[U] Kraft v. [],

[1] IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION EIGHT

[2]

[3] 2002.CA.0009172< http://www.versuslaw.com>

[4] October 7, 2002

[5] **EVELYN R. KRAFT, PLAINTIFF AND APPELLANT,**
v.
[]
, DEFENDANT AND RESPONDENT.

[6] APPEAL from the judgment of the Superior Court of Los Angeles County. Robert M. Letteau, Judge. Reversed. (Super. Ct. No. SC059816)

[7] Claudia Kloss for Plaintiff and Appellant.

[8] Lewis, D'Amato, Brisbois & Bisgaard, Kenneth C. Feldman and Victor I. King, for Defendant and Respondent.

[9] The opinion of the court was delivered by: Rubin, J.

[10] NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

[11] California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

[12] Plaintiff Evelyn R. Kraft appeals from the summary judgment entered for defendant and respondent [] in this action for legal malpractice. For the reasons set forth below, we reverse the judgment.

[13] FACTS AND PROCEDURAL HISTORY

[14] Evelyn R. Kraft hired lawyer [] to help her stop lender Washington Mutual (the bank) from foreclosing on its mortgage on her home. [], who held himself out as a bankruptcy law specialist, filed two Chapter 13 proceedings in the local district United States Bankruptcy Court. The bank was made aware of the pending bankruptcy actions and, pursuant to the automatic stay provisions of 11 U.S.C. § 362, stopped its foreclosure proceedings. *fn1 Kraft's Chapter 13 proceedings were later converted to one under Chapter 7. In September 1998, a bank employee saw a computer-generated docket report showing that the Chapter 13 action had been dismissed. Because the employee failed to note that the form also showed that a Chapter 7 proceeding had commenced, the bank foreclosed and sold Kraft's home to someone else (the buyer). Attempts by the Bank and [] to set aside the sale were unsuccessful because the buyer was found to be a good faith purchaser who acted without knowledge of the bankruptcy stay.

[15] Kraft sued [] for legal malpractice, contending he failed to record a notice of the pending bankruptcy actions with the Los Angeles County Recorder (the Recorder), pursuant to section 549(c). Had that been done, the buyer could not have been a good faith purchaser and the sale would have been invalidated.

[16] [] moved for summary judgment, contending that section 549 was aimed solely at protecting innocent creditors from a defrauding debtor who sold its property while the bankruptcy stay was in place. The declaration of bankruptcy lawyer Earle Hagen accompanied the motion. Among Hagen's many qualifications as an expert witness was his certification by the State Bar as a bankruptcy law specialist. According to Hagen, a bankruptcy debtor's lawyer had no duty to record a notice of a pending bankruptcy action under these circumstances because the bank should not have sold Kraft's home in violation of the automatic stay.

[17] Kraft's opposition cited several decisions involving debtors whose homes were sold at foreclosure in violation of the automatic stay. Lawyer Boyd S. Lemon submitted a declaration stating in effect that [] should have known that violations of the automatic stay sometimes happen and that in order to safeguard Kraft's property during the bankruptcy proceedings he should have filed a notice of the action with the Recorder. According to Lemon, []'s failure to do so breached his duty of care to Kraft.

[18] []objected to Lemon's declaration, contending it did not establish his qualifications to give an expert opinion on questions of bankruptcy law. He also contended that Lemon's opinion was based on a misreading of certain bankruptcy law cases. At the hearing on []'s summary judgment motion, the trial court said it had serious doubts about Lemon's qualifications. Delaying a ruling on [] 's objections, the court gave Kraft 10 days to find a "credentialed, certified bankruptcy expert," adding that "certification is part of it." Kraft eventually submitted the declaration of Glen

Calsada, a certified bankruptcy law specialist. Calsada opined that [] breached his duty of care in two respects: (1) by misrepresenting that he would "stop" the foreclosure when the bankruptcy case merely postponed it; and (2) by failing to advise Kraft to monitor the foreclosure proceedings so she could have intervened to stop any sale in violation of the stay.

[19] [] submitted a supplemental opposition pointing out that the supposed breaches of duty mentioned by Calsada were outside the scope of Kraft's complaint. [] also submitted excerpts from Calsada's deposition where he testified that [] in fact had no duty to record a notice of the bankruptcy action, confining his opinion that [] breached his duty of care to the same new points made in his declaration. When the hearing on the summary judgment motion resumed, the trial court sustained []'s objections to Lemon's declaration.

[20] Noting that Calsada was retained to give an opinion solely on the issue of []'s duty to record a notice of the bankruptcy action, the court granted the motion based on Calsada's opinion that [] did not have such a duty. Kraft contends the court's rulings were wrong and asks that we reverse the summary judgment.

