Filed 12/12/18 Shankar v. Chu 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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| ARVIND SHANKAR,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>JEFFREY CHU et al.,<br><br>Defendants and Respondents. | B278128<br><br>(Los Angeles County Super. Ct. No. SC119634) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Nancy L. Newman, Judge. Affirmed in part, reversed in part, and remanded.

Robert C. Moest; Arvind Shankar, in pro. per., for Plaintiff and Appellant.

Phillips Law Partners, George Phillips, Jr., for Defendants and Respondents C. Edward Chu and Yoon Young Chu.

Moon & Yang, Kane Moon and Allen Fegahli for Defendant and Respondent Jeffrey D. Chu.

Fidelity National Law Group, Kevin R. Broersma and Robin Ratner for Defendant and Respondent Chicago Title Insurance Company.

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## I. INTRODUCTION

Plaintiff Arvind Shankar appeals from an order granting a motion for judgment on the pleadings brought by defendant Chicago Title Insurance Company and joined by defendants C. Edward Chu (personally and as trustee), Yoon Young Chu (personally and as trustee), and Jeffrey D. Chu (personally and as trustee). Plaintiff contends that the allegations of his first amended complaint adequately state causes of action against these defendants for fraudulent transfer of assets and an accounting. Specifically, plaintiff contends that by acting as a trustee of a deed of trust in a real property transaction, Chicago Title Insurance Company conspired with the other defendants and assisted in transferring real property to shield those assets from potential liability defendant Jeffrey D. Chu could incur in his other ongoing litigation with plaintiff.

We conclude the allegations do not state causes of action against Chicago Title Insurance Company, but do state causes of action against C. Edward Chu, Yoon Young Chu, and Jeffrey D. Chu as trustee of the Jeffrey D. Chu Trust dated June 28, 2005. Accordingly, we affirm as to Chicago Title Insurance Company and reverse as to C. Edward Chu, Yoon Young Chu, and Jeffrey D. Chu as trustee. We dismiss the appeal as to Jeffrey D. Chu individually because the order granting the motion for

judgment on the pleadings was not a final judgment and not appealable as to him.

## II. FACTUAL BACKGROUND

For over a decade, plaintiff and defendant Jeffrey D. Chu (Jeffrey)[1] have been embroiled in multiple legal disputes concerning plaintiff's employment at Chu Sarang Medical, Inc. (CSM), with which Jeffrey was also involved. In one of those separate action, in 2007, Jeffrey sued plaintiff, and plaintiff filed a cross-complaint against Jeffrey and CSM (2007 action).

On January 4, 2013, plaintiff filed the current action alleging among other things that in December 2010, Jeffrey fraudulently transferred real property to his brother, C. Edward Chu (Edward), and another relative, Yoon Young Chu (Yoon), to prevent plaintiff from collecting a potential judgment if plaintiff prevailed on his cross-complaint in the 2007 action. The complaint alleged Chicago Title Insurance Company (Chicago) conspired with Jeffrey, Edward, and Yoon and aided and abetted the transfer. Plaintiff named Chicago and the other defendants (in their individual capacities and as trustees of their respective trusts) in the third and fourth causes of action for fraudulent transfer of assets and an accounting.

On April 8, 2013, plaintiff filed a first amended complaint alleging the same third and fourth causes of action and adding allegations about Chicago's involvement in the alleged fraudulent transfer. Plaintiff alleged Chicago "knew or reasonably should have known that a [c]ross-[c]omplaint filed by [plaintiff] was

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[1] Because defendants share last names, we refer to them by their first names. No disrespect is intended.

pending against [Jeffrey] . . . [and] that the amount of liability to which [Jeffrey] may be exposed as a result of the aforesaid [c]ross-[c]omplaint would exceed his ability to pay if the assets set forth below were not in the possession or control of [Jeffrey]." Plaintiff alleged Chicago "acted in concert and engaged in a conspiracy" with the other defendants to defraud plaintiff and obstruct his ability to collect on his pending claims, and alternatively "affirmatively supported, aided, and abetted the fraudulent transfer of assets . . . by impliedly consenting to serve as the trustee on one of more [d]eeds of [t]rust through which valuable assets were fraudulently conveyed." Plaintiff contended that Chicago failed to "investigate whether any legal claims were pending against [Jeffrey]" and "failed to require that the party conveying real property certify that it had sufficient assets to pay for any legal claims that may be pending against that party."

