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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

BENJAMIN HEDLUND,  
Plaintiff and Appellant,

v.

EUGENE LUCAS et al.,  
Defendants and Respondents.

A136709

(Humboldt County  
Super. Ct. No. DR 110793)

This case arises from a complicated series of real estate transactions involving more than 5,000 acres of timberland in Humboldt County. It comes to us on appeal from a summary judgment in a quiet title action favoring defendants, who foreclosed on a parcel known as “Property No. 2” within the larger acreage. Both plaintiff and his brother, Joshua Hedlund (Joshua) were part owners of Schmook Ranch, LLC (Schmook Ranch), which lost Property No. 2 through the foreclosure. Plaintiff alleges the deed of trust on Property No. 2 allowed Schmook Ranch to obtain a reconveyance once it had paid \$462,394 of the amount owed on the acreage. Plaintiff alleged in his complaint that Property No. 2 had been paid off in September 2007, but reconveyance was wrongfully withheld by defendants.

By early 2008, things began to unravel between the purchaser and seller, and Schmook Ranch failed to keep up its payments on the acreage. By mid-2009, as foreclosure loomed, Schmook Ranch filed for bankruptcy under Chapter 11, which resulted ultimately in the bankruptcy court authorizing defendants to foreclose on Property No. 2. Their trust reacquired Property No. 2 at the trustee’s sale for

approximately \$500,000, which was the amount defendants claimed Schmook Ranch owed on the promissory note attributable to Property No. 2.

A year after the foreclosure, plaintiff filed his complaint in superior court claiming ownership of Property No. 2 as trustee of the Dupri Family Trust dated March 1, 2007 (Dupri Trust), which, as we shall explain, had succeeded to a \$1.4 million deed of trust on Property No. 2 through an unrecorded assignment from Schmook Ranch. At the least, plaintiff claims, defendants hold Property No. 2 subject to the deed of trust now owned by the Dupri Trust, and a constructive trust should be imposed.

The trial court granted summary judgment for the cotrustees, allowing them to retain unencumbered title to Property No. 2 on the basis that plaintiff's entitlement to any remedy should have been adjudicated in the Schmook Ranch bankruptcy proceeding. We find summary judgment was properly granted and affirm.

### **STATEMENT OF FACTS**

In 2005, the McLean Survivors' Trust under trust agreement dated June 1, 1987 (McLean Trust) owned a large amount of acreage in Garberville in Humboldt County through its ownership of Eel River Sawmill. Eel River Sawmill sold approximately 5,091 acres<sup>1</sup> to Schmook Ranch on April 12, 2005 for a purchase price of \$5 million, of which \$1 million was paid in cash and \$4 million was carried on a promissory note by the McLean Trust, secured by eight deeds of trust, each covering a separate parcel within the acreage. Property No. 2, comprised of approximately 600 acres, secured a deed of trust for \$462,394.<sup>2</sup> The deed of trust was recorded April 21, 2005. Apparently, Schmook Ranch planned to sell off the smaller parcels individually at a profit.

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<sup>1</sup> Plaintiff's opening brief says Schmook Ranch bought 5,091 acres from Eel River Sawmill, while defendants assert it was 3,500 acres. The difference appears to reflect the difference between the number of acres in the original transaction and the number that remained at the time the Schmook Ranch bankruptcy petition was filed. The exact number of acres originally purchased is immaterial to our decision.

<sup>2</sup> Plaintiff has identified the eight deeds of trust as securing the following amounts of the debt: Property No. 1 = \$590,866, Property No. 2 = \$462,394, Property No. 3 =

Schmook Ranch was owned in part by two brothers, Joshua and Benjamin Hedlund, the latter of whom is the plaintiff and appellant herein and shall be referred to as Hedlund or plaintiff. Each brother owned 23.3 percent of Schmook Ranch, with the remaining 53.4 percent owned by the Schmook Ranch Trust. (The trustee and beneficiaries of Schmook Ranch Trust have not been disclosed in the parties' briefing.)<sup>3</sup> Joshua was the "managing member" of Schmook Ranch.

Within days after purchasing the acreage from Eel River Sawmill, on April 26, 2005, Schmook Ranch transferred the smaller Property No. 2, as well as Property No. 6, to Reed Mountain, LLC (Reed Mountain). Reed Mountain, in turn, was owned in large part (47 percent) by Schmook Ranch. Schmook Ranch Trust also owned nearly 12 percent of Reed Mountain. Hedlund admitted in discovery that Joshua had formed Reed Mountain. Reed Mountain executed one or more notes and a deed of trust in favor of Schmook Ranch in the amount of \$1,415,600 (Reed Mountain note and deed of trust), which was \$473,600 more than Schmook Ranch owed on the two properties. This deed of trust was recorded on May 18, 2005. The note or notes are not in the record.<sup>4</sup>

On March 21, 2007, Schmook Ranch assigned its interest in the Reed Mountain notes and deed of trust to the Dupri Trust, using the following language: Schmook Ranch "grants, assigns and transfer [*sic*] to" the Dupri Trust "all beneficial interest in" the Reed Mountain deed of trust "[t]ogether with the note or notes therein described." Joshua was settlor of the Dupri Trust, and plaintiff was a beneficiary. The assignment of the Reed Mountain note and deed of trust to Dupri Trust was not recorded. From March 2007 to

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\$694,531, Property No. 4 = \$456,524, Property No. 5 = \$580,895, Property No. 6 = \$479,303, Property No. 7 = \$512,400, Property No. 8 = \$223,087.

<sup>3</sup> Defendants surmise the Schmook Ranch Trust may be "yet another creation of Joshua Hedlund, controlled by him." According to a filing by the trustee in Joshua's individual bankruptcy, Schmook Ranch was the trustee of Schmook Ranch Trust, and the beneficiaries were individual retirement accounts or trusts for Joshua, plaintiff, Carmella West (Joshua's ex-girlfriend), Joshua's son, his mother and another Hedlund.

<sup>4</sup> Plaintiff's arguments suggest there was only one promissory note, but the Reed Mountain deed of trust refers to there being four associated promissory notes.

August 2010, Joshua was the trustee of the Dupri Trust, and from August 2010 until the present, plaintiff has been the trustee.

Sometime before September 2007, McLean Trust reconveyed to Schmook Ranch the deeds of trust on Property No. 4 and Property No. 8 based on Schmook Ranch's having paid to the McLean Trust an amount sufficient to cover the deeds of trust on those two properties.

On September 19, 2007, plaintiff alleged, Schmook Ranch paid the McLean Trust \$791,140.01, of which \$500,000 was to go towards the principal of the \$4 million McLean note. Plaintiff alleged this paid all amounts due on the deed of trust on Property No. 2 (\$462,394), and the remainder was to be applied to the obligations secured by the remaining five deeds of trust. He further alleged that the McLean Trust "wrongfully refused to reconvey deed of trust" on Property No. 2. Defendants dispute these facts, but contend the dispute is not material.

