

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CONNIE FLORES,

Plaintiff and Appellant,

v.

DENNIS HAGOBIAN et al.,

Defendants and Respondents.

F063571

(Super. Ct. No. 08CECG03585)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Connie Flores, in pro. per., for Plaintiff and Appellant.

Berliner Cohen, Ralph J. Swanson and Laura Palazzolo for Defendants and Respondents Dennis Hagobian, Victoria Hagobian, The Victoria Hagobian Residential Trust, The Dennis Hagobian Residential Trust, and Yosemite Technologies, Inc.

The Crone Law Group and Jaime J. Santos for Defendants and Respondents Russell Davidson, William Davidson and Michael Hedberg.

No appearance for Defendants and Respondents Sandy L. Vartan, Judith Yeramian, The Dennis Vartan Family Trust, The Dennis and Sandy L. Vartan Family Trust, The Lee Yeramian Family Trust, The Lee Yeramian Exempt QTIP Trust, The

Judith Mary Yeramian Family Trust, Rod Christensen, Taft & Traner, Inc., ECO Farms Field, Inc., ECO Farms Sales, Inc., Norman Traner, Steven Taft, C. Russell Georgeson, Richard A. Belardinelli, and Georgeson & Belardinelli.

-ooOoo-

Article VI, section 13 of the California Constitution provides, in part: “No judgment shall be set aside, or new trial granted, in any cause, ... for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause ... the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” While the procedures involved in the present case have, in some instances, been unusual, upon review of the entire record we are satisfied that there has been no miscarriage of justice. That is, the net result of dismissal of appellant Connie Flores’s causes of action against Dennis Hagobian and the other respondents could have been accomplished pursuant to regular procedures and, in the proceedings that actually occurred, appellant had a full and fair opportunity to be heard. We also conclude the superior court correctly decided appellant did not have standing to pursue any cause of action in the second amended complaint, and the complaint was properly dismissed. Accordingly, we affirm the superior court’s order of August 24, 2011, denying appellant’s motion to vacate the clerk’s dismissal of this action.

FACTS AND PROCEDURAL HISTORY

This is the fifth time some aspect of the present litigation has been before this court.¹ We briefly recount the history.

¹ See *Flores v. Georgeson* (2011) 191 Cal.App.4th 881; *Flores v. Georgeson* (June 11, 2012, F061787) [nonpub. opn.]; *Flores v. Davidson* (Sept. 6, 2011, F060575) [nonpub. opn.]; *Flores v. Yeramian* (Oct. 20, 2010, F059076) [nonpub. opn.]. Appellant filed a request on March 23, 2012, that we take judicial notice of certain documents, including the nonpublished decisions in the previous cases. This court deferred action on that request. We now grant judicial notice of those documents specified in appellant’s

Appellant and her husband, Joe Flores, who is not a party to this appeal, recovered judgment in federal court in 2004 against DDJ, Inc. and DDJ, LLC (the DDJ entities²). When appellant sought to collect on that judgment, the DDJ entities filed for bankruptcy. After that point, appellant tried in state and federal court to collect the judgment on a variety of theories and from a variety of persons and entities who, according to appellant, had fraudulently received property rightfully belonging to the DDJ entities, property that should have been available to appellant to satisfy the underlying judgment.

The present case was initiated in state court in 2008 by James E. Salven as bankruptcy trustee for the DDJ entities, W.D. Farming, Joe Flores, and appellant.³ The Floreses were named as plaintiffs pursuant to a September 5, 2007, settlement agreement in bankruptcy court. That stipulation included a handwritten portion executed by the parties and the transcript of a confirmation hearing, each page of which was initialed by the parties. The handwritten portion of the stipulation provided, in part: “Joe Flores and

request to the extent each document was before the trial court. In all other particulars, the request for judicial notice is denied.