Chicago filed an answer on May 8, 2013, and the other defendants filed their joint answer on November 5, 2013.

Meanwhile in the 2007 action, plaintiff settled his cross-claims against CSM, and in October 2012 he obtained a judgment against CSM in the amount of $1,500,000.[2] Plaintiff then moved to add Jeffrey as an additional judgment debtor to the judgment against CSM, and in March 2013, the court in the 2007 action entered an unsigned minute order stating plaintiff's motion was granted. But plaintiff does not identify any judgment actually entered naming Jeffrey as a judgment debtor. Instead, after a bench trial, in August 2015, Jeffrey and CSM prevailed on

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[2] Chicago contends CSM had served a statutory offer to compromise pursuant to Code of Civil Procedure section 998, which plaintiff accepted, but that between offer and acceptance, CSM dismissed its complaint against plaintiff.

plaintiff's cross-complaint against them, with the trial court ruling, "[j]udgment will be entered in favor of cross-defendants CSMI and [Jeffrey] Chu and against cross-complainant Shankar." Plaintiff objected that the proposed statement of decision did not take into account the earlier settlement with CSM and the March 2013 minute order. Nevertheless, on August 31, 2015, the trial court entered a judgment in favor of Jeffrey and CSM, stating it had considered plaintiff's objections and ordering that plaintiff "shall have and recover nothing by way of his [c]ross-[c]omplaint." Plaintiff has appealed that judgment in a separately pending appeal.[3]

Back in the current action, on July 22, 2016, Chicago filed a motion for judgment on the pleadings on the third and fourth causes of action, arguing Chicago had no duties to plaintiff and plaintiff had no judgment in his favor that could be the subject of a fraudulent transfer cause of action because he had lost the 2007 action. The other defendants joined in the motion. Plaintiff countered that the judgment in the 2007 action would likely be reversed on appeal and his aiding and abetting theory did not depend on Chicago owing a duty to him. On August 18, 2016, the trial court issued a tentative ruling granting the motion because plaintiff alleged insufficient facts to demonstrate Chicago had the requisite knowledge and intent to provide assistance to the alleged fraudulent transfer and had no duty to investigate, and because plaintiff had no claim on which to collect given the entry of judgment against him in the 2007 action. On September 7, 2016, the trial court adopted the tentative ruling as its final

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[3] Case No. B268290 is currently pending in Division One of this court.

ruling. The order was entered on September 20, 2016. No judgment was entered.

On October 4, 2016, plaintiff filed a notice of appeal stating he was appealing from the "[o]rder issued September 7, 2016."

## III. DISCUSSION

### A. *Appealability*

An order granting a motion for judgment on the pleadings is not appealable; the appeal should be taken from the judgment. (Code Civ. Proc., § 904.1; *Smiley v. Citibank* (1995) 11 Cal.4th 138, 144, fn. 1.) Although we may treat an appeal from an unappealable order as one from a subsequent judgment (*Campbell v. Jewish Committee for Personal Service* (1954) 125 Cal.App.2d 771,773), the record on appeal here does not reflect any judgment. Nonetheless, in the interest of justice and to avoid delay, we may construe the order appealed from as incorporating an appealable judgment and the notice of appeal as appealing from such judgment. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Therefore, we construe the September 7, 2016 order granting the motion for judgment on the pleadings as incorporating an appealable judgment and the notice of appeal as appealing from that judgment.

The September 7, 2016 order disposed of all issues between plaintiff and the defendants except for Jeffrey in his individual capacity. The complaint also names Jeffrey individually as a defendant in the first, second and fifth causes of action. A judgment that leaves "nothing to be decided between one or more parties and their adversaries" is considered final and appealable

as to those parties. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741.) "A judgment that disposes of *fewer* than all of the causes of action framed by the pleadings, however, is necessarily 'interlocutory' (Code Civ. Proc., § 904.1, subd.(a)), and not yet final, as to any parties between whom another cause of action remains pending." (*Ibid.*) The September 7, 2016 order (construed as a judgment) is therefore appealable as to Chicago, Edward, Yoon and Jeffrey as trustee, but not Jeffrey individually. Plaintiff appears to concede that the order is not appealable as to Jeffrey individually, but Jeffrey filed briefs as a party to the appeal. To the extent plaintiff appealed the September 7, 2016 order as to Jeffrey individually, the appeal as to Jeffrey in his individual capacity is dismissed.[4]