Hedlund claims the refusal to reconvey the deed of trust was based on a clause of the McLean Trust deed of trust on Property No. 2, which provided in paragraph E for partial reconveyance of the properties, but only upon approval by McLean Trust "in its sole discretion," which approval "shall not be unreasonably withheld." The deed of trust further provided that McLean Trust's withholding of "discretion to approve of said reconveyance shall be unreasonable if the consideration offered by TRUSTOR [Schmook Ranch] is of an amount sufficient to result in the reasonable value of the portion of the real property described in Exhibit A that remains encumbered by this Deed of Trust is at least One Hundred Twenty Percent (120%) of the remaining principal and interest owing on the Note." Plaintiff claims on appeal that McLean Trust "unilaterally and improperly decided to impose the 120% value requirement." Plaintiff contends the refusal of the reconveyance was "completely inconsistent with [p]aragraph D"<sup>5</sup> of the deed of trust

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<sup>5</sup> Paragraph D read as follows: "BY ACCEPTANCE OF THIS instrument by BENEFICIARY [McLean Trust] as security for the Note, BENEFICIARY agrees to instruct the TRUSTEE to reconvey, without warranty, to the TRUSTOR [Schmook Ranch], all the estate held by the TRUSTEE in the real property described in Exhibit A

relating to Property No. 2<sup>6</sup> and was inconsistent with “the prior practice for the reconveyance of [Property No. 4 and No. 8.]” He claims paragraph E applied only to partial reconveyances of the individual parcels. Defendants dispute plaintiff’s allegations,<sup>7</sup> but assert the dispute is not material because any such claim had to be brought in the Schmook Ranch bankruptcy.

On October 10, 2008, the McLean Trust recorded a notice of default on the remaining deeds of trust securing the McLean note, including the deed of trust on Property No. 2, because Schmook Ranch had stopped making payments. On May 27, 2009, the McLean Trust recorded a notice of sale with respect to the remaining properties (i.e., Property Nos. 1-3 and 5-7), including Property No. 2.<sup>8</sup>

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[Property No. 2], upon written request received from TRUSTOR, after payment in full of the portion of the indebtedness evidenced by the Note which is secured by this Deed of Trust.”

<sup>6</sup> Construction of a contract is generally an issue of law for the court, which may be resolved on summary judgment. (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1031; *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 314.) However, proper construction of paragraphs D and E of the deed of trust could turn on contested facts regarding the parties’ intent (*Gale v. Wood* (1952) 112 Cal.App.2d 650, 656) if the dispute about reconveyance were properly before the court. But given our resolution of this appeal, any such issue, whether factual or legal, should have been litigated in the Schmook Ranch bankruptcy proceeding.

<sup>7</sup> Included in the bankruptcy court records of which we have taken judicial notice (Evid. Code, §§ 452, subd. (d), 459) is a letter from McLean Trust to Joshua and Schmook Ranch dated January 24, 2008, suggesting there had been a mutual mistake in the per acre value reflected in the deed of trust and explaining that an additional payment of \$43,500 would be required before McLean Trust would reconvey the deed of trust on Property No. 2. McLean Trust explained in the letter that the reasonable value per acre had been calculated using the \$4 million amount of the promissory note, rather than the \$5 million purchase price.

<sup>8</sup> Schedule D to the Schmook Ranch bankruptcy petition shows a deed of trust for \$220,000 held by Don B. Miselis as of April 2009 and a \$17,600 deed of trust held by Selzer Home Loans (Wendy Fetzer) also as of April 2009, both listed as secured by Property No. 3. Another deed of trust for \$200,000 was held by PLM Lender Services (unspecified date) on “Parcel No. 3.”

On June 13, 2009, Schmook Ranch filed a voluntary petition for bankruptcy under Chapter 11 in *In re Schmook Ranch, LLC*, U.S. Bankruptcy Court, Northern District of California, Case No. 09-11827, listing Property No. 2 as an asset in its bankruptcy schedules, valued at \$996,000. The filing stayed the foreclosure action on Property No. 2. (11 U.S.C. § 362.) Joshua was identified in the bankruptcy filing as the “managing member” of Schmook Ranch. At the same time, he was also the trustee of Dupri Trust. Neither the Hedlund brothers nor Dupri Trust were listed as creditors in the Schmook Ranch bankruptcy filing. Schmook Ranch confirmed under penalty of perjury it was not holding any property for any other person or entity.

According to filings in the various bankruptcy matters of which we have taken judicial notice,<sup>9</sup> Joshua was in federal prison in Minnesota at the time the Schmook Ranch bankruptcy petition was filed.<sup>10</sup> The petition was signed by Stacy Favaloro, identified as “manager” of Schmook Ranch. On August 7, 2009, the bankruptcy court

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<sup>9</sup> Requests for judicial notice were filed in this court by both plaintiff and defendants and were granted on August 9 and September 13, 2013. Among the matters we judicially noticed were the filings in both the Schmook Ranch bankruptcy and the Reed Mountain bankruptcy, as well as in Joshua’s individual bankruptcy (*In re Joshua L. Hedlund* (Bankr. N.D. Cal. 2009) No. 09-57539) and another related company’s bankruptcy (*In re Vilica, LLC* (Bankr. N.D. Cal. 2010) No. 10-62728). In taking judicial notice of the records on file in these court proceedings, we do not judicially notice the truth of any hearsay statements therein. (*In re Vicks* (2013) 56 Cal.4th 274, 314; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882–883; *Columbia Casualty Co. v. Northwestern Nat. Ins. Co.* (1991) 231 Cal.App.3d 457, 473.)

<sup>10</sup> It appears Joshua was in prison for use of property for the purpose of manufacturing marijuana under title 21 United States Code section 856(a)(1). (See *United States v. Hedlund* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 98371; *Hedlund v. United States* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 101717.) Evidently, he had allowed his warehouse in Berkeley to be used for a marijuana operation. He was sentenced to 33 months in prison on February 27, 2009 and self-surrendered on May 11, 2009. (*Hedlund v. United States, supra*, 2011 U.S. Dist. LEXIS 101717, at p. \*1.) He was due to be released on December 4, 2011. (*Ibid.*) His imprisonment appears to have nothing to do with the facts of this case, but the date of his surrender shows he was in prison at the time the Schmook Ranch bankruptcy petition was filed (June 13, 2009), and at the time the Reed Mountain bankruptcy petition was filed (April 26, 2010).

appointed Favaloro to act on behalf of the bankrupt estate. Despite his imprisonment, Joshua participated actively in the Schmook Ranch bankruptcy beginning in June 2010, filing pro se papers expressing exasperation with Favaloro's failure to act in accordance with his orders. Meanwhile, on February 19, 2010, the bankruptcy was converted from a Chapter 11 to a Chapter 7 proceeding.

Plaintiff claimed in the court below, and argues on appeal, that the bankruptcy petition was filed by an unauthorized person who was not a member of Schmook Ranch (Favaloro) and had not been authorized by a majority of the members to file the petition, as well, that the inclusion of Property No. 2 in the bankruptcy estate was clearly erroneous, as Property No. 2 had been conveyed to Reed Mountain four years earlier.

On February 10, 2010, McLean Trust moved for relief from the automatic stay with respect to the remaining parcels it originally sold to Schmook Ranch. (11 U.S.C. § 362(d)(3).) On April 8, 2010, the bankruptcy court lifted the automatic stay applicable to the remaining properties, including Property No. 2, so that McLean Trust could move forward in foreclosing. Neither the Hedlund brothers, Reed Mountain, nor the Dupri Trust had opposed McLean Trust's motion for relief from the stay, nor had they brought to the bankruptcy court's attention prior to issuance of the order lifting the stay their claim that Favaloro was unauthorized to represent Schmook Ranch, or that Property No. 2 was erroneously included as an asset in the bankruptcy schedules.

But after the automatic stay was lifted, on June 1, 2010, Joshua filed a pro se document entitled "Joshua L. Hedlund's Motion for Relief from Judgment or Order." In that document, Joshua complained that Property No. 2 should have been reconveyed to Schmook Ranch in early 2008, and should not be part of the bankruptcy estate.<sup>11</sup> Joshua also stated in his June 1 filing that there were several other unsecured creditors of Schmook Ranch who were owed over \$1 million, and who had not been included in the Schmook Ranch bankruptcy petition, including himself and H & H Capital Management.

