal liability. Glaefke offers no authority to support a concern that a reinstated deed of trust could lead to re-establishment of his personal liability. The action at issue concerns only Union Bank’s lien on the property. Union Bank does not seek personal liability against Glaefke.

Case law is in accord with Union Bank’s interpretation that its causes of action are not claims and do not give rise to a “right to payment.” The remedy Union Bank seeks is an “equitable remedy,” and Washington courts have found this to be so. *U.S. Nat’l Ass’n v. Oliverio*, 109 Wn. App. 68, 72-73, 3 P.3d 1104 (2001); *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006) (discussing imposition of equitable liens). Union Bank’s equitable action does not “give[] rise to a right of payment.” Analysis under Section 101(5)(B), which has not been raised in this appeal, is instructive with regard to Glaefke’s claim that Union Bank’s equitable action constitutes a “right to payment” under subsection A, as well. *In re Pribonic*, 70 B.R. 596, 602 (Bankr. W.D. Pa. 1987). “The key therefore, in determining whether an equitable remedy gives rise to a claim under bankruptcy law is to ascertain whether the equitable remedy would also give rise to a right to payment; that is, could a monetary award

substitute for the equitable remedy.” *In re Indian River Estates, Inc.*, 293 B.R. 429, 434 (Bankr. N.D. Ohio 2003). If the equitable action is capable of liquidation in a monetary award, the action is a claim subject to discharge; if the action cannot be liquidated, the claim survives bankruptcy. *In re Udell*, 18 F.3d 403, 407 (7th Cir. 1994).

Union Bank’s equitable action is not capable of liquidation. Its claims do not give rise to any alternative right to payment. Union Bank is seeking rescission of its Deed of Reconveyance and Reinstatement of the Deed of Trust. Glaefke’s personal liability under the Note has been discharged in bankruptcy, and Union Bank has no ongoing right to payment from him. Reinstatement of Union Bank’s lien on specific real property is the only remedy. There is no alternative monetary remedy available. See, e.g., *Sheerin v. Davis*, 3 F.3d 113, 117 (5th Cir. 1993) (holding that an equitable action for reformation of ownership deed did not have a monetary alternative remedy).

The Ninth Circuit case *Irizarry v. Schmidt (In re Irizarry)* is analogous to this case and illustrates the analysis the Court should follow. 171 B.R. 874, 878 (B.A.P. 9th Cir. 1994). In *Irizarry*, the bankruptcy Debtors owned real property that was transferred to them via a grant deed by Marion Guyton. *Id.* at 857. After Ms. Guyton passed away, her three heirs sued the Debtor seeking monetary damages as well as equitable

remedies of cancellation of the deed, reconveyance of the property, and cancellation of liens. *Id.* at 876. The Debtors filed bankruptcy, and received a discharge. The Plaintiff heirs then sought to continue the lawsuit just as to the equitable remedies. *Id.*

The issue before the appellate court was whether the Plaintiff heirs' equitable claims were discharged, or could be pursued after bankruptcy. The Ninth Circuit determined that these equitable actions were not "claims" subject to discharge, explaining as follows that remedies that do not arise from breach of performance and do not give rise to a right to personal payment are nondischargeable:

In the instant case, the equitable remedies of cancellation of the grant deed, recovery of the Los Gatos Property and cancellation of liens are not claims or debts subject to discharge. Since the Heirs seek these equitable remedies and not money damages, a state court judgment in their favor granting these equitable remedies would not constitute a right to payment as discussed in § 101(5)(A). Additionally, the Heirs' request for equitable relief does not arise from any failure by the Debtor to perform contractual or injunctive obligations. Rather, the Heirs seek the equitable remedies on the grounds that the Decedent did not have the requisite mental capacity to execute the grant deed transferring the Los Gatos Property to the Debtor. Accordingly, the equitable remedies do not constitute claims as defined in § 101(5)(B), since these remedies do not arise from a breach of performance and do not give rise to a right to payment.

Id. at 878 (emphasis added). Similarly, Union Bank's equitable action in this case involves a lien on real property, does not arise from a breach of performance, and does not give rise to a right to payment. The trial court

order granting Union Bank's requested relief did not constitute a right to payment. This court should uphold the conclusion of the trial court that Union Bank's equitable action does not qualify as a claim and was not discharged in Glaefke's bankruptcy.