B. *Standard of Review*

"'A motion for judgment on the pleadings, like a general demurrer, challenges the sufficiency of the plaintiff's cause of action and raises the legal issue, regardless of the existence of triable issues of fact, of whether the complaint states a cause of action. [Citation.]' [Citation.] The standard of review for a motion for judgment on the pleadings is the same as that for a general demurrer. [Citation.] 'We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' [Citation.] '"We review the complaint de novo to determine whether [it] alleges facts sufficient to state a cause of action under any legal

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[4] Because Jeffrey individually is not a proper party to this appeal, we deny his request for judicial notice of numerous documents from the 2007 action.

theory. [Citations.]"" (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1213-1214.) Leave to amend "is properly denied if the facts and nature of plaintiffs' claims are clear and under the substantive law, no liability exists." (*Beck v. County of San Mateo* (1984) 154 Cal.App.3d 374, 379.)

C. *Chicago's Motion for Judgment on the Pleadings*

The third and fourth causes of action are premised on the claim that Jeffrey fraudulently transferred property to Edward and Yoon. A fraudulent transfer is ""a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim."" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829.) Plaintiff alleged Chicago participated in the fraudulent transfer by conspiring with the other defendants to prevent him from collecting on his claims against Jeffrey, aiding and abetting the fraudulent transfer, and failing to investigate whether any legal claims were pending against Jeffrey and whether he had sufficient assets to pay any legal claims. We address each of these allegations below.

1. *Conspiracy*

"Civil conspiracy is 'a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration.'" (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1473 (*American Master Lease*).) "'By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to

plaintiff recognized by law and is potentially subject to liability for breach of that duty.'" (*Id.* at pp. 1473-1474.) In sum, plaintiff can state a cause of action for conspiracy against Chicago only if it owed a duty to protect him from the alleged wrongdoing of the other defendants.

"'As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.'" (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 740.) A deed of trust typically establishes a relationship among the trustor (debtor), beneficiary (lender), and trustee. (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813 (*Biancalana*).) "If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale." (*Ibid.*) Civil Code sections 2924 through 2924k are a "'comprehensive scheme'" governing the role of the trustee. (*Id.* at pp. 813-814.) These statutes and the deed of trust define the trustee's duties. (*I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 287-288 (*I.E. Associates*) ["The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes. . . . [¶] [T]here is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes"]; *Heritage Oaks Partners v. First American Title Ins. Co.* (2007) 155 Cal.App.4th 339, 345 (*Heritage Oaks*).)

The trustee's duties are quite limited. "His only duties are: (1) upon default to undertake the steps necessary to foreclose the

deed of trust; or (2) upon satisfaction of the secured debt to reconvey the deed of trust." (*Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 677 (*Vournas*).) Indeed, a deed of trust trustee has been described as an agent, rather than a true trustee with fiduciary obligations. (*Heritage Oaks, supra*, 155 Cal.App.4th at p. 345 ["The trustee under a deed of trust 'is not a true trustee, and owes no fiduciary obligations; [it] merely acts as a common agent for the trustor and beneficiary of the deed of trust'"].)

The extremely limited duties of a deed of trust trustee are part of the statutory scheme designed to balance multiple interests—to provide an efficient remedy against a defaulting debtor, protect the debtor from wrongful loss of property, and ensure that a properly conducted sale is final and conclusive as to a bona fide purchaser. (*Biancalana, supra*, 56 Cal.4th at p. 814.) The nonjudicial foreclosure statutes "reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees. . . . Trustees, the middlemen, need to have clearly defined responsibilities to enable them to discharge their duties effectively and to avoid embroiling the parties in time-consuming and costly litigation." (*I.E. Associates, supra*, 39 Cal.3d at p. 288.) The statutes governing deeds of trust are the type of "'[g]eneral and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described,'" thus indicating "'a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter.'" (*Id.* at p. 285.)