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<sup>11</sup> In September 2009, an individual bankruptcy petition was filed on Joshua's behalf by an attorney, though he later claimed the petition had been filed without his authorization.

Meanwhile, shortly after the bankruptcy court in the Schmook Ranch bankruptcy lifted the stay, on April 26, 2010, Reed Mountain voluntarily filed for bankruptcy under Chapter 11 in *In re Reed Mountain, LLC* (Bankr. N.D.Cal. 2010) No. 10-11517, again listing property that appears to correspond to Property No. 2 as an asset in fee simple. Plaintiff signed the bankruptcy petition as the “authorized representative” for Reed Mountain. Nowhere in Reed Mountain’s bankruptcy filing did it mention any alleged interest in Property No. 2 held by plaintiff, Joshua, or Dupri Trust, either as secured or unsecured creditors.<sup>12</sup> On July 7, 2010, the bankruptcy court dismissed Reed Mountain’s petition at the request of the bankruptcy trustee due to Reed Mountain’s failure to comply with a status conference order. The bankruptcy trustee alleged plaintiff had failed to cooperate in providing paperwork and authorizations to the trustee. The same bankruptcy judge presided over the Schmook Ranch and Reed Mountain bankruptcies.

On August 13, 2010, the trustee’s deed in the foreclosure of Property No. 2 was recorded in favor of McLean Trust. McLean Trust purchased Property No. 2 at the trustee’s sale for \$494,164.10 (the amount then due on that property under the McLean note and deed of trust).

### **STATEMENT OF THE CASE**

Plaintiff, as trustee of the Dupri Trust, filed his complaint on October 14, 2011, alleging two causes of action against the cotrustees of the McLean Trust: (1) for quiet title (imposition of a constructive trust); and (2) for declaratory and injunctive relief. On April 27, 2012, defendants moved for summary judgment. On July 20, 2012, the superior court granted summary judgment on the basis that the claims plaintiff asserted were within the jurisdiction of the bankruptcy court and would need to be brought in the bankruptcy court.

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<sup>12</sup> Plaintiff’s counsel stated in argument before the trial court on the motion for summary judgment that the *amount* of the Reed Mountain note was reflected in the Reed Mountain bankruptcy filing. Although the amount was reflected on Schedule D (Creditors Holding Secured Claims), it was shown as owing on a first mortgage to the McLean Trust (\$462,394 on Property No. 2 and \$479,606 on Property No. 6), and to Schmook Ranch on a second mortgage of \$473,600. Dupri Trust was not mentioned.

Judgment was entered for defendants on July 26, 2012.

## **DISCUSSION**

### **The Trial Court's Ruling**

In granting defendants' summary judgment motion the court gave the following reasons: "I've heard both of you and I have reviewed all of the papers in this matter. And having read and considered the pleadings, as well as all the documents submitted by the parties in support of the motion as well as an opposition to the motion and the argument of counsel, defendant's motion for summary judgment is granted, first, because plaintiff's claims relating to Property No. 2 must be brought in federal bankruptcy court; the relevant evidence proffered in the pleadings and documents do show that Property No. 2 is part of a larger parcel of land purchased by Schmook Ranch LLC from Eel River Sawmills and that in June 2009, Schmook Ranch LLC filed for bankruptcy in the U.S. Bankruptcy Court for the Northern District of California in Case Number 09-11827, which is still pending; plaintiff is a 23.3 percent equity owner in Schmook Ranch LLC; Property No. 2 was listed as an asset of Schmook Ranch LLC in Schedule A to the bankruptcy petition; neither plaintiff nor the Dupri Trust are listed as creditors or as having any interest in Property No. 2 nor is there any evidence here that they pursued any claim as to that in that particular bankruptcy; plaintiff's claims relating to Property No. 2, including any claimed assignments, any claimed interest and deed of trust that relate to Property No. 2, must be litigated in the bankruptcy case. Plaintiff's assertions that the bankruptcy petition was unauthorized [or] is in error, is to be decided by the federal bankruptcy court, not this Court.

"For these reasons, the motion for summary judgment in favor of the defendant is granted. So, I do believe that the Court would not need to reach the other grounds that are raised because the Court is basing its granting the motion on the grounds that I've just stated, although I will indicate, though, that having considered all of the grounds advanced, that from the proffered evidence, judicial estoppel would appear to be applicable, as well. In the Reed Mountain bankruptcy petition filed by plaintiff, the plaintiff did not disclose the interest in Property No. 2 that he now claims here and

although he was involved in the Schmook bankruptcy, as well, and shown that he's an equity owner in that particular entity, he did not notify the Schmook bankruptcy court of the interest in Property No. 2 now claimed here.

“It also would appear to the Court that the constructive trust argument in support of summary judgment also has merit with regards to the bankruptcy trustee taking Property No. 2 as a bona fide purchaser under federal bankruptcy law and then through a nonjudicial foreclosure procedure, which McLean then took it as a bona fide purchaser. But, as indicated, the claim should be brought in bankruptcy court and so probably actual determinations on these other issues probably left to another court and to another time.”

### **Issues on Appeal**

Hedlund appeals, claiming the court erroneously granted summary judgment because it confused the transfer of a note and deed of trust with a transfer of the property securing them. The precise issues he raises are: (1) the court erred in granting summary judgment because Property No. 2 is not subject to a currently pending bankruptcy proceeding; (2) the bankruptcy trustee was not entitled to the status of bona fide purchaser for value with respect to the assigned Reed Mountain note and deed of trust; (3) judicial estoppel cannot properly be applied to this case to bar plaintiff's claims; and (4) the trial court erred in sustaining objections to Hedlund's declaration filed in opposition to the summary judgment motion.

Plaintiff acknowledges “the facts are complicated and not easily understood” because “[b]oth sides . . . are sophisticated real estate developers.” The parties acting on behalf of McLean Trust and Schmook Ranch “used a complex and innovative scheme to divide thousands of acres of prime real estate in Humboldt County into smaller parcels for resale without the McLean Trust, as the seller/financier, obtaining any governmental approvals.” According to plaintiff's briefing, this arrangement was chosen to allow McLean Trust to avoid compliance with the Subdivision Map Act. (Gov. Code, § 66410 et seq.)

Plaintiff claims McLean Trust was guilty of “double dip[ping]” in that it ended up receiving both the purchase price of Property No. 2 from Schmook Ranch prior to the

bankruptcy and the property itself through foreclosure after the automatic stay in bankruptcy court was lifted. Plaintiff calls the legal arguments made by McLean Trust, in both the trial court and on appeal, “grossly oversimplified,” and asks us to reverse.

For its part, McLean Trust points out that Schmook Ranch and related entities were formed by and largely under the control of Joshua and plaintiff. McLean Trust insinuates the Hedlund brothers, especially Joshua, were guilty of nefarious dealings, including the “secret” assignment of the Reed Mountain note and deed of trust. Plaintiff retorts that defendants’ brief is “sanctimonious” and implies it was McLean Trust, not Schmook Ranch, that flouted the law.

### **Matters Judicially Noticed from the Bankruptcy Court Files**

Having reviewed the filings in the bankruptcy matters, it appears that Joshua played a central role in the operation of the various entities in which he held an interest and there is substantial reason to question his conduct of the affairs of those entities. In light of the complexity of the transactions involved, and the federal bankruptcy court’s prior assertion of jurisdiction over the properties involved, the state courts need not and should not intervene. The bankruptcy filings, besides revealing a bewilderingly complicated web of interrelated entities, include numerous allegations of wrongdoing by Joshua, suggesting he has built a personal empire of limited liability companies and trusts that have dealt with each other in questionable transactions. Though we do not accept as true bare allegations of wrongdoing in court documents, neither are we required to ignore the numerous allegations by multiple individuals,<sup>13</sup> including the bankruptcy trustees.