2. Discharge of the equitable action did not occur because the parties did not reasonably contemplate the equitable action at the time of bankruptcy; in contrast, the relief from stay order expressly allowed Union Bank to "enforce" "all of its rights in the real property."

Even if this Court somehow found that Union Bank's equitable action is capable of liquidation, it does not qualify as a "claim" because it was not reasonably contemplated by the parties at the time of bankruptcy. Courts have noted that the definition of a "claim" under bankruptcy is not boundless. *Hexcel Corp. v. Stepan Co. (In re Hexcel Corp.)*, 239 B.R. 564, 567 (N.D. Cal. 1999). It does not include future rights that are "unknown or unforeseeable." *Id.* at 567. "Nothing in the legislative history or the Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed." *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993).

A California district court, after careful analysis of Ninth Circuit precedent, explained the rule that unknown claims fall outside a bankruptcy discharge in this way:

A claim cannot fall within the purview of section 101(5)—and thus cannot be discharged as a pre-petition claim, unless that claim could have been contemplated by the parties prior to the bankruptcy proceedings. Any future, unknown claim that could not have been reasonably contemplated does not fall within the purview of section 101(5) and must not be discharged, even if the conduct giving rise to the claim took place before the bankruptcy proceeding.

Hexcel, 239 B.R. at 56 (explaining the Ninth Circuit has required “fair contemplation” in its cases on the subject); *see also Strickrath v. Globalstar, Inc.*, 2008 U.S. Dist. LEXIS 105692, at *13 (N.D. Cal. 2008).

Union Bank’s claim was clearly not contemplated by the parties prior to, or during, Glaefke’s bankruptcy action. Both parties and the court operated under the mistaken belief that Union Bank’s Deed of Trust remained on the property. The court granted relief from stay, authorizing Union Bank as a secured creditor to enforce “all of its rights in the real property.” CP 186.

It would be unfair for Union Bank’s action to be discharged when it did not even know it existed, and could take no steps to protect it in the bankruptcy. Despite the fact that the action giving rise to the claim occurred prior to the bankruptcy, Union Bank’s future unknown claim was not contemplated by the parties. Thus, it does not fall within the definition of a “claim” subject to discharge.

3. Union Bank’s equitable lien on the property passed through the bankruptcy.

Affirmance also is proper on the basis that Union Bank’s equitable

action constitutes an equitable lien upon Glaefke's property that passed through bankruptcy. The Washington State Supreme Court has recognized that "there are a number of circumstances where an equitable lien has been and may be an appropriate equitable remedy." *Sorenson*, 158 Wn.2d at 535 n.11 (such as resolution of community property issues, where defendant purchased property with embezzled funds, or where an owner conveyed property in exchange for construction of a building that was not completed). The Supreme Court further noted that an equitable lien is appropriate where the party asserting the lien advanced money to another, which was applied to discharge a legal obligation of the recipient, but because of a disability of the recipient no valid contract was made for repayment. *Id.* (citing *Falconer v. Stevenson*, 184 Wash. 438, 442, 51 P.2d 618 (1935)).

These general rules are merely a "framework" to be followed by the trial court when determining whether to impose an equitable lien. *Id.* The Supreme Court specifically refused to foreclose "a trial court's ability to apply this remedy when the particular legal circumstances and equities call for it." *Id.* Lower courts have held that "no particular form is required to give rise to an equitable lien," except that "the parties must have intended to impress a particular fund or thing with a charge as security for an underlying debt or obligation." *Kinne v. Kinne*, 27 Wn. App. 158, 162,

617 P.2d 66 (1980) (citing *Monegan v. Pacific Nat'l Bank*, 16 Wn. App. 280, 556 P.2d 226 (1976)).

Liens, which are a “charge against or interest in property to secure payment of a debt or performance of an obligation” are distinct from “debts” and under the express terms of the Bankruptcy Code are not subject to discharge. 11 U.S.C. § 101(37); 11 U.S.C. § 727(b). It is well established in bankruptcy law that “unless a lien has been avoided, it survives bankruptcy, even if the debtor claims the property securing the lien exempt and the debtor’s underlying personal liability to the lienholder, or the ‘debt’ has been discharged.” *Lowther v. Lowther (In re Lowther)*, 2002 Bankr. LEXIS 429, at *8 (Bankr. 10th Cir. 2002) (citing 11 U.S.C. § 522(c)(2); *Johnson v. Home State Bank*, 501 U.S. 78, 115 L. Ed. 2d 66, 111 S. Ct. 2150 (1991)).

