

NO. 72606-4-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

UNION BANK, N.A.

Respondent

v.

DANIEL GLAEFKE

Appellant.

REPLY BRIEF OF APPELLANT

Jennifer Sehlin, WSBA 25111
Attorney for Appellant

Galvin Realty Law Group, P.S.
6100 219th Street, Suite 560
Mountlake Terrace, WA 98043
(425) 248-2163

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COURT OF APPEALS
STATE OF WASHINGTON
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A. SUMMARY OF REPLY

Terms used herein:

“Deed of Trust”, Deed of Trust recorded on February 8, 2008 under King County recording number 20080208000506. CP 53.

“Glaefke”, Danial Glaefke

the **“Property”**, Glaefke’s property located at 16341 Inglewood Place NE, Bothell, WA 98020.

the **“Reconveyance”**, Full Reconveyance recorded under King County recording number 20120124001157. CP 63.

“Union Bank”, MUFG Union Bank, N.A.

Union Bank puts forth four arguments as to why Glaefke (“Glaefke”) should not prevail on appeal. Each argument fails. First, Union Bank’s claim to rescind the Reconveyance and reinstate the Deed of Trust is a “claim” that was discharged in Glaefke’s bankruptcy. Reinstating the Deed of Trust would provide Union Bank with a right to foreclosure and the right to the proceeds from the sale of the Property. A deed of Trust is an enforceable obligation and is therefore debt and was discharged in the bankruptcy. Second, Union Bank’s claim was reasonably contemplated and as such it falls within the definition of a “claim” subject to discharge. Third, Union Bank does not have an equitable lien that passed through bankruptcy as the requisite elements to

establish and equitable lien have not been met. Fourth, judicial estoppel does not apply as Glaefke's position in the bankruptcy was based on a mistake, neither court was misled and there is no windfall to Glaefke.

B. ARGUMENT

1. Union Bank's claim to reinstate the Deed of Trust is a "claim" that was discharged in bankruptcy.

Union Bank is seeking to have the Deed of Trust reinstated, an equitable remedy. Allowing the reinstatement of the Deed of Trust will necessarily give rise to Union Bank's right to payment as Union Bank may then proceed to foreclose against Glaefke providing Union Bank with the proceeds from the sale of Glaefke's property. Furthermore, the terms of the Deed of Trust require payment and as such it is debt. Whether analyzed as a right to proceed in foreclosure or under the terms of the Deed of Trust, the reinstatement of the Deed of Trust is the reinstatement of a "claim" or "debt" and as such Union Bank's cause of action was discharged in the bankruptcy.

All of Glaefke's debt was discharged in the bankruptcy. 11 U.S.C. § 727(b). "Debt" is a "liability on a claim". 11 U.S.C. § 101(12). A claim is defined 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). The definition of claim “is meant to be broad and sweeping so as to further the ‘fresh-start’ policy of the Bankruptcy Code”.

In re Indian River Estates, 293 B.R. 429, 434 (Bkcty. N.D. Ohio 2003).

Union Bank argues that its cause of action to reinstate the Deed of Trust is not a claim within the meaning of 11 U.S.C. § 101(5) as the reinstatement of the Deed of Trust does not give rise to a “right to payment”. *See* Respondent’s Brief (BR) 9. In direct opposition to Union Bank’s position, the Supreme Court has held that in fact the remedy of foreclosure necessarily gives rise to a right to payment. *Udell v. Standard Carpetland USA, Inc.*, 18 F.3d 403, 407 (1994). The reinstatement of the Deed of Trust, under the terms of the Deed of Trust and under RCW 61.24 *et seq.*, gives rise to Union Bank’s right to foreclosure and the right to payment.

In determining whether a mortgage interest was a “claim” within the meaning of 11 U.S.C. § 101(5) the Supreme Court held stated as follows (emphasis added):

We have previously explained that Congress intended by this language to adopt the broadest available definition of ‘claim’. See *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990); see also *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985). In *Davenport*, we concluded that ‘right to payment’ [means] nothing more nor less than an enforceable obligation...” 495 U.S. at 559.

Applying the teachings of *Davenport*, **we have no trouble concluding that a mortgage interest that survives the discharge of a debtor’s personal liability is a ‘claim’ within the terms of §101 (5). Even after the debtor’s personal obligations have been extinguished, the mortgage holder still retains a “right to payment” in the form of its right to the proceeds from the sale of the debtor’s property.** Alternatively, the creditor’s right to foreclose on the mortgage can be viewed as a ‘right to an equitable remedy’ for the debtor’s default on the underlying obligation. **Either way, there can be no doubt that the surviving mortgage interest corresponds to an “enforceable obligation” of the debtor.**

Johnson v. Home State Bank, 501 U.S. 78, 83-84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991).