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<sup>13</sup> Wendy Fetzer, a mortgage broker who had worked closely with Joshua in securing financing, stated under oath that Joshua “had acquired millions of dollars worth of real estate,” and “at all times while working with [Joshua] I was under the absolute impression that all of the real property belonged to [Joshua].” Referring to the various properties vested in various entities, Fetzer said, “It’s all Josh. Josh personally negotiated each and every purchase, sale, loan, lease, or whatever that had to do with his real property assets or otherwise which Josh vested in the various LLC’s and Trusts.” She described how Joshua would borrow against the equity held by one of the entities to forestall foreclosure on a property belonging to a different entity without proper accounting. (Footnote continues on next page.)

We consider those allegations solely to inform ourselves of the unusually complicated nature of the affairs of Schmook Ranch and related entities.

On July 16, 2010, the bankruptcy trustee in Joshua's individual bankruptcy filed a motion for order for substantive consolidation of numerous nondebtor entities with Joshua's estate, alleging, "Debtor Joshua L. Hedlund organized and created various limited liability companies and business trusts for the purpose of operating a single enterprise. The Debtor made no attempt to distinguish among the limited liability companies and trusts from himself, never complied with 'corporate' formalities, and treated all of the entities as extensions of himself." The trustee continued, "The number of Entities and the interrelationships among them, [Joshua], and family members are overwhelming, and any explanation of the entanglements is bound to be confusing." He requested consolidation because "the affairs of [Joshua] and the [listed] entities are so entangled that they cannot be disentangled without exorbitant and unwarranted expense, and unwarranted delay."

According to filings in the bankruptcy proceedings, shortly after it acquired the 5,091 acres, Schmook Ranch also sold Property No. 1 (735 acres) to Milk Ranch for approximately \$1.9 million. On that property, Schmook Ranch owed McLean Trust just \$590,866. Milk Ranch claimed in the Schmook Ranch bankruptcy proceeding that the sale involved fraud, misrepresentation, breach of fiduciary duty and breach of contract. As far as we can tell, this was an arm's length transaction.

However, according to the bankruptcy trustee's motion for consolidation, other transactions involving the acreage did not appear to be at arm's length. The trustee

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In addition, West, Joshua's former girlfriend and the mother of his children, filed a declaration under oath in September 2011, stating that Joshua had "stopped paying [child] support" when West "stopped signing as a robot for [Joshua's] 'alter ego' companies," after she figured out she was being "duped into providing [Joshua] a 'false color of propriety' for his alter ego real estate holding companies."

Counsel for Milk Ranch Creek, LLC (Milk Ranch) also stated in a brief in the Schmook Ranch bankruptcy that Joshua was "very conversant in using multiple entities to hide assets."

alleged Schmook Ranch, on May 18, 2005, conveyed part of the property acquired from the McLean Trust to Lewis Opening, LLC (allegedly wholly owned by Schmook Ranch), a parcel of the acreage it purchased from McLean Trust in exchange for a promissory note for \$1,898,000, secured by a deed of trust. The same document recited that Schmook Ranch transferred another parcel of the acreage to Chervimov Opening, LLC (allegedly wholly owned by Schmook Ranch) on the same date and took back a note for \$2,274,000, secured by a deed of trust. Again, according to Joshua's bankruptcy trustee, Schmook Ranch conveyed to Tom Long Junction, LLC (allegedly wholly owned by Schmook Ranch) on the same date another parcel purchased from McLean Trust for a promissory note for \$1,408,000, secured by a deed of trust. And yet again, on the same date, Schmook Ranch transferred part of the acreage to Peterson Opening, LLC (allegedly wholly owned by Schmook Ranch), taking back a note for \$3,420,000, secured by a deed of trust. Thus, when the transfers of Property No. 2 to Reed Mountain and Property No. 1 to Milk Ranch are considered, within a few weeks after purchasing the acreage, Schmook Ranch had "sold" the acreage initially acquired for \$5 million (\$1 million in equity), with Schmook Ranch owning approximately \$12.3 million in notes receivable, secured by deeds of trust to individual parcels, most of which were purchased by entities over which Joshua allegedly exercised control, thereby arguably inflating the paper assets of Schmook Ranch.

The trustee's motion for substantive consolidation referred to these entities as a "tangle" of "shell[]" entities, naming 17 such entities, including Reed Mountain, LLC, Schmook Ranch, LLC, and Schmook Ranch Trust. The trustee further referred to "the inability of the Debtor's brother, Benjamin Hedlund, the responsible individual, to resist [Joshua's] efforts" to "maintain control" over these entities even after they were in bankruptcy. The motion alleged, "From his jail cell, [Joshua] has continued to dominate entities and trusts he created and treat their assets as his own." The motion for substantive consolidation was eventually withdrawn on November 22, 2010. The trustee explained: "When the Trustee filed the motion, it was intended to protect property held in the name of other entities but in which the Debtor appeared to hold the equitable

interest. The Debtor's opposition to the motion and subsequent delays have negated for all practical purposes the intent of the motion."

On January 3, 2011, the bankruptcy trustee in Joshua's individual bankruptcy (see fn. 11, *ante*) filed a motion to dismiss the Chapter 7 case (having been converted from a Chapter 11) because Joshua (again) had asserted the bankruptcy petition had been filed without his "knowledge or approval,"<sup>14</sup> and the United States trustee had filed a "section 727 complaint against [Joshua] on September 7, 2010, alleging that [Joshua] had made material false oaths on his bankruptcy schedules and that [Joshua] had concealed estate property." (11 U.S.C. § 727(a)(4)(A).) The trustee concluded: "If [Joshua's] declarations are true and accurate, then this case should never have been filed in the first place. If [Joshua's] declarations are false, then he is attempting to commit fraud on the Court. Either way, this case should not be allowed to proceed."

The trustee's motion to dismiss was eventually withdrawn after a hearing on it was delayed for more than a year. The trustee had by then concluded "it can be readily inferred that the Debtor approved the filing of the case, and that he continued to ratify the filing of the case and take full advantage of the bankruptcy system for a substantial period of time." By then Joshua was asking to have the case dismissed, but the trustee believed "that justice and the interests of creditors will be better served if the Debtor's case remains open, and if the assets of this estate are substantively consolidated with the assets of the numerous entities that are owned and controlled by [Joshua]." (Around the same time, a motion to consolidate had been filed in the Schmook Ranch bankruptcy by West.)<sup>15</sup> We note with special concern the bankruptcy trustee's allegation: "The Trustee is aware that [Joshua] has claimed to have concealed funds available to him to save property from foreclosure once he is released from prison."

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<sup>14</sup> We note Favalaro cannot be blamed for filing Joshua's individual petition without his authority; this time he blamed his attorney for acting without authority.

<sup>15</sup> A motion for substantive consolidation was filed in the Schmook Ranch bankruptcy by West on February 21, 2012. That motion was denied without prejudice on May 25, 2012.