² At various points in the litigation, an entity known as W.D. Farming, LLC (W.D. Farming), was named as a party aligned with the two DDJ entities. It appears W.D. Farming was an owner of one of the DDJ entities and that the bankruptcy trustee sought to exercise control over W.D. Farming as an incident of his powers as trustee. In any event, W.D. Farming has no independent representation, role, or apparent interest in this litigation, and we will include it with the DDJ entities in our collective reference to the DDJ entities.

³ This case, known as “Flores II” in various documents from the bankruptcy court, was originally filed in federal court in 2004 by the Floreses. Salven intervened in that case. The case also included causes of action under federal statutory law. Subsequently, the district court dismissed the federal law claims and determined it lacked continuing jurisdiction over the remaining state law claims. It dismissed the federal court action in 2008. The present case is composed of the state law causes of action, refiled in state court, after dismissal of the federal court case. The 2007 stipulation in bankruptcy court is viewed by the parties as governing the present case which, in its state court incarnation, did not exist at the time of the stipulation.

Connie Flores will continue to be party plaintiffs in the cases Flores I and Flores II and will jointly prosecute the cases with Trustee Salven to their conclusion.” In the transcript of the oral confirmation of the settlement, the settlement judge asked: “[W]hat about the fraudulent conveyance claims?” An attorney replied: “With respect to the fraudulent conveyance claims, Flores, whatever rights or claims they have as individuals, they will retain.” The settlement judge added: “Whatever they may be.”⁴

Flores II proceeded in state court and eventually the operative second amended complaint was filed by appellant, Salven, and W.D. Farming. The complaint listed 24 defendants connected with the DDJ entities in various ways. (Of those defendants, eight have appeared as respondents in this appeal.⁵) The second amended complaint alleged eight causes of action for fraudulent conveyance of property belonging to the DDJ entities or similar conveyances in violation of various provisions of the Corporations Code; two other causes of action were against attorneys for the DDJ entities, for breach of contract and legal malpractice; and the final cause of action was for constructive trust as a means to enforce liability under the remaining causes of action. Appellant is alleged in the second amended complaint to be a creditor of the DDJ entities who holds an outstanding judgment against them. The requested relief in part seeks disgorgement of fraudulently obtained benefits “to Connie Flores and other non-consenting creditors.” In part, the relief requested is general damages of \$2,100,000 to the DDJ bankruptcy estates

⁴ As to a different case then-pending in federal court, known as Flores III, all rights were retained by the Floreses. The stipulation provided: “The Trustee[] ha[s] no interest in said case as of this date, and deemed case ab[a]ndoned” by the DDJ bankruptcy estates. There was no similar abandonment by the trustee for Flores II, the case that is now before this court.

⁵ Respondents who joined in respondents’ brief are Dennis Hagobian, Victoria Hagobian, The Victoria Hagobian Residential Trust, The Dennis Hagobian Residential Trust, Yosemite Technologies, Inc., Russell Davidson, William Davidson, and Michael Hedberg.

and \$1,450,000 to appellant. Appellant's only asserted interest in the various causes of action is alleged to arise as a result of her status as a creditor of the DDJ entities.

At some point in 2010, Salven determined that the present litigation should be abandoned. After negotiations with Salven, appellant offered to buy the bankruptcy estate's litigation rights in return for a promise to pay the estate a portion of any recovery in the case. Thereafter, however, the trustee determined that it was of greater benefit to the estate to accept an offer from respondents in the present case to purchase those litigation rights for \$55,000. The bankruptcy judge approved this sale of litigation rights. The Floreses appealed that order and, as far as our record shows, that appeal is still pending.⁶ After payment of the settlement amount to Salven and after notice by respondents to appellant of the proposed dismissal, Salven filed a request in superior court for dismissal of the "[f]raudulent transfer and other avoidance claims." The clerk entered the dismissal. Appellant thereafter filed an objection to the dismissal, a request for stay pending determination of the appeal of the sale of litigation rights in the bankruptcy case, and, subsequently, a motion to set aside the dismissal as to appellant's interest in the case. After receiving opposition to the motion to set aside, and appellant's replies to the opposition, the superior court denied the motion by minute order dated August 24, 2011. In its tentative decision, subsequently adopted by the superior court as reflected in the minute order, the court held, in essence, that appellant's claims in the second amended complaint were derivative of the claims of the bankruptcy estate and that appellant's participation in the action had been only to obtain damages for the estate,