Union Bank’s equitable cause of action to reinstate the Deed of Trust clearly falls within the reasoning of the Supreme Court in *Home State Bank* as reinstating the Deed of Trust gives Union Bank the right to foreclose and in turn the right to the proceeds from the sale of the Property. Under *Home State Bank* the cause of action to reinstate the Deed of Trust is a “claim” within the definition of 11 U.S.C. § 101 (5)A and was discharged under 11 U.S.C. § 727(b).

Additionally, under *In re Perma Pacific Properties* the court found, based on the language in the document, that the deed of trust was an “enforceable obligation” and therefore debt, separate and apart from the promissory note. *In re Perma Pacific Properties*, 983 F.2d 964, 967 (10th Cir. 1992). Under either analysis, *Home State Bank*, or *In re Perma Pacific Properties*, the reinstatement of the Deed of Trust reinstates a debt which was discharged under 11 U.S.C. § 727(b).

Union Bank argues that the court should rely on the Ninth Circuit case of *In re Irizarry*. BR 10-12. In that case the court held that the cancellation of a grant deed, reconveyance of property and the cancellation of liens are not claims or debts subject to discharge. *In re Irizarry*, 171 B.R. 874, 878 (B.A.P. 9th Cir. 1994). That case is distinguishable from the matter herein. In the *Irizarry* case the plaintiffs in the underlying action were seeking to have a grant deed cancelled, they sought the reconveyance of the property transferred under the grant deed and they sought the release of any liens encumbering the subject property. *Id.* p. 876. The *Irizarry* court held that those specific equitable remedies are not claims or debts as those remedies do not give rise to a right to payment. *Id.* at 878. In contrast, the reinstatement of the Deed of Trust (distinguishable from cancellation of a deed, reconveyance of property and

a release of liens) will give rise to Union Bank's right to payment as analyzed in section B1 herein. The *Irizarry* case is inapplicable.

2. Union Bank's claim was reasonably contemplated and as such it falls within the definition of a "claim" subject to discharge.

Union Bank argues that its claim for reinstatement was not reasonably contemplated at the time of bankruptcy and was therefore not subject to the bankruptcy discharge. BR 12-13. This argument fails. Union Bank's cause of action to reinstate the Deed of Trust accrued when the Reconveyance was recorded. *1000 Virginia Ltd. Pshp. v. Vertects Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). Union Bank had constructive notice of the cause of action upon the recording. "A properly recorded instrument supplies constructive notice of the rights created by the instrument and of the recitals of the instrument." *Chelan County v. Nykreim*, 105 Wn.App. 339, 358, 20 P.3d 416 (2001). Furthermore, although the Reconveyance was "recorded in error" (BR 4) the Reconveyance was recorded upon the instruction of Union Bank as its plain language states "...having received from the beneficiary under said deed of trust a written request to reconvey, reciting that the obligation secured by said deed of trust has been fully paid and performed...". CP 63.

To qualify as an unknown claim not subject to discharge in bankruptcy “the claim could not have been reasonably contemplated.” *In re Hexcel Corp.*, 239 B.R. 564, 567 (N.D. Cal. 1999). Certainly the facts in this matter do not give rise to a finding that the claim could not have been reasonably contemplated. The parties had constructive notice of the claim upon the recording of the Reconveyance. Additionally, pursuant to the specific terms of the Reconveyance, Union Bank instructed the Trustee to record the document. The claim giving rise to the reinstatement of the Deed of Trust could have been reasonably contemplated and as such falls within the definition of a “claim” subject to discharge.

3. Union Bank does not have an equitable lien that passed through bankruptcy as the requisite elements to establish an equitable lien have not been met.

Union Bank argues that an equitable lien was created that passed through bankruptcy. BR 13. The state Supreme Court has established clear and specific elements for the creation of an equitable lien as follows: “a party at the request of another advances him money to be applied to the discharge of a legal obligation of that other, but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for payment.” *Falconer v. Stevenson*, 184 Wash. 438, 442, 51 P.2d 618 (1935).

The court reaffirmed the specific necessary elements established under *Falconer* that “must be established” and stated (emphasis added) “[W]e take this opportunity to reaffirm the *Falconer* decision, **and the criteria we indicated is to be applied by a trial court when determining whether to impose an equitable lien. In doing so, we give meaning to our pronouncement in *Falconer* that the equitable lien doctrine has ‘prescribed boundaries’.**” *Sorenson v. Pyeatt*, 158 Wn.2d 523, 536, 146 P.3d 1172 (2006). The court specifically declines to adopt the lender’s position in *Sorenson* that “the Court of Appeals should be reversed because it applied a narrow and inflexible approach to equity.” *Id.* at 535. The court states (emphasis added), “Even though an equitable lien is an equitable remedy and may arise from any number of varied facts and circumstances, the Court of Appeals correctly concluded that **this remedy has certain elements that must be established by claimant before it can be imposed.**” *Id.* at 535-536.

