Filed 3/29/17 Flaherty v. Bank of America CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

VINCE FLAHERTY, Plaintiff and Appellant, v. BANK OF AMERICA, N.A., Defendant and Respondent.	B261594 (Los Angeles County Super. Ct. No. SC108012)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig D. Karlan, Allan J. Goodman, Judges. Affirmed.

Vince Flaherty, in pro. per., for Plaintiff and Appellant.

McGuire Woods, Leslie M. Werlin, for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Vince Flaherty brought an action against defendant and respondent Bank of America, N.A. (incorrectly named as Bank of America, Inc.)[1] that ultimately asserted 18 causes of action concerning a home loan plaintiff obtained from defendant. After sustaining without leave to amend defendant's demurrer to 13 of plaintiff's causes of action, the trial court ruled that four of plaintiff's remaining causes of action and part of the fifth were barred by the doctrine of judicial estoppel. As to the remaining part of the fifth cause of action, the trial court granted non-suit. Thereafter, the trial court entered judgment in defendant's favor. Plaintiff appeals, and we affirm.

PROCEDURAL AND FACTUAL BACKGROUND[2]

On May 17, 2010, plaintiff filed a complaint against defendant. Defendant demurred to the complaint. On October 4, 2010, prior to the hearing on defendant's demurrer to the complaint, plaintiff filed a first amended complaint[3] alleging

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1 Plaintiff also named Northwest Trustee Services, Inc. (apparently incorrectly named as Northwest Trustee Services) as a defendant in his original complaint and in his first, second, third, and fourth amended complaints. He named BAC Home Loans Servicing as a defendant in his third and fourth amended complaints. Neither Northwest Trustee Services, Inc. nor BAC Home Loans Servicing is a party to this appeal.

2 Plaintiff's opening brief does not include a statement of the significant facts relevant to his appeal as required by California Rules of Court, rule 8.204(a)(2)(C).

3 By filing his first amended complaint before the hearing on

causes of action for: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) fraud and deceit, (4) negligent misrepresentation, (5) false advertising, (6) failure to modify pursuant to disaster, (7) quiet title, (8) slander of title, (9) intentional infliction of emotional distress, (10) negligent infliction of emotional distress, (11) cancellation of instruments, (12) bad faith, (13) failure to notice balloon payment, (14) interference with business relationship, (15) negligence, (16) declaratory relief, (17) relief based upon rescission, and (18) injunctive relief.

Defendant demurred to the first amended complaint. The trial court sustained without leave to amend defendant's demurrer to certain of plaintiff's causes of action.

On July 15, 2011, plaintiff filed a third amended complaint.[4] Defendant demurred to the third amended complaint. The trial court sustained without leave to amend defendant's demurrer to certain of plaintiff's causes of action.

On February 12, 2012, plaintiff filed a fourth amended complaint with respect to his five remaining causes of action. Remaining in the fourth amended complaint were plaintiff's causes of action for breach of contract (1st cause of action), breach of the covenant of good faith and fair dealing (2nd cause of

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defendant's demurrer, plaintiff mooted defendant's demurrer. (Code Civ. Proc., § 472, subd. (a); *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 505-506.)

[4] Plaintiff had filed a "Draft Second Amended Complaint" on June 3, 2011. The record does not reflect that defendant demurred to or moved to strike that "draft" complaint or that the trial court granted plaintiff leave to file the third amended complaint.

action), fraud and deceit (3rd cause of action), negligent misrepresentation (4th cause of action), and false advertising (5th cause of action).

Defendant demurred to the fourth amended complaint and moved to strike plaintiff's prayer for $20 million in punitive damages from the fourth amended complaint. The record on appeal does not contain a ruling on defendant's demurrer or its motion to strike. We infer that the trial court overruled the demurrer as defendant filed an answer to the fourth amended complaint and the trial court's judgment addresses the five causes of action alleged in the fourth amended complaint. We also infer that the trial court granted the motion to strike as plaintiff filed a "Motion for Reconsideration of Ruling to Strike Punitive Damages . . ." that the trial court denied.