Recognizing the careful legislative balancing in the statutes regulating deeds of trust, courts decline to expand the trustee's duties. (See, e.g., *Heritage Oaks, supra*, 155 Cal.App.4th at

p. 346 ["policy reasons militate against the recognition of a duty running from the person or entity that conducts a foreclosure sale to subsequent purchasers of the property being sold"]; *Vournas, supra*, 73 Cal.App.4th at p. 677 [trustee had no duty to confirm note had been repaid before reconveying deed of trust]; *I.E. Associates, supra*, 39 Cal.3d at pp. 288-289 [trustee had no duty to search for trustor's current address to provide notice of default].)

We too decline to extend a deed of trust trustee's duties to potential or actual creditors of the trustor. Plaintiff's allegations that Chicago had the duty to investigate potential claims against Jeffrey and his ability to pay a potential judgment, as well as a duty not to serve as a trustee due to the litigation pending against Jeffrey, find no support in the statutes regulating deeds of trust or California law. If the Legislature had intended to impose those duties on a trustee of a deed of trust, it would have so stated in the comprehensive statutory scheme.

Because we find no duty owed by Chicago to plaintiff, we conclude plaintiff cannot state a cause of action for conspiracy against Chicago. (*American Master Lease, supra*, 225 Cal.App.4th at p. 1474.)

2. *Aiding and abetting*

On appeal, plaintiff retreats from claiming Chicago owed a duty to him and now contends his causes of action do not depend on Chicago having any duty to him. He focuses his arguments on his allegations that Chicago aided and abetted defendants' fraudulent transfer.

"'"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citation.]'" (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144 (*Casey*).) Plaintiff argues Chicago's conduct falls within the former theory of aiding and abetting liability.

Liability under that theory first "depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey, supra*, 127 Cal.App.4th at p. 1145.) This requires "'an intentional participation *with knowledge of the object to be attained*' [citation]" and "'*the intent of facilitating the commission of that tort*.' [Citation.]" (*Id.* at p. 1146.) The aider and abettor must make "'"a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act."'" (*American Master Lease, supra*, 225 Cal.App.4th at p. 1477.)

In *Casey*, the court analyzed at length the pleading requirements for this theory of liability when the alleged aider and abettor operates in a highly regulated industry with limited duties to third parties, in that case, banking. (*Casey, supra*, 127 Cal.App.4th at pp. 1151-1152.) Reconciling aiding and abetting principles with the banking law's strict limitation on banks' duties to third parties "depend[ed] on a strict application of the pleading requirement for the knowledge element of the aiding and abetting claim. In other words, on demurrer, a court must carefully scrutinize whether the plaintiff has alleged the bank

had actual knowledge of the underlying wrong it purportedly aided and abetted." (*Id.* at p. 1152.) The court concluded the plaintiff had not satisfied the strict pleading requirements because at most the plaintiff alleged the banks knew certain account holders were involved in a criminal enterprise using forged checks and large amounts of cash. (*Id.* at p. 1149.) But the plaintiff's "kitchen sink" allegations about the wrongful conduct did not allege the banks' actual knowledge of the specific purpose of the wrongful conduct, and the allegations that did allege the bank's actual knowledge were conclusory and "not otherwise supported by the rest of the complaint." (*Id.* at p. 1153.)

The pleading standard in *Casey* applies to allegations against a trustee of a deed of trust. Like the banks, the trustee is highly regulated by statute and has very limited duties (if any) to third parties, as the Legislature has determined the conduct of deed of trust trustees is to be governed by comprehensive statutes to the preclusion of common law. (*I.E. Associates, supra*, 39 Cal.3d at p. 285.) And as in *Casey*, plaintiff's allegations do not satisfy the pleading requirements for alleging the trustee had actual knowledge of the underlying wrong it purportedly aided and abetted.

Plaintiff alleged Chicago "knew or reasonably should have known" about plaintiff's cross-complaint against Jeffrey, and "knew or reasonably should have known" that the cross-complaint could result in Jeffrey being liable for an amount greater than his ability to pay if the assets were not in his control. Plaintiff alleged Chicago "acted with actual knowledge that it would injure the rights of [plaintiff], or with the reckless disregard for the probability of injuring the rights of

[plaintiff] . . . ." Plaintiff alleged Chicago acted with "the intention of hindering, delaying, obstructing, or subverting the ability of [plaintiff] to collect upon the claims pending against [Jeffrey]." These allegations are all conclusory and fail to allege "sufficient facts to establish the knowledge element of the aiding and abetting cause of action." (*Casey, supra*, 127 Cal.App.4th at p. 1154; see also *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 97 (*Schulz*) [allegations "that PayPal knew the [Web] site was an illegal lottery but agreed EZ could use its payment system with the knowing intent to aid and abet EZ's operation because it could be profitable to PayPal" were "mere conclusions" that did "not sufficiently allege PayPal's . . . knowledge of the alleged illegal lottery"].)

