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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALBERT BRONT, Plaintiff and Respondent, v. ROBERT G. BERNHOFT et al., Defendants and Appellants.	B276582 (Los Angeles County Super. Ct. No. BS 159598)

APPEAL from an order of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Reversed and remanded with directions.

The Bernhoft Law Firm and Daniel J. Treuden for Defendants and Appellants.

Albert Bront, in pro. per., for Plaintiff and Respondent.

Defendants and appellants Robert G. Bernhoft and The Bernhoft Law Firm, S.C.,[1] challenge the trial court's denial of Bernhoft's petition to vacate an arbitration award in favor of plaintiff and respondent Albert Bront, as well as the trial court's order confirming the arbitration award. While the arbitration was pending, Bront filed a bankruptcy petition in which he claimed not to have any valuable unliquidated claims. Bernhoft contends that Bront, by taking inconsistent positions in bankruptcy court and in his arbitration proceedings, attempted to fraudulently claim funds to which he was not entitled. Bernhoft argues that the trial court erred when it found that it lacked the authority to exercise equitable power to vacate the arbitration award under a theory of judicial estoppel. We disagree with Bernhoft's position. Nevertheless, we reverse the judgment of the trial court on the ground that the claim against Bernhoft belonged to the bankruptcy estate, and that Bront lacked standing to petition to confirm the arbitration award.

FACTS AND PROCEEDINGS BELOW

In 2010, Bernhoft agreed to represent Bront in his defense of criminal tax charges in federal court. At the time, Bront was an employee of the Internal Revenue Service. In 2011, Bront pleaded guilty to one count of subscribing a false tax return (26 U.S.C. § 7206(1)), and two counts of assisting or advising in the preparation of a false tax return (26 U.S.C. § 7206(2)). All three counts were felonies, and the court sentenced Bront to three years in prison. As part of his plea agreement, Bront admitted that he prepared false tax returns on behalf of relatives,

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[1] The Bernhoft Law Firm, S.C., is also an appellant in this case. For the sake of convenience, we refer to appellants collectively as Bernhoft.

claiming deductions and losses to which the relatives were not entitled, then diverted the excess refunds to his own bank account.

In September 2013, after Bront was released from prison, he filed a petition for fee arbitration with the Los Angeles County Bar Association, contending that Bernhoft had failed to represent him adequately. In order to proceed with the arbitration, Bront paid a filing fee of $5,000. Three months later, Bront filed a Chapter 7 bankruptcy petition. In his bankruptcy petition, Bront did not list his arbitration claim as an asset. On the schedule of personal property Bront filed with his bankruptcy petition, in the category of "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims," Bront checked a box to indicate that he had no such claims. In another section of his bankruptcy petition that required him to provide additional detail regarding his debts, assets, and income, in response to a request to "[l]ist all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case" (boldface omitted), Bront again checked a box labeled "None." Because his only scheduled assets were exempt from distribution, Bront's creditors recovered nothing when the bankruptcy court discharged Bront's debts in April 2014.

In December 2014, the arbitration panel issued an award of $100,000 in favor of Bront. The panel found that although Bront paid $300,000 to Bernhoft to represent him, the reasonable value of the legal services he received was only $200,000. Almost one year later, in December 2015, Bront petitioned the trial court to confirm the award.

In March 2016, Bernhoft filed an opposition to Bront's petition to confirm the arbitration award, along with a motion to dismiss and a motion to vacate the arbitration award. Bernhoft claimed that Bront was judicially estopped from collecting on the

arbitration claim because the existence of the claim was inconsistent with Bront's representation in his bankruptcy proceeding that he had no interest in any unliquidated claims. In response, Bront acknowledged that he did not list the claim against Bernhoft in his bankruptcy petition, but suggested that he did not need to do so, since the arbitration claim was "highly [f]anciful" and was not accepted for arbitration by the bar association until one month after Bront filed his bankruptcy petition. Bront also claimed that he did not realize he needed to disclose the existence of his arbitration claim in his bankruptcy petition.

The trial court granted Bront's petition to confirm the award and denied Bernhoft's petition. The court found that the petition to vacate the award was untimely, in that it was not filed within the 100-day deadline established by section 1288 of the Code of Civil Procedure.[2] The court also found that because judicial review of arbitration awards is limited by statute, the court lacked the equitable authority to vacate the award on the ground of judicial estoppel.