[21] STANDARD OF REVIEW

[22] Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) In reviewing an order granting summary judgment, we must assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (Barber v. Marina Sailing, Inc. (1995) 36 Cal.App.4th 558, 562.)

[23] The moving party must identify the issues framed in the pleadings and need address only those theories actually pled.*fn2 (Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal.App.4th 1334, 1342; Lennar Northeast Partners v. Buice (1996) 49 Cal.App.4th 1576, 1582.) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown 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)(2).) Once the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denial of his pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (Ibid.) A triable issue of material fact exists

"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." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850.)

[24] DISCUSSION

[25] Once a debtor files a bankruptcy action, section 362(a)(3) of the Bankruptcy Code stays any act to obtain possession of the debtor's property. The section has three purposes: (1) to protect the debtor from his creditors while trying to reorganize; (2) to prevent a creditor from gaining an unfair advantage over other creditors by dismembering the bankruptcy estate; and (3) to maintain the status quo in order to permit an orderly distribution of the debtor's assets in accord with the Bankruptcy Code's priorities. (In re Hill (Bankr. N.D.Ill. 1993) 156 B.R. 998, 1005 (Hill).)

[26] Section 549(c) provides an exception to the automatic stay: when a good faith purchaser without knowledge of the bankruptcy action pays fair market value for the debtor's real property, the bankruptcy trustee may avoid the sale, but only if a notice of the action was filed with the Recorder. (Hill, supra, 156 B.R. at p. 1007.) Section 549(c) is designed to protect creditors from unauthorized transfers of a debtor's property (ibid.) as well as to protect innocent buyers of a debtor's real property. (Matter of Russell (Bankr. W.D.Pa. 1980) 8 B.R. 342, 344 (Russell).) Only the bankruptcy trustee or a debtor-in-possession has standing to invoke the avoidance powers of section 549(c) (Matter of Pointer (5th Cir. 1992) 952 F.2d 82, 87), and that section "imposes a duty to record upon the trustee or debtor-in-possession." (Russell, supra, 8 B.R. at p. 344.)

[27] Kraft contends that regardless of the statutory purposes of section 549(c), a prudent bankruptcy lawyer would have filed a notice of his client's bankruptcy action with the Recorder in order to prevent an unauthorized foreclosure sale of the client's real property. She cites several bankruptcy court decisions involving debtors who were able to invalidate a foreclosure sale because a notice of the bankruptcy action had been filed with the Recorder, as well as cases where the debtors lost their real property because no such notice had been filed. Although those cases were factually distinguishable, they were important, according to Kraft, because they showed the advantages of filing the notice and the risks of not doing so.

[28] In professional malpractice cases such as this, the general rule requires expert testimony in order to establish the applicable standard of care. (Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal.App.4th 1229, 1239 [legal malpractice]; Wright v. Williams (1975) 47 Cal.App.3d 802, 810-811 [in legal malpractice claim against lawyer claiming to be a specialist in a certain area, "only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met"].) Pointing to decisions that underscored the risks of not filing a notice with the Recorder, Lemon's opposition declaration concluded that [] breached his duty of care to his client by not recording a notice of Kraft's bankruptcy case with the Recorder.

[29] According to [], Lemon was not qualified to give an opinion on the subject. The standards for qualifying as an expert witness are found at Evidence Code section 720, which states in relevant part: "(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Lemon's declaration stated he had practiced law for 34 years, including many years as a partner at several well-known law firms. According to Lemon's declaration, he was admitted to practice before numerous federal courts, including "various . . . Bankruptcy Courts." During his years of practice, he "handled hundreds of cases in a variety of areas, including real estate litigation, bankruptcy litigation, and legal malpractice cases arising out of real estate and bankruptcy matters." Finally, Lemon stated that he had "been retained as an expert witness in more than 300 legal malpractice and attorney's fee dispute cases. I have qualified as an expert witness on legal malpractice in all types of underlying cases, including real estate and bankruptcy law matters."

[30] Responding to []'s objection that Lemon did not qualify as a bankruptcy law expert, the trial court pointed out that []'s expert, Hagen, was amply qualified, adding that "there's no way that I could know Boyd Lemon's qualifications in bankruptcy to begin to compare [sic] those of Earl Hagan [sic]." The court observed that Lemon "doesn't know anything about recording these documents because that's not what he does on a daily basis," adding that Lemon "doesn't do the bankruptcy files. He doesn't know what's recorded and what's not recorded. He's a litigation lawyer specializing in legal malpractice." The court asked why it should not continue the matter so Kraft could "find an expert that is credentialed in the area of bankruptcy law," wondering why Kraft could not "find a real expert who . . . is credentialed . . . ?" The court gave Kraft 10 days to find a "credentialed, certified bankruptcy expert, certification is part of it, . . ." (Italics added.) If not, the court would sustain []'s objection to Lemon's declaration and grant the summary judgment motion. Kraft agreed, eventually hiring Calsada, whose opinion was not helpful on the designated issue.