We could go on at great length reciting more of the allegations in the bankruptcy proceedings suggesting that Joshua has played “fast and loose” with the courts and with those who did business with him. We find particularly significant the fact that the bankruptcy court in the Schmook Ranch bankruptcy annulled an assignment of a note and deed of trust relating to the Milk Ranch property to Stateside Asset Trust on the authority of title 11 United States Code section 105(a), which gives the bankruptcy court power to make any order necessary or appropriate in support of its jurisdiction. The assignment, except for the names of the parties and the descriptions of the properties, is identical to the assignment of the Reed Mountain note and deed of trust to the Dupri Trust. Both assignments were signed on the same date, recorded on the same date, signed by the same person (Jessica Immitt, as “managing member” of each entity), and both of the trusts to which the notes and deeds of trust were assigned were believed to have been created by Joshua and were created on the same date.

The background of the annulment of the Milk Ranch assignment was as follows: On July 15, 2010, the bankruptcy trustee in the Schmook Ranch bankruptcy proposed approval of a settlement he had reached with Milk Ranch regarding its indebtedness to Schmook Ranch. On August 2, 2010, Joshua filed pro se papers in the Schmook Ranch bankruptcy on his own behalf and on Hedlund’s behalf opposing the settlement. In those papers, Joshua alleged that Favaloro had not been authorized to file the Schmook Ranch bankruptcy, and that the inclusion of Property No. 2 as an asset of the bankruptcy estate was erroneous. On August 9, 2010, the court approved the proposed Milk Ranch settlement, noting that no timely objections had been filed. The court made no express factual findings regarding Joshua’s allegations.

After the Milk Ranch settlement was approved, a previously unrecorded assignment of the Milk Ranch deed of trust in favor of Stateside Asset Trust surfaced. This assignment was recorded on August 30, 2010, and nearly derailed the foreclosure on the Milk Ranch property. Milk Ranch sought ex parte relief from the bankruptcy court, with the trustee’s support. On September 16, 2010, the court annulled and avoided the assignment of the Milk Ranch note and deed of trust from Schmook Ranch to Stateside

Asset Trust with the following order: “The Notice of Assignment recorded at Humboldt County Official Records, Document No. 2010-18738-1, is annulled and avoided.”

Stateside Asset Trust appears to have been another entity created by Joshua.

We do not and need not decide the truth or falsity of any of the allegations in the bankruptcy matters. Nevertheless, given this background, we are convinced that the dispute forming the basis of Hedlund’s complaint is far more complex than appears at first glance, and the interrelationships of several different entities would potentially have to be examined in the course of a trial. Even though Joshua is technically not a party to the present lawsuit, from a purely practical standpoint, the bankruptcy court, which has become familiar with the parties, the players, and the transactions, is best equipped to deal with the present dispute. It would be extremely wasteful of judicial resources and disrespectful of the bankruptcy court to assume jurisdiction over this matter. We explain in the succeeding sections of the opinion why Hedlund’s legal positions are also properly rejected.

### **Standard of Review of Summary Judgment**

Summary judgment must be granted when the moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) “The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)). “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Id.* at p. 850.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if the defendant establishes that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (o)(1) & (2).) A defendant moving for summary judgment is not required “to conclusively negate an element of the plaintiff’s

cause of action.” Rather, “[a]ll that the defendant need do is to ‘show[ ] that one or more elements of the cause of action . . . cannot be established’ by the plaintiff.” (*Aguilar, supra*, 25 Cal.4th at p. 853, quoting Code Civ. Proc., § 437c, subd. (o)(2).) The “defendant need not himself conclusively negate any such element.” (*Aguilar, supra*, at p. 853.)

In reviewing a grant of a motion for summary judgment we “must independently examine the record to determine whether triable issues of material fact exist. [Citation.]” (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767 (*Saelzler*); *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1168 (*Walker*).) The appellate court applies the same rules and standards that govern a trial court’s determination of a motion for summary judgment. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 (*Carnes*).) “In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [plaintiff’s] evidentiary submission while strictly scrutinizing defendants’ own showing, and resolving any evidentiary doubts or ambiguities in plaintiff’s favor.” (*Saelzler, supra*, 25 Cal.4th at p. 768.)

Additionally, issues of law are reviewed de novo and the trial court’s reasoning or ruling is given no deference. (*Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 780; *Enos v. Foster* (1957) 155 Cal.App.2d 152, 157.) The question of jurisdiction is an issue of law for the court to decide, and it may properly be adjudicated on summary judgment. (*Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036; *Choy v. Redland Ins. Co.* (2002) 103 Cal.App.4th 789, 796.) Ultimately, the sole question properly before us on review is whether the trial court reached the right result, whatever path it might have taken to get there. (*Carnes, supra*, 126 Cal.App.4th at p. 694; *Walker, supra*, 98 Cal.App.4th at p. 1169.)

### **Ruling that Claims Must Be Asserted in Bankruptcy Court**

Exercising independent review, we agree with the trial court’s ruling on the first ground stated, namely that the bankruptcy court had jurisdiction over this dispute and the present quiet title action could not be maintained without undermining that court’s

jurisdiction. The bankruptcy court exercised jurisdiction over Property No. 2 for approximately 10 months before the automatic stay was lifted. Proceedings were held concerning McLean Trust's motion for relief from the stay, but the Hedlund brothers and Dupri Trust failed to participate in those proceedings until after the order lifting the automatic stay was entered. When asked by the trial court why Hedlund had failed to bring his claim before the bankruptcy court, Hedlund's counsel answered that filing papers in the bankruptcy proceeding making that argument would have "ratifie[d]" the bankruptcy petition.

Defendants moved for summary judgment below on the basis that plaintiff's interest in Property No. 2 had been declared an asset in the Schmook Ranch bankruptcy matter, the assignment by Schmook Ranch of the Reed Mountain note and deed of trust to Dupri Trust was never recorded, the bankruptcy trustee took title to the property as a bona fide purchaser under title 11 United States Code section 544(a)(3), and he, therefore, held the property free of the interest in the Reed Mountain note and deed of trust now asserted by Dupri Trust. In addition, Schmook Ranch had not listed the Hedlund brothers or the Dupri Trust as secured or unsecured creditors in its bankruptcy filing, and Schmook Ranch had declared under penalty of perjury in its bankruptcy filing that it was not holding any property for any other person or entity. In these circumstances, any claim relating to the enforceability of the Reed Mountain deed of trust by the Dupri Trust, as well as any alleged errors in the Schmook Ranch bankruptcy filing or any unauthorized act in filing the bankruptcy petition itself, had to be litigated in the bankruptcy court. (*In re Tleel* (9th Cir. 1989) 876 F.2d 769, 771–772 (*Tleel*).

Plaintiff claims, however, that the assignment of the Reed Mountain note and deed of trust to Dupri Trust was never included as an asset of the bankruptcy estate because the note and deed of trust were no longer Schmook Ranch assets. He contends the assignment of the Reed Mountain note and deed of trust to the Dupri Trust was an interest separate and distinct from Property No. 2 itself, and even if the Reed Mountain note and deed of trust had been listed as assets in the Schmook Ranch bankruptcy

schedules, the dispute would not properly have been subject to the bankruptcy court's jurisdiction: "the bankruptcy court has no jurisdiction to decide this case."

The last stated proposition clearly cannot be sustained. Whether or not the Reed Mountain note and deed of trust were themselves assets of the Schmook Ranch bankruptcy estate, attempted enforcement of their assignment, nevertheless, posed a dispute over a property that was included in the bankruptcy schedules and, therefore, fell within the jurisdiction of the bankruptcy court. Federal bankruptcy courts are granted jurisdiction over the property of the bankrupt, wherever located, as well as over "all civil proceedings arising under" the Bankruptcy Code, or "arising in or related to a case under" the code. (28 U.S.C. §§ 157(a), 1334(b).) Thus, for purposes of determining whether the bankruptcy court had subject matter jurisdiction, a matter need only be "related to" a bankruptcy case.