⁶ The parties inform us that the bankruptcy court has denied appellant's requests for stay pending disposition of that appeal. In the federal system, a trial court's ruling is deemed final, even though an appeal is pending, until and unless that ruling is reversed by an appellate court. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 172, 173.) We are required to give the bankruptcy orders the same final effect they would be given by a federal court; that is, the orders are final until and unless reversed by a higher court. (*Id.* at pp. 172, 173.)

which might result in eventual payment of her claims against the DDJ entities in the bankruptcy case. Appellant filed a notice of appeal.

DISCUSSION

Appellant has broken her argument down into 17 separate points, and we will address most of those points specifically (albeit, briefly). Her most important contention, which we address both first and most extensively, is that she had substantive rights in the various causes of action stated in the second amended complaint, and she was entitled to prosecute that action even if the bankruptcy trustee no longer desired to do so. Appellant cites to *Shaoxing County Huayue Import & Export v. Bhaumik* (2011) 191 Cal.App.4th 1189 (*Shaoxing*) in her supplemental authorities as support for her position. *Shaoxing*, however, does not support the conclusion that a creditor, who has a judgment against a bankrupt entity, has standing to sue third parties to set aside fraudulent transfers or for an action for conversion to recover assets of the bankrupt entity.

In *Shaoxing*, the plaintiff sought to hold the defendant liable as an alter ego of a bankrupt corporation (ITC), of which the plaintiff was a creditor. (*Shaoxing, supra*, 191 Cal.App.4th at p. 1193.) In January 2007, the plaintiff sued ITC after the latter failed to pay for goods delivered by the plaintiff. In February, the plaintiff amended its complaint to add Bhaumik as a defendant, alleging he was the alter ego of ITC. (*Ibid.*) Almost two years later, ITC filed its bankruptcy petition. (*Id.* at p. 1194.) Thereafter, the plaintiff voluntarily dismissed ITC from the action. Bhaumik filed a motion contending that the case was subject to the automatic bankruptcy stay, that any alter ego claim should be pursued only by the bankruptcy trustee, and that voluntary dismissal of ITC mooted plaintiff's claim against the alter ego. (*Ibid.*) The trial court rejected these claims. On the merits, it found that ITC owed money to the plaintiff and that Bhaumik "failed to maintain the corporate existence of [ITC] in anything but its name." (*Id.* at p. 1195.) Judgment was "entered against [] Bhaumik individually" (*Ibid.*)

The appellate court in *Shaoxing* stated the basic rules for applicability of the bankruptcy stay, including the rule that the stay applied to “any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” (*Shaoxing, supra*, 191 Cal.App.4th at p. 1196, quoting from 11 U.S.C. § 362(a)(3).) The estate encompassed any claim that the trustee would be entitled to prosecute, which includes any “suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy” [citation omitted] (*Shaoxing, supra*, at p. 1197); in other words, any claim held by the bankrupt entity (*ibid.*). In such a case, the trustee’s standing “is exclusive and divests all creditors of the power to bring the claim. [Citation.]” (*Ibid.*) This includes an action brought against a defendant based on an alter ego theory when there is an allegation of injury to the corporation, “including an action to set aside fraudulent transfers or an action for conversion to recover assets of the bankrupt corporation.” (*Id.* at pp. 1998-1999.)

On the other hand, a “creditor’s action to hold the individual liable as an alter ego for a creditor’s substantive causes of action against a bankrupt corporation [is] not the property of the bankruptcy estate.” (*Shaoxing, supra*, 191 Cal.App.4th at p. 1193.) So, the *Shaoxing* court concluded, “Shaoxing’s claims were not stayed by the ITC’s bankruptcy filing.” (*Id.* at p. 1197.)