Ultimately, trial was set for October 31, 2014. Prior to trial, defendant moved to try its judicial estoppel defense before plaintiff tried his case-in-chief. At the October 30, 2014, hearing on defendant's motion, defense counsel explained his judicial estoppel theory to the trial court, stating that plaintiff had listed the value of the instant action against defendant in his bankruptcy case as "zero," and thus had obtained a discharge from the bankruptcy case. He informed the trial court that he had prepared a trial brief on the issue.

Plaintiff responded that the bankruptcy trustee[5] did not "want any part of this lawsuit" and asked plaintiff the value of the action to the trustee. Plaintiff told the trustee, "[I]t's rolling the dice. Who knows what is going to happen." The trustee told

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[5] Referring to the same official, plaintiff at times used the terms "commissioner" and "trustee." For clarity and consistency, we will use the term "trustee."

plaintiff that plaintiff had to list the action's value as zero to be discharged from bankruptcy.

Defense counsel suggested the trial court take the motion under submission and review defendant's trial brief. The trial court took the motion under submission.

The following day, when it appeared that the trial court was going to proceed with a trial on plaintiff's case-in-chief, defense counsel asked to be heard. The trial court granted defense counsel's request. Before defense counsel addressed the trial court, the trial court, referring to defendant's trial brief on judicial estoppel, framed the issue thusly: plaintiff apparently had listed the value of his lawsuit against defendant as "zero" in a bankruptcy case. At the trial court's request, defense counsel provided the trial court with previously marked defense exhibit 20, which contained Schedule B from plaintiff's bankruptcy case.

The trial court then told plaintiff that defense counsel was arguing that plaintiff was not permitted to take inconsistent judicial positions, and because plaintiff took the position in bankruptcy court that his lawsuit against defendant had no value, he was not entitled to recover damages in this case. Plaintiff responded that he "had it listed at the value of the property, and the [trustee] said he wouldn't discharge. He said he didn't want this lawsuit. He had no interest in it." Plaintiff said he believed he was listing the value of the lawsuit at its value to the trustee.

Defense counsel argued that all of plaintiff's remaining causes of action were barred by the doctrine of judicial estoppel because each required proof of damages. Upon further discussion with the trial court, defense counsel conceded the judicial estoppel doctrine would not bar plaintiff's claim for prospective

injunctive relief with respect to his false advertising cause of action.

After a recess, the trial court stated, "The court has given great consideration to the motion of [defendant] regarding judicial estoppel. The court's tentative is to grant the motion. [¶] I'll give [defense counsel] and [plaintiff] a last opportunity to comment or argue, but it's clear Schedule B lists this lawsuit as having a zero value, having a Chapter 7 bankruptcy."

The trial court found that plaintiff had signed his Schedule B under penalty of perjury on December 4, 2011; that plaintiff had filed his third amended complaint several months earlier, on July 15, 2011; and that plaintiff sought in that complaint $20 million in punitive damages, and general and special damages according to proof. The trial court further found that plaintiff obtained a benefit in the bankruptcy court—discharge from bankruptcy—by listing the value of his lawsuit against defendant as zero.

After further argument from defense counsel and plaintiff, the trial court marked as defense exhibits plaintiff's "bankruptcy filing," the bankruptcy docket sheet, plaintiff's bankruptcy petition, and plaintiff's discharge from bankruptcy. Defense counsel requested the trial court take judicial notice of excerpts from plaintiff's June 23, 2014,[6] deposition in which plaintiff testified that he had determined he "had been damaged in the sum of millions of dollars that [he] wanted back from [defendant] by this lawsuit" when he filed his first amended complaint.

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[6] The reporter's transcript appears to include a typographical error, listing the year the deposition was taken as 2004 rather than 2014. Subsequent reporting clarified the issue.