Moreover, the alleged lack of authority to file the petition and the error in listing Property No. 2 as an asset, as well as Hedlund's claim that Property No. 2 was improperly included in Schmook Ranch's bankruptcy estate, go to the fundamental question of the bankruptcy court's jurisdiction, which was entirely within that court's jurisdiction to decide. (See *Frazier v. Wasserman* (1968) 263 Cal.App.2d 120, 124.) These claims surely would fall within the ambit of issues relating to the "administration of the estate," which come within the definition of "core" proceedings as to which the bankruptcy court has exclusive jurisdiction. (*In re Thorpe Insulation Co.* (9th Cir. 2012) 671 F.3d 1011, 1021–1022; 28 U.S.C. § 157(b)(2)(A).) We further believe the entire dispute would be considered a "core" proceeding under title 28 United States Code section 157(b), which includes as core proceedings those that determine the validity, extent, or priority of liens; that determine, avoid or recover fraudulent conveyances; and actions to turn over property to the estate. (28 U.S.C. § 157(b)(2)(E), (H) & (K).)

In a case where a debtor executed trust deeds in favor of family members on two properties owned by him before filing for bankruptcy, but the deeds remained unrecorded on the date he filed his bankruptcy petition, a subsequent adversary action by the trustee to avoid postpetition recording of the deeds of trust was a "core proceeding" subject to

the bankruptcy court's exclusive jurisdiction. (*In re Jones* (B.A.P. 9th Cir. 2006) 2006 Bankr. LEXIS 4785, \*1-\*3, \*7-\*13, affd. (9th Cir. 2009) 310 Fed. Appx. 122, 123.)

Courts ordinarily determine their own jurisdiction (*People v. Williams* (2005) 35 Cal.4th 817, 824; *Frazier v. Wasserman*, *supra*, 263 Cal.App.2d at p. 124), and the bankruptcy court obviously believed it had jurisdiction to rule on such assignments because it did rule on a nearly identical assignment of the Milk Ranch deed of trust to Stateside Asset Trust. For plaintiff to claim now that the bankruptcy court had "no jurisdiction" to consider the matters here in dispute is palpably erroneous.

But even if the state court also would have had jurisdiction, we still believe it acted properly in declining to exercise such jurisdiction. "Bankruptcy jurisdiction, at its core, is in rem." (*Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 362.) The courts of California, when dealing with in rem jurisdiction, have historically recognized that the first court asserting jurisdiction over property retains jurisdiction, and other courts should decline to interfere with its exercise of jurisdiction in subsequent disputes relating to that same property.

In *Cutting v. Bryan* (1929) 206 Cal. 254, Bryan sued Cutting and codefendants in federal district court, contending they held certain California real property in trust for Bryan. The federal court appointed a receiver, who took custody of the property. A few months later, Cutting's wife brought an action to quiet title and for declaratory relief against Bryan in the California Superior Court, claiming the property as community. The California Supreme Court held the action was properly dismissed, citing "the general rule of comity established by a long line of authority" to the effect that "the court which first takes the subject matter of a litigation into its control for the purpose of administering the rights and remedies with relation to specific property obtains thereby jurisdiction so to do, to the exclusion of the exercise of a like jurisdiction by other tribunals, the powers of which are sought to be invoked by parties or their privies to the original action." (*Id.* at pp. 256–257.)

Thus, if "two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in

order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other. We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property. The doctrine is necessary to the harmonious cooperation of federal and state tribunals.” (*Princess Lida of Thurn & Taxis v. Thompson* (1939) 305 U.S. 456, 466; see also *Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 522–523, fn. 20 [citing rule with approval].) Whether the trial court’s refusal to exercise jurisdiction is regarded as mandatory or discretionary, its ruling on summary judgment was correct.

In this regard, *Ross v. Universal Studios Credit Union* (2002) 95 Cal.App.4th 537 (*Ross*) is instructive. There, a credit union obtained a state court judgment against Ross for money due on a note. (*Id.* at p. 539.) Four months later, Ross declared bankruptcy under Chapter 7. In the bankruptcy court, the credit union requested that its judgment be declared nondischargeable under title 11 United States Code section 523(d). The bankruptcy court disagreed and granted judgment in favor of Ross. (*Ross, supra*, at p. 539.) The credit union unsuccessfully appealed in the federal courts. Thereafter, Ross filed an action in state court alleging abuse of process and malicious prosecution based on the credit union’s course of action in the bankruptcy court. The trial court dismissed the complaint on the credit union’s demurrer based on the conclusion that the “bankruptcy court has exclusive jurisdiction of the case.” (*Ibid.*) The Court of Appeal affirmed, noting that remedies for abuse of process were available in bankruptcy court (*id.* at p. 540), and concluding that “Ross chose not to invoke the remedies available to him in the bankruptcy court and he may not circumvent them by filing a malicious prosecution action in state court.” (*Id.* at p. 542.) The same must certainly be true here.

### **The Bankruptcy Trustee As a Bona Fide Purchaser for Value**

Section 544(a)(3) of title 11 of the United States Code provides as follows:

“(a) The [bankruptcy] trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—[¶] . . . [¶]

“(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.”

Defendants claim the bankruptcy trustee took Property No. 2 as a bona fide purchaser, relying on *Tleel, supra*, 876 F.2d 769. There, the debtors owned legal title to a property that had been acquired in part with one Chbat, but debtors had allegedly bought out Chbat’s interest prior to transferring the property to a third party, with debtors taking back a note and deed of trust for \$400,000. (*Id.* at p. 770.) The debtors later filed a bankruptcy petition under Chapter 11 while a state court action was pending in which Chbat continued to claim the debtors’ interest in the property should be held subject to a constructive trust in Chbat’s favor based on an alleged oral contract with the debtors to share proceeds from the sale of the property 50/50. (*Id.* at pp. 770, 772, fn. 6.) The bankruptcy court ultimately gave the debtors permission to sell the property free and clear of all liens or to proceed to foreclosure sale. (*Id.* at pp. 770–771.) Chbat participated in the bankruptcy proceedings and objected to the lifting of the automatic stay. (*Id.* at p. 770.)

The Ninth Circuit held, “A constructive trust is not the same kind of interest in property as a joint tenancy or a remainder. It is a remedy, flexibly fashioned in equity to provide relief where a balancing of interests in the context of a particular case seems to call for [it . . . .] Moreover, in the case presented here it is an inchoate remedy; we are not dealing with property that a state court decree has in the past placed under a constructive trust. We necessarily act very cautiously in exercising such a relatively

undefined equitable power in favor of one group of potential creditors at the expense of other creditors, for ratable distribution among all creditors is one of the strongest policies behind the bankruptcy laws.” (*Tleel, supra*, 876 F.2d at p. 771.) “Even if it is assumed that Chbat’s interest could qualify for a constructive trust, the Trustee, as a bona fide purchaser of the Property, had no actual or constructive notice of Chbat’s alleged interest under California law. Therefore, the Trustee could take priority over Chbat’s interest.” (*Id.* at pp. 771–772.)

This result obtained despite Chbat’s argument that title 11 United States Code section 541(d)<sup>16</sup> should apply, and despite the fact that the debtors and bankruptcy trustee were aware of Chbat’s claim. (*Tleel, supra*, 876 F.2d at pp. 769, 772.) Title 11 United States Code section 544(a) “must be applied ‘without regard to any knowledge of the trustee or of any creditor.’ ” (*Id.* at p. 772, quoting 11 U.S.C. § 544(a).) Chbat’s action in state court for imposition of a constructive trust was ineffective to deprive the bankruptcy trustee of the rights and powers of a bona fide purchaser.