In this case, each cause of action sought to benefit the debtor corporation (and its bankruptcy estate) by recovering funds diverted by the corporation’s owners to third party recipients who were alleged to have received the corporate assets without payment of equivalent value. Under the Uniform Fraudulent Transfer Act, Civil Code section 3439.07, most of the remedies to a creditor who successfully attacks a fraudulent transfer involve restoration of the money or property *to the debtor corporation*. (See *id.*, subd. (a).) If a creditor’s claim against the debtor is reduced to a judgment, the creditor “may levy execution on the asset [fraudulently] transferred or its proceeds.” (*Id.*, subd. (c).) The remedy of execution on behalf of a judgment creditor, while authorized

under state law when the creditor is not under the protection of the bankruptcy court, is, however, precluded after the debtor/transferor has filed for bankruptcy and such proceedings stayed. (*Shaoxing, supra*, 191 Cal.App.4th at p. 1196.) The purpose for the stay, and the limitation on an individual creditor's right to execute upon assets of, or owed to, the bankrupt debtor, is specifically to prevent an inequitable preference for one creditor over other creditors of the debtor and to prevent piecemeal diminution of the debtor's estate. (*Ibid.*)

Accordingly, appellant did not have an independent right to sue third parties to set aside fraudulent transfers from the DDJ entities, directly or indirectly, to the third-party recipients. All causes of action to set aside any such transfers (as alleged in the first eight causes of action in the second amended complaint), belonged solely and exclusively to the bankruptcy trustee.

Our conclusion largely resolves three additional contentions appellant makes. First, it is true that a bankruptcy trustee is permitted by bankruptcy law to abandon a particular cause of action—that is, in effect, to re-assign the cause of action to a creditor of the bankrupt debtor. This option is particularly appropriate where the trustee determines it is not economical to prosecute the cause of action, and a creditor, who would particularly benefit by the cause of action, disagrees as to its potential value. (2 Bankr. Desk Guide (2012) § 12:116, pp. 12-122, 12-123.) In fact, in the present bankruptcy, as part of the September 5, 2007, settlement, the trustee specifically abandoned to appellant a different federal court case known as Flores III.⁷ In other instances, however, the trustee may enlist the assistance of creditors in pursuing litigation on behalf of the bankruptcy estate. (*Id.*, § 19:123, p. 19-128.) In that circumstance, as

⁷ The settlement agreement provided: “Flores III case #CIV050291-AWI will be p[ur]sued by Joe and Connie Flores. The Trustee[] ha[s] no interest in said case as of this date, and deemed case ab[a]ndoned.”

opposed to the abandonment circumstance, the trustee and the estate continue to be the owners of the cause of action, and the creditor is merely assisting in prosecution of the action. That is what happened here with respect to Flores II, the present state court action. The settlement provided, in language very different from that disposing of Flores III: “Joe Flores and Connie Flores will continue to be party plaintiffs in the cases Flores I and Flores II and will jointly prosecute the cases with Trustee Salven to their conclusion.”⁸ The September 5, 2007, settlement agreement did not constitute an abandonment by the trustee of the Flores II causes of action, nor an assignment to appellant of any portion of those causes of action.⁹

Appellant argues at length that this court, the superior court, the other parties, and the bankruptcy court have recognized her as a “plaintiff” in this case and, accordingly, the superior court must have erred when it concluded it was “without jurisdiction” to grant relief from the judgment of dismissal because appellant was not the real party in interest, a term she equates with “plaintiff.” As the superior court correctly explained in its minute order, however, appellant was properly a plaintiff, even though her interest was derivative of the interest of the bankruptcy estate, and even though her interest was terminable by the actions of the bankruptcy trustee.

⁸ The nature of the estate’s continuing interest in Flores II is exemplified in the negotiations between appellant and the trustee when the trustee made an initial determination to dismiss the present action: Appellant offered to buy the causes of action from the estate by, inter alia, payment to the estate of the first \$150,000 recovered from defendants.