The trial court ruled that plaintiff's causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud and deceit, and negligent misrepresentation were entirely barred by the doctrine of judicial estoppel because each depended on proof of damages and plaintiff had represented in his bankruptcy case that his action against defendant had zero value. The trial court explained to plaintiff, "You took the benefit of the bankruptcy court discharge which protects you from creditors. Now you're precluding [*sic*] from coming in here and seeking to argue that it truly isn't worth zero, but it's worth millions of dollars especially given that you knew the claim had millions of dollars—had a value of millions of dollars to you, and that's why you brought it, and that's why you indicated in the deposition testimony that it was worth a substantial sum; so the positions are clearly inconsistent."

As for plaintiff's remaining cause of action for false advertising, the trial court ruled that judicial estoppel barred plaintiff's claim for restitution, but not his claim for an injunction. After a court trial on plaintiff's false advertising cause of action, the trial court ruled that plaintiff was not entitled to injunctive relief and granted defendant's motion for non-suit.[7]

DISCUSSION

I. The Demurrers

In a section entitled "The Court Erred Prior To The Estoppel Ruling by Sustaining Demurrers Without Leave," which

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[7] Plaintiff does not challenge the trial court's order granting non-suit to defendant on the injunction claim in plaintiff's 5th cause of action for false advertising.

occupies one page of his 46-page brief, plaintiff contends the trial court erred in sustaining without leave to amend defendant's demurrers to plaintiff's 7th through 18th causes of action.[8] By his perfunctory claims of error that fail to cite supporting authority, plaintiff has forfeited review of his challenge to the trial court's rulings.

A. Standard of Review

"On appeal from a judgment after an order sustaining a demurrer, our standard of review is de novo. We exercise our independent judgment about whether, as a matter of law, the complaint states facts sufficient to state a cause of action. [Citations.] We view a demurrer as admitting all material facts properly pleaded but not contentions, deductions, or conclusions of fact or law. [Citation.]" (*Lin v. Coronado* (2014) 232 Cal.App.4th 696, 700-701.) When a trial court has sustained a demurrer without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

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[8] Plaintiff does not challenge the trial court's ruling sustaining without leave to amend defendant's demurrer to plaintiff's 6th cause of action for failure to modify pursuant to disaster.

B. Application of Relevant Principles

Plaintiff provides no meaningful argument regarding how the trial court erred in sustaining without leave to amend defendant's demurrers to 12 causes of action. Plaintiff lists the 12 causes of action followed by no argument with respect to the 12th, 13th, and 14th causes of action. He repeats a single sentence—"Error sustaining demurrer without leave."—with respect to plaintiff's 8th, 9th, 10th, 15th, and 17th causes of action. He similarly asserts a single sentence—"Error sustaining demurrer without leave when pleadings sufficiently alleged the wrong party was attempting to foreclose"—as to the 11th cause of action. He makes a three-sentence statement—"Plaintiff alleged that [defendant] was merely the servicer with no security interest to enforce foreclosure because they previously sold the promissory note to Wells Fargo. Plaintiff sought declaratory relief[.] Error sustaining demurrer without leave."—as to plaintiff's 16th cause of action. And, he makes a one-sentence declaration—"Error in first imposing an arbitrary $433,000 bond and on remand a $300,000 bond amount, contrary to the Court of Appeal's instructions."—as to the 18th cause of action. Plaintiff does not support any of these conclusory statements with any reasoned argument or citation to authority in support thereof.

Plaintiff has forfeited review of his claim that the trial court erred in sustaining defendant's demurrers to plaintiff's 7th through 18th causes of action by making only perfunctory claims of error. (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 667, fn. 11 ["plaintiffs' one-sentence, perfunctory request for retrial of the causation issue that cites no supporting authority constitutes a forfeiture of the issue"]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 ["One cannot simply

say the court erred, and leave it up to the appellate court to figure out why. [Citation.]"].) Plaintiff also has failed to show that he could have amended the challenged causes of action to state valid causes of action such that the trial court abused its discretion in denying leave to amend. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318.)