[31] We review the trial court's decision for an abuse of discretion but will reverse if the witness has disclosed sufficient knowledge of the subject to entitle his opinions to go before the jury. (Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal.App.3d 1432, 1442-1443 (Glickman).) The Glickman court held that the more relaxed standard for qualifying as a medical expert also applied to legal malpractice questions-so long as the proposed expert's background, experience and learning showed sufficient knowledge of the issue in dispute, it did not matter whether the lawyer worked in the same precise field as did the defendant. (Id. at pp. 1434-1443 [trial court abused its discretion by finding a lawyer with extensive experience in the savings and loan field did not qualify to give an opinion regarding the advice defendant lawyers should have given to a client trying to process a certain savings and loan application simply because the lawyer had never processed that type of application through to completion].)

[32] Although the trial court here expressed concerns that Lemon did not know enough about the issue of recording a notice of action under section 549(c), it made other comments indicating that in order to qualify as an expert, not only did Lemon need to practice in the area, he also had to be a State Bar certified expert. *fn3 This is underscored by the trial court's explicit insistence that Kraft's replacement expert possess that certification. Such a requirement violates both Evidence Code section 720 and the holding in Glickman by focusing on possession of a specialist's certification instead of the knowledge and experience possessed by the proposed expert witness. The trial court's use of the wrong standard was an abuse of discretion. At a minimum, we are unable to say whether the court applied this incorrect standard or whether it would have sustained the objections to Lemon's declaration had it applied the correct standard. (In re Marriage of Simpson (1992) 4 Cal.4th 225, 236.) As a result, we reverse the judgment.

[33] [] also contends we should affirm the summary judgment because: (1) a compensation disclosure agreement he filed with the bankruptcy court does not list recording a notice of the action as one of his duties; (2) he had no duty to record the notice because the bank's unauthorized foreclosure sale was not reasonably foreseeable; and (3) Kraft's proper remedy lies with the bank. We disagree.

[34] As to the first, the disclosure form states that [] had been retained to "render legal services for all aspects of the bankruptcy case, including: [¶] . . . [¶] [p]reparation and filing of any petition, schedules, statement of affairs and plan which may be required: [¶] . . . and . . . [¶] [o]ther provisions as needed." This form is so vague and broadly worded that it might well encompass the duty to record a notice of the action with the Recorder and certainly does not exclude that duty. Furthermore, a lawyer has the duty to inform his client of the limits of his representation and of the possible need for other counsel. (Nichols v. Keller (1993) 15 Cal.App.4th 1672, 1684.) [] does not contend and the record does not show that he so advised Kraft, who denied ever seeing the disclosure form.

[35] As to the second, foreseeability of the harm that occurred is one factor to be considered when deciding whether a duty of care exists. (Ludwig v. City of San Diego (1998) 65 Cal.App.4th 1105, 1110.) Expert testimony is needed to define the applicable standard of care. (Wright v. Williams, supra, 47 Cal.App.3d at pp. 810-811.) By reinstating Lemon's declaration, summary judgment is precluded on the issue because we are now faced with a conflict in the expert evidence as to the extent of []'s duty. *fn4 (Hanson v. Grode (1999) 76 Cal.App.4th 601, 606.)

[36] As to the third point, Kraft has sued the bank and its foreclosure trustee in federal court for violation of the automatic stay. *fn5 However, [] cites no authority, and we are aware of none, which therefore bars Kraft from seeking damages from an alleged concurrent tortfeasor.

[37] DISPOSITION

[38] For the reasons set forth above, the judgment is reversed. Appellant to recover her costs on appeal.

[39] NOT FOR PUBLICATION.

[40] We concur:

[41] COOPER, P.J.

[42] BOLAND, J.

Opinion Footnotes

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[43] *fn1 Unless otherwise indicated, all further section references are to title 11 of the United States Code (the Bankruptcy Code).

[44] *fn2 Accordingly, [] was not required to address the new grounds raised for the first time by Calsada's declaration in the supplemental opposition.

[45] *fn3 The court asked why Kraft could not obtain a "credentialed" expert "in the pure bankruptcy field," asked again for a "pure . . . bankruptcy specialist," and told Kraft's lawyer there were "hundreds of people . . . credentialed as specialists in bankruptcy law."

[46] *fn4 The same is true of Calsada's opinion that [] did not have a duty to record a notice of the bankruptcy action. Disregarding the fact that his opinion is only before us due to the trial court's apparent error, we are still left with conflicting expert opinions on []'s duty of care.

[47] *fn5 [] has asked us to judicially notice the existence of those cases. (Evid. Code, § 452, subd. (d) [court records].) We hereby grant that request.

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