Contrary to Glaefke’s argument, *see Op. Br. 7*, a debtor has no interest in obtaining a “fresh start” free of real property liens. The important policy interest of a “fresh start” is not implicated in this case. *Johnson v. Home State Bank* makes clear that a deed of trust passes through a Chapter 7 bankruptcy unaffected by the discharge. 501 U.S. at 83. Equitable liens survive bankruptcy in the same manner as a traditionally recorded lien. *In re Lowther*, 2002 Bankr. LEXIS at *12 (citing *First Community Bank v. Hodges*, 907 P.2d 1047 (Okla. 1995)).

Bankruptcy does not free a debtor from liens of any type.

Here, an equitable lien arose on the real property when the Deed of Full Reconveyance was mistakenly recorded. *See N. Comm'l Co. v. Hermann Co.*, 22 Wn. App. 963, 968 n.2, 593 P.2d 1332 (1979) (“Equity will create a lien where there is no valid lien at law and it is needed to prevent an injustice.”). It is undisputed that the parties intended there to be a lien on the property—the Deed of Trust is conclusive evidence of that and Glaefke does not argue otherwise. Finding an equitable lien in this case is necessary to prevent injustice. During the bankruptcy, the parties fully contemplated that Union Bank would be able recover on the property. Without imposition of an equitable lien, Glaefke would unfairly benefit and Union Bank would be denied its lien rights. The Court, as an alternate ground for upholding the trial court decision, should hold that an equitable lien arose on the property when the recorded lien was mistakenly reconveyed and that the equitable lien survived the bankruptcy and remains on the property.

B. Alternatively, Glaefke is judicially estopped from contesting Union Bank’s lien rights in the property in order to seek a windfall at Union Bank’s expense.

In the alternative, this Court should affirm because Glaefke is judicially estopped from taking a position in these proceedings that is

inconsistent with his prior position before the bankruptcy court.

Washington has recognized the doctrine of judicial estoppel as an equitable doctrine that “prevents a party from asserting a particular position in a judicial proceeding and later taking a clearly inconsistent position in order to gain an advantage.” *Harris v. Fortin*, 183 Wn. App. 522, 524, 333 P.3d 556 (2014); *see also Yan v. Lombard Flats, LLC (In re Lombard Flats, LLC)*, 2014 U.S. Dist. LEXIS 113127, at *48 (N.D. Cal. 2014) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)). The doctrine prevents litigants from making inconsistent claims in two different cases, *Hamilton*, 270 F.3d at 783 (citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1995)), and applies to positions taken in a bankruptcy proceeding. *Harris*, 183 Wn. App. at 530. Judicial estoppel may arise from silence. *Sorenson v. Pyearr*, 158 Wn.2d 523, 541, 146 P.3d 1172 (2006) (citing *Strand v. State*, 16 Wn.2d 107, 115, 132 P.2d 1011 (1943)).

The doctrine is comprised of the following three elements present in this case:

- (1) [W]hether “a party’s later position” is “clearly inconsistent with its earlier position”;
- (2) whether “judicial acceptance of that inconsistent position would create the perception that either the first or second court was misled”;
- and (3) “whether the party seeking to assert an inconsistent position would derive an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.”

Harris, 183 Wn. App. at 527 (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). In the bankruptcy Glaefke listed Union Bank on his schedules as a secured creditor, and did not object to Union Bank's right to receive relief from the automatic stay to recover on the Kenmore real property. In this action, Glaefke changed his tune, stating that Union Bank's equitable action (and any hope to recover on the property) was discharged in the bankruptcy. This is contrary both to his previous position and the position accepted by the bankruptcy court, which explicitly authorized Union Bank to recover on the real property. Union Bank's position is not inconsistent: in both actions it sought to pursue its right to recover on the property.

Acceptance of Glaefke's position in the superior court litigation would nullify the bankruptcy court's order, and demonstrate that the bankruptcy court had been misled. The bankruptcy court granted that relief based on the parties' representations that Union Bank was secured with rights in the real property. The judicial determination that Glaefke sought in these proceedings—that any and all right Union Bank may have to recover on the property was discharged—is contrary to the bankruptcy court's order granting relief from stay. The second prong is met.