Union Bank has not satisfied the *Falconer* required elements for the establishment of an equitable lien, specifically, neither party to the transaction was under a disability at the time the Promissory Note and Deed of Trust were executed and a valid contract was made for repayment. Union Bank has failed to establish an equitable lien.

4. Judicial estoppel does not apply as Glaefke's position in the bankruptcy was based on mistake, neither court was misled and there is no windfall to Glaefke.

Union Bank argues that Glaefke is judicially estopped from arguing a position in the instant case that is inconsistent with his position in the bankruptcy. BR 16. Judicial estoppel is an equitable doctrine preventing “a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) citing *Arkinson v. Ethan Allen, Inc.* 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006)).

Three elements generally must be shown to establish judicial estoppel. Those factors are as follows:

- (1) Whether the party's later position is clearly inconsistent with its earlier position;
- (2) whether the party successfully persuaded a court to accept the party's earlier position but then creates the perception that the court was misled when it adopts a later, inconsistent position; and
- (3) whether the party would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Skinner v. Holgate, 141 Wn.App. 840, 848, 173 P.3d 300 (2007) citing *New Hampshire v. Maine*, 532 U.S. 742, 750-751, 121 S.Ct. 1808, 149 L.Ed. 2d 968 (2001).

The analysis fails on the first element. Glaefke mistakenly listed Union Bank as a secured creditor in the bankruptcy schedules as Glaefke was unaware that the Reconveyance had been recorded. CP 46. Consistent with the foregoing, Glaefke did not respond to the Motion for Relief from Stay in the bankruptcy proceedings. CP 180-182. Application of the doctrine of judicial estoppel may be inappropriate “when a party’s prior position was based on inadvertence or mistake.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, 160 P.3d 13 (2007) citing *New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808. In this instance, Glaefke was unaware of the recording of the Reconveyance and he mistakenly listed Union Bank as a secured creditor and did not respond to the Motion for Relief from Stay. Glaefke’s position in the bankruptcy was based on mistake. Judicial estoppel is inappropriate.

The second element necessary to establish judicial estoppel also fails as Glaefke did not successfully persuade the Bankruptcy Court to accept his position and then create the perception that the court was misled when he adopted a later, inconsistent position. Glaefke has been clear from the outset that he was unaware that the Reconveyance was recorded. CP 46. Neither the Bankruptcy Court nor the court in this matter were misled.

Union Bank has not established the third element for judicial estoppel as Glaefke has not derived an unfair advantage. Discharging Union Bank's claim simply fulfills one of the primary purposes of the Bankruptcy Act which is "to provide debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *State v. Eyre*, 39 Wn.App. 141, 143, 692 P.2d 853 (1984) citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934); *People v. Washburn*, 97 Cal.App. 3d 621, 158 Cal.Rptr. 822, 825 (1979); *People v. Mosesson*, 78 Misc.2d 217, 356 N.Y.S.2d 483, 484 (1974).

Judicial estoppel does not apply in the instant case. In a case where the information provided to the first court was provided by mistake judicial estoppel is not appropriate. Furthermore, neither court was misled. Finally, discharging Union Bank's claim does not result in a windfall to Glaefke but rather fulfills the primary purpose of the Bankruptcy Act. None of the elements for judicial estoppel have been satisfied.

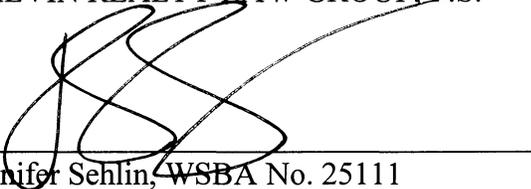
E. CONCLUSION

Glaefke respectfully requests that the court reverse the trial court's decision on summary judgment in favor of Union Bank and reverse the trial court's ruling denying summary judgment to Glaefke and remand the

matter to the trial Court for further proceedings consistent with the court's ruling.

Dated this 27th day of February, 2015

GALVIN REALTY LAW GROUP, P.S.



Jennifer Sehlin, WSBA No. 25111
Attorney for Appellant

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury and under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness herein.

On February 27, 2015, I hand delivered a copy of the Reply Brief of Appellant and Declaration of Service to the following:

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Averil Rothrock
Joel A. Parker
Claire L. Rootjes
Schwabe, Williamson & Wyatt, P.C.
Attorneys at Law
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010

DATED this 27th day of February, 2015.


Michelle Straub