II. Judicial Estoppel

Plaintiff contends the trial court erred in ruling that the doctrine of judicial estoppel barred his causes of action for breach of contract, breach of the covenant of good faith and fair dealing, fraud and deceit, and negligent misrepresentation, and the restitution claim in his false advertising cause of action. We disagree.

A. Standard of Review

We review de novo a trial court's determination that the doctrine of judicial estoppel applies to the facts in a given case. (*Blix Street Records, Inc. v. Cassidy* (2011) 191 Cal.App.4th 39, 46.) We review the trial court's factual determinations under the substantial evidence standard—i.e., "whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the trial court's factual determinations. [Citations.]" (*Id.* at p. 47.) Because judicial estoppel is an equitable doctrine, its application is within the trial court's discretion. (*Ibid.*) We review the exercise of such discretion under the abuse of discretion standard. (*Id.* at pp. 46-47.)

B. Application of Relevant Principles

"The doctrine of judicial estoppel, sometimes called the doctrine of ""preclusion of inconsistent positions"" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 [70 Cal.Rptr.2d 96]), ""precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.] Application of the doctrine is discretionary.'" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 735 [135 Cal.Rptr.2d 415], fn. omitted.) The doctrine 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." (*Jackson v. County of Los Angeles, supra,* 60 Cal.App.4th [at p. 183] . . . ; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 943 [134 Cal.Rptr.2d 101]).' (*Aguilar v. Lerner* [(2004)] 32 Cal.4th [974,] 986-987.)" (*Blix Street Records, Inc. v. Cassidy*[*, supra,*] 191 Cal.App.4th at p. 47.)

"'As a general matter, upon the filing of a petition for bankruptcy, "all legal or equitable interests of the debtor in property' become the property of the bankruptcy estate and will be distributed to the debtor's creditors. [Citation.]' [Citation.]" (*M & M Foods, Inc. v. Pacific American Fish Co., Inc.* (2011) 196 Cal.App.4th 554, 562.) A debtor in bankruptcy has a duty to file a schedule of assets and liabilities (11 U.S.C. 521(a)(1)(B)(i);

International Engine Parts, Inc. v. Feddersen (1998) 64 Cal.App.4th 345, 351), including causes of action (*Bone v. Taco Bell* (W.D. Tenn. 2013) 956 F.Supp.2d 872, 884). The debtor must provide a true and correct estimate of a cause of action's value. (*Bone v. Taco Bell, supra,* 956 F.Supp.2d at p. 884.)

"After notice and a hearing, the [bankruptcy] trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." (11 U.S.C. 554(a).) "Unless the court orders otherwise, any property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate." (11 U.S.C. 554(d).) "[A]bsent abandonment of the claim by the trustee, a debtor out of possession has no standing to prosecute a cause of action which has passed to the bankruptcy estate." (*Bostanian v. Liberty Savings Bank* (1999) 52 Cal.App.4th 1075, 1081.)

The trial court correctly determined that the doctrine of judicial estoppel applied in this case. Plaintiff took two positions—(1) in his bankruptcy case, the value of his lawsuit against defendant was zero and (2) in his lawsuit against defendant, the value of his claims exceeded $20 million. He took those two positions in judicial proceedings—in his bankruptcy and superior court cases. He was successful in asserting in his bankruptcy case that the value of his lawsuit against defendant was zero and subsequently obtained a discharge in bankruptcy. His position in his bankruptcy case that the value of his lawsuit against defendant was worth zero was entirely inconsistent with his claims for damages in excess of $20 million against

defendant.[9] Finally, there was no evidence that plaintiff took the position in his bankruptcy case that the value of his lawsuit against defendant was zero as a result of ignorance, fraud, or mistake—i.e., he acknowledged the bankruptcy trustee told him he would need to list the lawsuit's value at zero in order to be discharged from bankruptcy. (*Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 47.)