Finally, allowing Glaefke to change his position would allow him to derive an unfair advantage. It is undisputed in this case that Glaefke did

not pay back the amounts he borrowed from Union Bank. It is also undisputed that Union Bank, but for the mistaken reconveyance, would have been able to recover the amounts owed by Glaefke after bankruptcy by foreclosing on the property. Additionally, other creditors in the bankruptcy were denied the opportunity to potentially recover on the Kenmore real property because of Union Bank's undisputed secured status. Thus, allowing Glaefke to claim that Union Bank's action was discharged before it even knew of it, would result in an unfair windfall to Glaefke at Union Bank's expense.

As an alternate ground for affirmance, the Court should apply the doctrine of judicial estoppel and preclude Glaefke's argument that Union Bank's equitable action was discharged in bankruptcy.

VI. CONCLUSION

This Court should affirm summary judgment in favor of Union Bank. Any other result would create an unjustified windfall for Glaefke that would be contrary to Washington law and bankruptcy law. Union Bank's equitable rights in the real property are not defeated by Glaefke's discharge. Glaefke is not subject to personal liability for his unpaid debt, just as the Bankruptcy Code requires. His real property, however, is subject to Union Bank's equitable lien, just as the superior court correctly held. Affirmance is proper.

Respectfully submitted on this 28th day of January, 2015.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Averil Rothrock, WSBA #24248
arothrock@schwabe.com
Joel A. Parker, WSBA #44494
jparker@schwabe.com
Claire L. Rootjes, WSBA #42178
crootjes@schwabe.com
*Attorneys for Respondent MUFG
Union Bank, N.A.*

Below is the Order of the Court.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Timothy W. Dore
U.S. Bankruptcy Court
(Dated as of Entered on Docket date above)

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON**

In re
DANIAL C GLAEFKE,

Debtor.

Case No. 13-12164-TWD
Chapter 7

**ORDER GRANTING MOTION FOR
RELIEF FROM AUTOMATIC STAY**

THIS MATTER having come before the Court on Union Bank, N.A., as Successor in Interest to the FDIC, as Receiver for Frontier Bank's ("Movant") Motion for Relief from Automatic Stay, proper notice having been given, the Court having examined the files and records, and having considered oral argument, if any, it is

ORDERED that:

1. The automatic stay of 11 U.S.C. § 362(a) is terminated as it applies to the enforcement by Movant of all of its rights in the real property commonly known as 16341 Inglewood Place NE, Kenmore, WA 98028 (the "Property"), which is legally described as:

LOT 1, MURRYWOOD, ACCORDING TO THE PLAT THEREOF RECORDED IN VOLUME 96 OF PLATS, PAGE(S) 11, RECORDS OF KING COUNTY, WASHINGTON; EXCEPT BEGINNING AT THE NORTHWESTERLY CORNER OF SAID LOT; THENCE SOUTH 89 DEGREES 04'07" EAST ALONG THE NORTH LINE OF SAID LOT, 166.86 FEET TO THE NORTHEASTERLY CORNER OF SAID LOT; THENCE SOUTH 84 DEGREES 42'44" WEST 60 FEET; THENCE NORTH 89 DEGREES 04'07" WEST 64.00 FEET; THENCE WEST 80 DEGREES 30'50" WEST 43.70 FEET TO THE POINT OF BEGINNING, SITUATE IN THE COUNTY OF KING, STATE OF WASHINGTON.

ORDER GRANTING RELIEF FROM AUTOMATIC STAY
Page 1

PITE DUNCAN, LLP
4375 Jutland Drive, P.O. Box
17933
San Diego, CA 92177-0933

APPENDI

United States Bankruptcy Court

Western District of Washington
700 Stewart St, Room 6301
Seattle, WA 98101

Case No. 13-12164-TWD

Chapter 7

In re Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Danial C Glaefke
16341 Inglewood Place NE
Kenmore, WA 98028

Social Security/Individual Taxpayer ID No.:

xxx-xx-6119

Employer Tax ID/Other nos.:

DISCHARGE OF DEBTOR

The Debtor(s) filed a Chapter 7 case on March 12, 2013. It appearing that the Debtor is entitled to a discharge,

IT IS ORDERED:

The Debtor is granted a discharge under 11 U.S.C. § 727.