“Normally, the Trustee of a bankruptcy estate is entitled to avoid . . . unrecorded (and therefore unperfected) security interests.” (*In re Dyer* (9th Cir. 2003) 322 F.3d 1178, 1188.) In *In re Deuel* (9th Cir. 2010) 594 F.3d 1073, 1075, 1078–1079 (*Deuel*), the Ninth Circuit held: “We address the ‘strong-arm power’ of the bankruptcy trustee under 11 U.S.C. § 544(a)(3) in the context of an unrecorded deed of trust. The question comes down to whether a bona fide purchaser for value without notice can take ahead of an unrecorded lien, and once the question is put that way, the answer is obviously ‘yes.’ ” (*Deuel, supra*, at p. 1075.) Thus, “[w]hen a creditor claims an inchoate equitable interest

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<sup>16</sup> Title 11 United States Code section 541(d) provides the following limitation on the property of the bankruptcy estate: “Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor’s legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.”

in real property owned by the debtor at the commencement of the case, which interest is not evidenced by a recorded instrument and not yet granted by a state court, the trustee as bona fide purchaser prevails.” (*In re Seaway Express Corp.* (9th Cir.1990) 912 F.2d 1125, 1128–1129.)

“The powers of a bona fide purchaser for purposes of [title 11 United States Code] section 544(a) are defined by state law.” (*Tleel, supra*, 876 F.2d at p. 772; see also *Deuel, supra*, 594 F.3d at pp. 1078–1079; *In re Seaway Express Corp., supra*, 912 F.2d at p. 1128.) Under California law a bona fide purchaser’s interest in property takes priority over an unrecorded prior-in-time deed of trust. Civil Code section 1214 provides: “Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action.” (See also e.g., *Jones v. Independent Title Co.* (1944) 23 Cal.2d 859, 861–862.)

Although plaintiff urges the same is not true when the transfer of interest is by assignment of a previously recorded deed of trust rather than by execution of a new deed of trust, we find that distinction unavailing. “An unrecorded instrument is valid as between the parties thereto *and those who have notice thereof.*” (Civ. Code, § 1217, italics added.) This would not apply to a bona fide purchaser or to a bankruptcy trustee. For purposes of Civil Code section 1214 “[t]he term ‘conveyance’ . . . embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills.” (Civ. Code, § 1215.) This broad definition would include an assignment of a previously recorded deed of trust. (See *Moore v. Schneider* (1925) 196 Cal. 380, 389.)

Plaintiff cites *Adler v. Sargent* (1895) 109 Cal. 42 (*Adler*) as preventing the bankruptcy trustee from taking Property No. 2 as a bona fide purchaser. But *Adler* dealt only with whether a bank, to whom a note on property had been assigned, but not

recorded, could receive the payments on the note instead of another claimant who had later paid off the note on the assignor's behalf in exchange for a forged copy of the note, even though he possessed and had recorded the original mortgage document. (*Adler, supra*, at pp. 46–47.) *Adler* stands only for the proposition that, as between two claimants to receipt of mortgage payments, one of whom had earlier been given the original note (which remained unrecorded), and another of whom had later been given the original mortgage document (which was recorded), the holder of the original note would be entitled to the mortgage payments because “[t]he assignment of a debt secured by mortgage carries with it the security.” (*Id.* at p. 48; Civ. Code, § 2936.)

The result in *Adler* was due to the fact that an assignment of a mortgage was not governed by the same rules as a grant of an estate in real property. (*Adler, supra*, 109 Cal. at p. 49.) The Supreme Court cited Civil Code section 2934, which at that time provided that recordation of an assignment “operates as notice *to all persons subsequently deriving title to the mortgage from the assignor.*” (Civil Code, § 2934, italics added.) Thus, the later assignee's recording of the assignment of the mortgage did not operate to give notice to the bank because the bank had not “subsequently” acquired its title to the property. (*Adler, supra*, at p. 49.) In light of then-existing statutory law, the bank in *Adler* was entitled to the payments on the note. (*Id.* at pp. 47, 50.)

Significantly, however, that code section was amended in 1931 to provide that such recordation gives notice “to all persons.” (See Notes foll. Civ. Code, § 2934.) As the statute now reads: “Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property (or by which any mortgage of, lien upon or interest in personal property a document evidencing or creating which is required or permitted by law to be recorded), is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, *to all persons.*” (Civ. Code, § 2934, italics added.) That would include a prior assignee whose interest in

the property was not recorded. Because the bankruptcy trustee is treated as a hypothetical bona fide purchaser as of the moment the bankruptcy petition was filed (*Deuel, supra*, 594 F.3d at pp. 1077–1079), the filing of the bankruptcy petition in June 2009 gave the bankruptcy trustee the rights and powers of a hypothetical bona fide purchaser of Property No. 2, free of the unrecorded assignment of the Reed Mountain note and deed of trust by Schmook Ranch to Dupri Trust.

Hedlund interprets *Adler* as standing for the proposition that an assignee of a note and deed of trust, though he or she fails to record the assignment, takes priority over a subsequent purchaser of the note and deed of trust, as the subsequent holder cannot be a bona fide purchaser. Especially in light of the statutory changes in the many years since *Adler* was decided, we cannot accept that interpretation, and we certainly do not interpret it as overriding a bankruptcy trustee’s powers under title 11 United States Code section 544(a)(3). Instead, the statutes quoted above demonstrate that an unrecorded assignment of rights and interests in real property (including a deed of trust) do not take priority over the interests of a subsequent bona fide purchaser. (Cf. *McLane v. Storr* (1946) 75 Cal.App.2d 459, 460–462, 464 [subsequent acquisition of property by quitclaim deed ineffective as against prior beneficiary of unrecorded reassignment of contract for sale of real property because (but only because) subsequent acquisition was with actual knowledge of reassignment].)

The parties also quarrel about the meaning of a sentence in 4 Miller & Starr, California Real Estate (3d ed. 2013) section 10:49, page 10-198: “An assignment of the note and deed of trust need not be recorded to be effective between the assignor and the assignee, and the assignee can enforce the note against the assignor and the assignor’s successors who are not bona fide purchasers.” (Fns. omitted.) Hedlund claims this passage means, as a matter of law, successors to the assignor “are not bona fide purchasers.” Defendants seem to construe the sentence as meaning the assignee can enforce the note against the assignor’s successors *so long as they are not* bona fide purchasers. We side with defendants on this point. Had the authors intended the

meaning advocated by plaintiff, they should have placed a comma between “successors” and “who.”<sup>17</sup>