Plaintiff's pleading deficiencies are readily apparent when read in context. (*Casey, supra*, 127 Cal.App.4th at p. 1153 ["In reviewing the sustaining of a demurrer, 'we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.'"].) Plaintiff hedges on Chicago's actual knowledge by adding the alternative "reasonably should have known" and "reckless disregard" allegations. Other allegations contend that Chicago failed to "investigate whether any legal claims were pending against [Jeffrey]," suggesting that Chicago did not actually know about plaintiff's cross-complaint against Jeffrey.

In addition, to be liable for aiding and abetting, the defendant must give "substantial assistance" to the others in the commission of the intentional tort. (*Casey, supra*, 127 Cal.App.4th at p. 1144.) Plaintiff alleges that Chicago aided and abetted the fraudulent transfer "by impliedly consenting to serve as the trustee on one or more [d]eeds of [t]rust . . . ." Plaintiff

does not allege any other act by Chicago that could constitute substantial assistance.

Merely agreeing to serve as a trustee on a deed of trust cannot be substantial assistance in the commission of a fraudulent transfer because a trustee does not need to be named to create a deed of trust. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 510 ["[t]he naming of the trustee is irrelevant to the creation of the deed of trust, so long as a trustee is named prior to the foreclosure"].) The other defendants could have committed the alleged fraudulent transfer without Chicago's, or any trustee's, involvement. The situation may be different where the trustee of the deed of trust conducts a foreclosure sale, which arguably could not occur without the trustee's participation, but that is not what plaintiff alleged. Because Chicago's consent to serve as trustee was not necessary to and did not advance the allegedly wrongful conduct, Chicago cannot be said to have substantially assisted that conduct.

Even if Chicago's consent to serve as a trustee was necessary to create the deed of trust, plaintiff would need to allege that Chicago had some kind of more extensive involvement in the wrongful conduct. (*Schulz, supra*, 152 Cal.App.4th at p. 97 [allegation that PayPal allowed illegal lottery to use its payment system did "not sufficiently allege . . . facts showing 'substantial assistance or encouragement'"]; *Perfect 10, Inc. v. Visa Intern. Service Ass'n* (9th Cir. 2007) 494 F.3d 788, 809 [under California aiding and abetting law, plaintiff failed to state claim against credit card companies where plaintiff alleged they processed payments for Web sites engaging in illegal activity but did not allege any other role in facilitating illegal activity].) For example, allegations that Internet payment systems allowed an illegal

lottery Web site to use their logos, facilitated direct links to their Web sites for easy payment, and loaned their "aura of respectability" to the lottery were sufficient to plead substantial assistance. (*Schulz, supra*, 152 Cal.App.4th at p. 94.) Plaintiff alleged nothing of that sort of affirmative assistance against Chicago.

3. *Accounting*

The fourth cause of action is "for an accounting arising out of the fraudulent transfer of assets" and therefore rises or falls with the third cause of action. Because we conclude plaintiff did not sufficiently allege a fraudulent transfer cause of action against Chicago, we also conclude he has not stated a claim against Chicago on the fourth cause of action.

Given that plaintiff already amended his complaint once to add more allegations against Chicago and did not explain what he could do to cure the defects, we see no reasonable possibility he could amend to satisfy the pleading requirements. (*Schulz, supra*, 152 Cal.App.4th at p. 97.) The trial court did not err in granting the motion for judgment on the pleadings as to Chicago without leave to amend.

D. *Edward, Yoon and Jeffrey's Joinder in the Motion for Judgment on the Pleadings*

Plaintiff's allegations against Edward, Yoon, and Jeffrey as trustee are briefer. He alleges Edward and Yoon "knew or reasonably should have known" about plaintiff's cross-complaint in the 2007 action, and they acted in concert with Jeffrey and Chicago to hinder, delay, obstruct or subvert plaintiff's ability to

collect on his claims against Jeffrey by transferring real property to Edward and Yoon. Edward, Yoon, and Jeffrey as trustee joined in Chicago's motion for judgment on the pleadings, briefly arguing that because plaintiff did not prevail in the 2007 action, the fraudulent transfer cause of action should be dismissed. The trial court agreed and granted the motion as to all defendants on that ground.