BY THE COURT

Dated: June 26, 2013

Timothy W. Dore
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

**EXPLANATION OF BANKRUPTCY DISCHARGE
IN A CHAPTER 7 CASE**

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:* There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts That are Not Discharged

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- b. Debts incurred to pay nondischargeable taxes;
- c. Debts that are domestic support obligations;
- d. Debts for most student loans;
- e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
- f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
- g. Some debts which were not properly listed by the debtor;
- h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;
- i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts; and
- j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans.

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

APPENDIX

FILED
14 SEP 22 AM 9:00

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 14-2-10246-1 SEA

Hearing Date: September 29, 2014
Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

UNION BANK, N.A.,

Plaintiff,

vs.

DANIEL GLAEFKE,

Defendant.

Judge John R. Ruhl

No. 14-2-10246-1 SEA

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT
AND JUDGMENT

(Clerk's Action Required)

THIS MATTER came before the Court for hearing on Plaintiff's Motion for Summary Judgment. The Plaintiff was represented by Claire L. Rootjes. The Defendant was represented by Jennifer Sehlin. The Court heard arguments of the parties and reviewed the submissions of the parties and the records and files herein, including:

1. Plaintiff's Motion for Summary Judgment (Dkt. 15);
2. Declaration of Claire Rootjes in Support of Motion for Summary Judgment (Dkt.16);
3. Declaration of Toni Scanlyn in Support of Motion for Summary Judgment (Dkt. 17);
4. Defendant's Response to Plaintiff's Motion for Summary Judgment (Dkt. 23);

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND JUDGMENT - 1

- 1 5. Appendix of Federal Authorities Cited in Defendant's Motion for Summary
- 2 Judgment (Dkt. 13);
- 3 6. Declaration of Jennifer Sehlin (Dkt.11);
- 4 7. Declaration of Danial C. Glaefke (Dkt. 12); and
- 5 8. Plaintiff's Reply (Dkt. 27).

6 At the hearing the parties' counsel agreed that there are no genuine issues as to any
7 material facts. They also agreed that there are no secured creditors whose liens against the
8 Defendant's real property would be affected if the Plaintiff's deed of trust were to be
9 reinstated.

10 The pivotal issue is whether the Plaintiff has valid and nondischargeable claims for
11 rescission of the Plaintiff's full reconveyance and reinstatement of the Plaintiff's deed of
12 trust, notwithstanding the fact that the Bankruptcy Court discharged the Defendant from
13 personal liability on his debt to the Plaintiff. The answer is yes.

14 In *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 2154, 115 L.Ed.2d
15 66 (1991), the U.S. Supreme Court stated:

16 [A] bankruptcy discharge extinguishes *only one mode of*
17 *enforcing a claim* – namely, an action against the debtor *in*
18 *personam* – while leaving intact another namely, an action
 against the debtor *in rem*. [emphasis added]

19 Here, the Bankruptcy Court's order discharged the Plaintiff's right to enforce its secured
20 claim by means of an *in personam* action against the Defendant, but the order left intact the
21 Plaintiff's right to pursue its secured claim through *in rem* proceedings. *Id.*; see *Irizarri v.*
22 *Schmidt*, 171 B.R. 874, 878 (B.A.P. 9th Cir. 1994). The Plaintiff is not seeking a monetary
23 judgment against the Defendant, but rather is seeking rescission of the full reconveyance and
24 reinstatement of its deed of trust against the Defendant's real property. Such claims are *in*
25 *rem* equitable remedies, involve no request for monetary relief, and thus were not discharged
26 in the Defendant's bankruptcy.

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND JUDGMENT - 2

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the ^{20th}~~28th~~ day of January, 2015, I arranged for service *via U.S. Mail* of the foregoing RESPONDENT UNION BANK'S BRIEF to the party to this action as follows:

Jennifer Sehlin
Galvin Realty Law Group, P.S.
6100 – 219th Street SW, Suite 560
Mountlake Terrace, WA 98043
Email: jsehlin@grlg.net



Mary A. Williams

PDX\107068\194775\AAR\15192167.2

H