⁹ Apparently at the settlement conference appellant continued to assert that she had a separate ownership interest in the causes of action. The settlement agreement reflected an “agreement to disagree,” to borrow a common phrase: The court announced that the settlement preserved appellant’s interests in the cause of action “[w]hatever they may be.” As such, there was neither an agreement in, nor a ruling by, the bankruptcy court that appellant actually had any independent interest in the Flores II causes of action.

The question is not whether appellant had an interest in restoring money and property to the bankruptcy estate. She unquestionably did, since no one disputes that she had filed a valid creditor's claim in the bankruptcy proceeding. That interest in restoring property to the estate, however, was always subject to the trustee's management of the estate under the supervision of the bankruptcy court. When the trustee, in effect, compromised the very claims that constituted the subject matter of the Flores II litigation for the sum of \$55,000, and when that compromise was approved by the bankruptcy court, appellant's right in the Flores II causes of action similarly became a right to her claimant's share (if any) of the \$55,000 in the trustee's estate. That concrete sum became, in law, the full equal of, and replacement for, the more nebulous claims comprising the Flores II causes of action. The trustee's decision to, in effect, compromise and settle the Flores II claims, when confirmed by the bankruptcy court, operated to foreclose appellant's (and, indeed, the trustee's) remaining rights in the Flores II litigation.

Appellant's remaining contentions all go to the form and formalities of the proceedings below. For example, she contends the clerk of the superior court should not have entered a dismissal of the entire action (as opposed to merely Salven's interest in the action) without notice and "input" from appellant. Similarly, she complains that Salven, a non-attorney, was not entitled to act on behalf of the bankruptcy estates except through counsel, which he did not have at relevant times. She contends that after the settlement transferring the causes of action to respondents, Salven had no continuing right to support his exercise of the power of dismissal of this case. Conversely, she argues that some of the causes of action, because they involved statutes that are penal in nature or are otherwise non-assignable as a matter of state law, were not properly subject to the settlement agreement at all. Each of these arguments fails because appellant has failed to demonstrate that the error, if any, resulted in a miscarriage of justice, a constitutional

precondition to reversal of the order refusing to set aside the judgment in this case. (See Cal. Const., art. VI, § 13.)

Thus, in the case of the clerk's dismissal of the action without notice to her, appellant had a full and fair opportunity to present her arguments about her independent interest as plaintiff, to the superior court in her motion to set aside the judgment. The court fully determined appellant's contentions in a manner that preserved those contentions for appellate review, which we have undertaken above. We have found that the superior court's analysis of appellant's legal rights was correct. Accordingly, appellant has not established that the clerk's earlier actions resulted in a miscarriage of justice.

With respect to the remainder of appellant's contentions, our review of the record discloses that the errors of which she complains did not affect appellant's rights in any manner. If the trustee was not permitted to act on behalf of the estate without counsel, his actions in doing so did not change the fact that appellant had no right to stop the trustee from dismissing the case; he could have accomplished the same thing with and through counsel, and appellant could not legally have prevented it. Similarly, if some of the causes of action were not assignable, as she contends, the bankruptcy settlement could have been structured simply as compromise and settlement of those claims (instead of being a sale and assignment of the claims), with the same net effect of dismissal of the present action. The structure of the bankruptcy settlement was a matter between the trustee and defendants (subject to oversight by the bankruptcy court), and those details had no effect whatsoever on the ultimate disposition of the present case, namely, its dismissal on the merits. None of the procedural deficiencies appellant identifies have been shown to be prejudicial to appellant. Appellant has not shown an entitlement to reversal of the order of the superior court.

DISPOSITION

The judgment is affirmed. Appellant's request for judicial notice filed March 23, 2012, is granted in part and denied in part, as stated in footnote 1, *ante*. Respondents are awarded costs on appeal.

DETJEN, J.

WE CONCUR:

WISEMAN, Acting P.J.

LEVY, J.