Under the Uniform Voidable Transactions Act (at the relevant time here, the Uniform Fraudulent Transfer Act (UFTA)), a creditor with a claim may file an action pursuing certain remedies. (Civ. Code, § 3439.07.) Civil Code section 3439.01 defines a "[c]reditor" as "a person that has a claim," and a "[c]laim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." (Civ. Code, § 3439.01, subds. (b) & (c).) A creditor does not need to "reduce his claim to judgment before seeking the benefit of the remedy." (*Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896; see also *Estate of Blanco* (1978) 86 Cal.App.3d 826, 832 ["a tort claimant before judgment is rendered is a 'creditor' within the meaning of Civil Code section 3439.01"].)

Under the UFTA, plaintiff potentially had a claim when he filed his cross-complaint in the 2007 action. But in August 2015, judgment was entered against him in that action. He then appealed, and his appeal remains pending. The parties dispute the effect of the judgment on plaintiff's status as a creditor with a claim. Defendants contend the judgment established plaintiff is not a creditor and thereby extinguished the fraudulent transfer cause of action. Plaintiff argues he remains a creditor with a

claim because there is no final determination of the matter until the appeal of the 2007 action concludes.

The court in *Cortez v. Vogt* (1997) 52 Cal.App.4th 917 (*Cortez*) obliquely came at this question in analyzing when a statute of limitations period begins to run under the UFTA. The court reasoned the UFTA "permit[ted], but [did] not require, a creditor to bring suit to set aside a fraudulent transfer before the claim has matured." (*Id.* at p. 931.) The court explained that if the statute of limitations began "to run before final judgment in the underlying creditor action, the creditor may be required to file and prosecute both actions to protect against the expiration of the limitations period," resulting in needless expense and effort if the underlying creditor action was unsuccessful. (*Id.* at p. 932.) The court concluded "the limitation period does not commence to run until the judgment in the underlying action becomes final." (*Id.* at p. 937.) The judgment was not final in that case until the Court of Appeal dismissed the appeal in the underlying action. (*Id.* at pp. 920, 923, 934; see also *Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1050-1051, fn. 5 [for determining when statute of limitations for fraudulent conveyance accrued, judgment in underlying action became final when remittitur issued].)

A rationale of *Cortez* is that the underlying action "establishes by final judgment the actual legal existence of a debtor-creditor relationship" (52 Cal.App.4th at p. 929), and that a judgment is not final until the conclusion of any appeal. (Code Civ. Proc., § 1049 ["An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed"].) Until then, the status of the claim is uncertain. That rationale applies here as well. Plaintiff will not know until the final determination of the

pending appeal in the 2007 action whether his claim and status as a creditor are finally extinguished. Until then, at minimum he has a potential claim that has not yet matured. (*Cortez, supra*, 52 Cal.App.4th at p. 931.)[5]

Because the parties in the 2007 action have not yet obtained a final judgment, the trial court erred in granting the motion for judgment on the pleadings on the ground that plaintiff had no claim to satisfy. We reverse the judgment in favor of Edward, Yoon, and Jeffrey as trustee, and remand for further proceedings.

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[5] If the judgment in favor of Jeffrey in the 2007 action is affirmed, nothing in this opinion would prevent the trial court from again dismissing the claims against defendants.

## IV. DISPOSITION

We dismiss the appeal as to Jeffrey D. Chu (individually). We affirm the judgment as to Chicago Title Insurance Company. We reverse the judgment as to C. Edward Chu (personally and as trustee), Yoon Young Chu (personally and as trustee) and Jeffrey D. Chu (as trustee) and remand for further proceedings consistent with this opinion. Chicago Title Insurance Company is awarded its costs on appeal. Plaintiff is awarded his costs on appeal solely with regard to his appeal of the judgment in favor of C. Edward Chu, Yoon Young Chu, and Jeffrey D. Chu (as trustee).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SEIGLE, J.*

We concur:

BAKER, Acting P.J.

KIM, J.

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