DISCUSSION

The Code of Civil Procedure strictly limits the time in which a party may petition to vacate an arbitration award. Under section 1288, a party must either file a petition to vacate or a response to a petition to confirm the award within "100 days after the date of the service of a signed copy of the award." (§ 1288; accord, § 1288.2.) The consequence of this law is that if the party who lost in the arbitration does " 'not serve and file a petition to vacate or a response to [a] petition to confirm within the 100–day period from the date of service of the award . . . , the award must be

[2] Unless otherwise specified, subsequent statutory references are to the Code of Civil Procedure.

treated as final.' "[3] (*Eternity Investments, Inc. v. Brown* (2007) 151 Cal.App.4th 739, 745.) In this case, Bernhoft did not file his petition to vacate until more than one year after being served with a copy of the arbitration award. On this basis, the trial court found that it lacked the authority to grant Bernhoft's petition.

Bernhoft contends that this was error and argues that, in spite of the late filing of the petition, the trial court had the authority to prevent Bront from obtaining the benefits of the arbitration award by applying the doctrine of judicial estoppel. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. [Citations.] This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast and loose with the courts.' " (*Hamilton v. State Farm Fire & Cas. Co.* (9th Cir. 2001) 270 F.3d 778, 782 (*Hamilton*).) Because Bront asserted in his bankruptcy petition that he had no interest in any pending causes of action, Bernhoft argues that Bront is judicially estopped from taking a diametrically opposite position and attempting to enforce an arbitration award based on his cause of action against Bernhoft.

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[3] In cases involving mistake, inadvertence, surprise, or neglect, a party may petition the court for relief from a final judgment. (See § 473, subd. (b).) This provision is irrelevant in this case because Bernhoft did not file his petition to vacate until more than six months after the arbitration award became final.

We agree with Bernhoft that Bront's arbitration claim was inconsistent with the representations Bront made in bankruptcy. Nevertheless, it is clear from the record that judicial estoppel is not an appropriate remedy at this stage because Bront is not the proper plaintiff in the case. When a party files for bankruptcy, all of his assets become the property of the bankruptcy estate, including causes of action relating to events that occurred before the bankruptcy filing. (*Parker v. Wendy's Intern., Inc.* (11th Cir. 2004) 365 F.3d 1268, 1272 (*Parker*); see 11 U.S.C. § 541(a)(1) [the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case"].) "Failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate." (*Parker*, *supra*, 365 F.3d at p. 1272.) Property of the estate reverts to the debtor only if the bankruptcy trustee elects to abandon it because it is burdensome or of inconsequential value to the estate. (*Ibid.*; 11 U.S.C. § 554(a).) Bront filed his arbitration claim before he filed his bankruptcy petition, and it is undisputed that his claim was based on events that occurred before bankruptcy. Because Bront did not list his arbitration claim among his assets in his bankruptcy petition, the trustee never knew of its existence and could not abandon it. The right to the cause of action against Bernhoft, including any proceeds from it, belongs to the bankruptcy estate, not to Bront.

Because the bankruptcy estate is the owner of the claim against Bernhoft, and the estate has never taken an inconsistent position with regard to the existence of the claim, judicial estoppel does not apply. As the court explained in *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 511, "judicial estoppel is rarely appropriate in a [C]hapter 7 context in a case in which the debtor has failed to schedule a claim." Because all pre-petition causes of action belong to the estate, "[t]he debtor will lack standing to sue so the suit can be maintained only if the bankruptcy trustee

substitutes in or abandons the claim. There is no possibility of unfair advantage because the bankruptcy court will take appropriate actions to promote the goals of bankruptcy and protect the process." (*Ibid.*, citing *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1020-1021 (*Cloud*); accord, *Parker*, *supra*, 365 F.3d at p. 1272.)

Moreover, "application of the doctrine of judicial estoppel . . . can frustrate the primary objectives of bankruptcy law. It penalizes both the debtor and the creditors, while bestowing a windfall upon the third[-]party noncreditor defendant." (*Cloud*, *supra*, 67 Cal.App.4th at p. 1020.) A finding of judicial estoppel in this case would create just such an unjust outcome. It would deprive Bront's creditors of $100,000, while giving Bernhoft an equal windfall.