On appeal, plaintiff contends that he made his zero valuation in bankruptcy court in good faith reliance on the then existing state of the law in California. That is, plaintiff claims that prior to our Supreme Court's decision in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), he had no "standing to pursue his pre-foreclosure claims such as the robosigning, back-dated substitution of trustee, false assignment and the wrong party foreclosing." Plaintiff's contention, however, ignores his June 23, 2014, pre-*Yvanova* deposition testimony that he knew as of his October 4, 2010, first amended complaint that defendant had caused him millions of dollars in damages. This contention also ignores plaintiff's pre-*Yvanova* third amended

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[9] Citing *Whitworth v. National Enterprise Systems, Inc.* (D. Ore. Sept. 9, 2009, Civ. No. 08-968-PK) 2009 WL 2948529 (*Whitworth*) and *Sparkman v. Zwicker & Associates, P.C.* (E.D.N.Y. 2005) 374 F.Supp.2d 293 (*Sparkman*), plaintiff contends he did not take inconsistent positions because he merely undervalued his lawsuit in his bankruptcy case. In *Whitworth* and *Sparkman*, however, the plaintiffs fully disclosed to the bankruptcy court that they sought damages in their lawsuits and made good faith valuations of the potential recovery within a few thousand dollars of the damages sought in their complaints. Here, by contrast, plaintiff claimed his suit against defendant was worthless, obtained a discharge in bankruptcy, and simultaneously sought millions of dollars in damages.

complaint in which he requested $20 million in punitive damages.

Plaintiff also argues that the trial court should not have applied the doctrine of judicial estoppel because the trial court purportedly surprised plaintiff by addressing the judicial estoppel issue on the day set for trial, even though plaintiff believed the matter had been resolved at the hearing the day before. Plaintiff further argues defendant did not serve him with its trial brief on judicial estoppel. Neither contention finds any support from the record. Plaintiff could not genuinely have been surprised when the trial court addressed the judicial estoppel issue on the day set for trial because the record is clear that the trial court took defendant's motion to try its judicial estoppel defense before the trial on plaintiff's case-in-chief under submission the previous day. As for plaintiff's claim that defendant did not serve him with its trial brief on judicial estoppel, the proof of service for that trial brief indicates defense counsel personally served plaintiff on October 30, 2014. More to the point, plaintiff provides no reason or authority for us to conclude that the trial court committed reversible error by ruling on the judicial estoppel issue on the first day of trial or by going forward on the issue after defendant raised it in a brief served on plaintiff the day before.

Finally, although somewhat unclear, plaintiff appears to contend that the doctrine of judicial estoppel should not have applied because he purportedly only learned of allegedly forged loan documents through discovery from defendant, which occurred after his bankruptcy case concluded. Plaintiff's contention fails because he alleged that his loan documents were forged in his third amended complaint. As noted above, the trial

court found that plaintiff filed his third amended complaint prior to ascribing zero value to his lawsuit against defendant on his Schedule B in bankruptcy.

III. Plaintiff's Remaining Claims

In addition to his arguments concerning the trial court's orders sustaining defendant's demurrers without leave to amend and its ruling on the judicial estoppel issue, plaintiff claims: (1) it was "likely an abuse of discretion" for Judge Goodman to rule on a required bond amount after he previously recused himself from a related case; (2) the trial court failed to hear his two motions to compel inspection of documents; and (3) the trial court erred in excluding plaintiff's expert witnesses. None of these claims concerns the propriety of the trial court's orders sustaining without leave to amend defendant's demurrers to plaintiff's 7th through 18th causes of action or its ruling that plaintiff's 1st through 4th causes of action and restitution claim in his 5th cause of action were barred by the doctrine of judicial estoppel. Because we affirm the trial court's demurrer and judicial estoppel rulings for the reasons set forth above, we need not reach these unrelated remaining claims.

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.