We also find plainly distinguishable plaintiff’s citation to *In re Columbia Pacific Mortgage, Inc.* (Bankr. W.D. Wash. 1981) 20 B.R. 259 (*Columbia Pacific*), which held that “participation ownership interests” in a package of notes secured by deeds of trust, which participation interest was acquired in the secondary mortgage market, were not “interests in real property” for purposes of title 11 United States Code section 544(a)(3). There the interest was an 80 percent undivided ownership of a package of notes on 49 residential properties. (*Columbia Pacific, supra*, 20 B.R. at p. 260.) The bankruptcy debtor was a mortgage company that in the regular course of its business “packaged and sold undivided participation interest in loans it negotiated to a number of savings and loan associations,” while the mortgage company continued to hold the deeds of trust in trust for the purchasing savings and loan. (*Id.* at pp. 260, 262–263.) Three of the loans had gone into default, and the seller of the participation interest (the bankrupt mortgage company) liquidated the underlying properties for \$200,700. (*Id.* at p. 260.) The bankruptcy court held the savings and loan that purchased the participation interest was entitled to 80 percent of the proceeds from the sale of the property, and its participation interest did not constitute “real property” that became part of the bankruptcy estate. (*Id.* at pp. 260–262.) Nor did the bankruptcy trustee acquire the participation interests as a bona fide purchaser such that he could avoid the savings and loan’s participation interest under title 11 United States Code section 544(a)(3). (*Columbia Pacific, supra*, at p. 263.) In reaching that decision, the bankruptcy court reviewed the legislative history of title 11 United States Code section 541(d), concluding it was largely intended to “validate participation interest,” and “to make certain that secondary mortgage market sales as they are currently structured [would not be] subject to challenge by bankruptcy trustees.” (*Id.* at p. 262.) In reaching its conclusion, however, the court emphasized that the

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<sup>17</sup> The distinction calls to mind the question whether the panda “eats shoots and leaves” or “eats, shoots and leaves.” (Truss & Timmons, *Eats, Shoots & Leaves: Why Commas Really Do Make a Difference!* (2006).)

participation agreement under which the savings and loan had purchased the participation interests created an “express trust,” recognized by Washington state law, and distinguished ordinary deeds of trust: “Deeds of Trust are real property under Washington Law [citation], but it does not follow that participating ownership interests are real property.” (*Id.* at p. 263.)

Given the last recited point, and because California law, like Washington law, recognizes that a deed of trust is an interest in real property, we find little or no support for plaintiff’s contention that the unrecorded assignment by Schmook Ranch of the Reed Mountain note and deed of trust did not constitute an interest in “real property” subject to the bankruptcy trustee’s avoidance powers as a bona fide purchaser under title 11 United States Code section 544(a)(3).

Under California law, Dupri Trust’s interest in the Reed Mountain note and deed of trust constituted an interest in real property and, therefore, was subject to the “strong arm” provision of title 11 United States Code section 544(a)(3). “By one definition, a note and deed of trust merely constitute evidence of debt and therefore fall under the definition of personal property in Civil Code section 14 [citations]. Yet attorneys as well as laymen commonly describe the beneficiary of a trust deed as ‘owning’ a lien upon, or security interest in, real property. In *Estate of Moore* (1955) 135 Cal.App.2d 122 [286 P.2d 939], the court reviewed the prior cases involving both mortgages and trust deeds, and concluded that ‘any rule that rests upon the assumption that the holder of a trust deed note does not have any interest in the land finds no substantial basis in California law.’ (135 Cal.App.2d at p. 132.) The court then held that a purchase money note and trust deed, not specifically mentioned in the will, passed under the testator’s devise of ‘real estate owned by me.’ ” (*Estate of Dodge* (1971) 6 Cal.3d 311, 319.) Or, stated more emphatically, “Of course the California real property security instrument known as a deed of trust creates rights or interests in real property. [Citations.]” (*Massae v. Superior Court* (1981) 118 Cal.App.3d 527, 536.)

And finally, there is tangible evidence that the Schmook Ranch bankruptcy court reached the same conclusion when it avoided and nullified the Milk Ranch note and deed

of trust that had been assigned to Stateside Asset Trust. Except for the names of the parties and the descriptions of the property, that document is practically identical to the assignment of the Reed Mountain note and deed of trust at issue here. The bankruptcy court's disposition of the Milk Ranch assignment constituted an implied determination that the bankruptcy trustee had the power to avoid an unrecorded (or in the case of Milk Ranch, a belatedly recorded) assignment of the respective notes and deeds of trust. That act, as well as its assumption of jurisdiction over Property No. 2 (by lifting the automatic stay and allowing McLean Trust to foreclose), were presumably within the bankruptcy court's jurisdiction. (Evid. Code, § 666.)

Nor does title 11 United States Code section 541(d) alter our conclusion. We reject plaintiff's argument that title 11 United States Code section 541(d) applies, rather than title 11 United States Code section 544(a)(3). The Ninth Circuit in *Tleel*, held "Chbat's contention that under section 541(d) *all* beneficial or equitable owners of property may exempt their property from the debtor's estate in all circumstances, notwithstanding the debtor's legal title and the avoidance powers of section 544, goes too far. This interpretation would open the door to allegations of secret deals resulting in constructive trusts and thereby shelter some unsecured claims from avoidance. This result was not intended by the Bankruptcy Code and is contrary to the policy goal of ratable distribution among creditors." (*Tleel, supra*, 876 F.2d at p. 773.) In the circumstance presented in *Tleel*, which we view as comparable to the present circumstances, the Ninth Circuit held that title 11 United States Code section 544(a)(3) "overrides" title 11 United States Code section 541(d) and "take[s] preference over equitable limitations imposed on a bankrupt's estate under section 541(d)." (*Tleel, supra*, at p. 773.)

### **Judicial Estoppel**

Defendants claimed below that Hedlund's action was also barred by judicial estoppel. The trial court agreed. Plaintiff also disputes this issue on appeal, and defendants call the court's ruling an "advisory opinion," but a correct one. We need not address the issue given our resolution of the first two of plaintiff's issues on appeal.

## Evidentiary Rulings

“The [trial] court’s evidentiary rulings made on summary judgment are reviewed for abuse of discretion.” (*Walker, supra*, 98 Cal.App.4th at p. 1169, citing *People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639–640; *Carnes, supra*, 126 Cal.App.4th at p. 694.) The issues raised by plaintiff were that certain hearsay and lack of foundation objections asserted by defendants against Hedlund’s declaration were improperly sustained by the trial court.

Again, we conclude the resolution of the evidentiary issues simply does not matter, given the legal basis for the trial court’s ruling and ours. The paragraphs held inadmissible by the trial court set forth the gravamen of plaintiff’s complaint (asserted on behalf of Dupri Trust) against defendants and McLean Trust. The gist of those statements was that Schmook Ranch paid McLean Trust the amount secured by the deed of trust on Property No. 2 and yet McLean Trust did not reconvey the trust deed to Schmook Ranch as purportedly required under paragraph D of McLean Trust’s deed of trust. The inadmissible matter also outlined Hedlund’s argument that the Schmook Ranch bankruptcy petition was filed without the approval of a majority of the membership.

We do not doubt that, if Hedlund’s declaration were to be credited, he has established disputed facts material to the question whether McLean Trust acted consistently with the deed of trust in refusing to reconvey the deed of trust in September 2007. However, given the trial court’s oral reasons for granting the motion for summary judgment, which resolved issues of law only, the pertinent facts were those with respect to the bankruptcy filings, which are either undisputed or indisputable based on the bankruptcy court records of which we have taken judicial notice. It simply does not matter whether plaintiff was able to identify a factual dispute or how he attempted to prove it. The law required plaintiff’s issues to be litigated in the Schmook Ranch bankruptcy proceeding, where the lack of authority for the bankruptcy filing, the claimed error in including Property No. 2 on the bankruptcy schedules, and Dupri Trust’s right to enforce its deed of trust all could have been litigated. Plaintiff’s claim that he has been

denied his day in court or that McLean Trust obtained a windfall by purchasing Property No. 2 at the trustee's sale for less than \$500,000 simply cannot be litigated now in the California courts when the Dupri Trust had a fair and appropriate forum in which to litigate the matter in the bankruptcy court and intentionally bypassed that opportunity.

**DISPOSITION**

The judgment is affirmed.

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Becton, J.\*

We concur:

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Dondero, Acting P.J.

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Banke, J.

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