The cases Bernhoft cites in which courts applied judicial estoppel against debtors who failed to disclose causes of actions in bankruptcy involve exceptional situations in which the interests of creditors were not at stake. In *Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 120-121, the court held that a debtor who in her bankruptcy petitions disclaimed any interest in two corporations was judicially estopped from suing to assert an interest in those corporations. In that case, however, the debtor's bankruptcy petitions had been dismissed, apparently without a discharge of her debts. (See *id.* at p. 118.) The rights to the cause of action, along with the rest of the debtor's assets, had reverted to the debtor at the time of dismissal. (See 11 U.S.C. § 349(b)(3).) Thus, there was no bankruptcy trustee present to assert an interest in her cause of action, nor creditors who could have recovered the benefits of the suit.

Similarly, in *Hamilton*, the court held that a debtor was judicially estopped from recovering from his insurer for claims that predated his bankruptcy but which he had failed to list in his

bankruptcy petition. (*Hamilton*, *supra*, 270 F.3d at pp. 784-785.) Prior to the filing of the suit, the bankruptcy court had dismissed the debtor's petition and vacated the discharge of his debts after the trustee alleged bad faith, a lack of truthfulness under oath, and failure to cooperate. (*Hamilton*, *supra*, 270 F.3d at p. 781.)[4]

Although judicial estoppel is not an appropriate remedy in this case, our discussion reveals a more fundamental problem with Bront's position: that of his standing to petition to confirm the arbitration award. Neither party discussed this issue in briefing, so we requested supplemental briefing on the subject. "[T]he issue of standing is so fundamental that it need not even be raised below—let alone decided—as a prerequisite to our consideration." (*Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 745.) Furthermore, because standing implicates the subject-matter jurisdiction of the court and can never be waived, a challenge to standing is not subject to the time limits of a petition to vacate an arbitration award. (See *United Firefighters of Los Angeles v. City of Los Angeles* (1991) 231 Cal.App.3d 1576, 1581-1582.)

Because Bront's cause of action is the property of the bankruptcy estate, Bront lacks standing to pursue his claim. (See *Cloud*, *supra*, 67 Cal.App.4th at pp. 1003-1004; § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."].) Consequently,

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[4] Bernhoft cites one additional case in which the court applied judicial estoppel to bar a debtor from asserting a claim she had failed to disclose in bankruptcy, *Neighbors v. Mortgage Electronic Registration Systems, Inc.* (N.D.Cal., Jan. 27, 2009, No. C 08-5530 PJH) 2009 WL 192445. That case was an unreported opinion of a federal district court, in which the court did not address the issue of the plaintiff's standing to sue or the preservation of the claim for the benefit of the bankruptcy estate. We find the court's reasoning unpersuasive.

the trial court's order confirming the arbitration award cannot stand.

In his supplemental brief, Bernhoft contends that we should remand the case to the LACBA arbitration panel to allow the bankruptcy trustee an opportunity to refile the case in arbitration. We decline to take that step. Case law appears to support a trustee in bankruptcy intervening in order to cure a debtor's lack of standing to bring a claim. (See *Cloud*, *supra*, 67 Cal.App.4th at pp. 1005-1008.) "[I]f the facts of the cause of action against the defendant would not be 'wholly different' after amendment, a complaint filed by a party without standing may be amended to substitute in the real party in interest." (*Id.* at p. 1005, see also *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19-22.) This issue has not been litigated, and it would be premature for us to decide the question before allowing the bankruptcy trustee to take a position. Nothing in this opinion should be interpreted as preventing the bankruptcy court from taking any appropriate action with respect to Bront's bankruptcy or the estate's interest in Bront's cause of action.

DISPOSITION

The trial court's order is reversed. We direct the clerk of this court to send copies of this opinion to the bankruptcy court and the trustee. On remand, the trial court shall stay the case for a reasonable period of time to allow the bankruptcy court and the trustee to take appropriate action. If they take no action, the court shall enter an order granting the motion to vacate the award. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.