

APR 11 2013

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-12-1513-KiPaTa
)		
CATHERINE Z. CASS,)	Bk. No.	12-16090-RK
)		
Debtor.)	Adv. No.	12-1235-RK
_____)		
)		
CHARLES W. DAFF, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JAMES WALLACE; REBECCA)		
WALLACE; GLORIA SUESS,)		
)		
Appellees.)		
_____)		

Argued and Submitted on March 22, 2013,
at Pasadena, California

Filed - April 11, 2013

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding

Appearances: Ed Hays, Esq. of Marshack Hays LLP argued for
appellant, Charles W. Daff, Chapter 7 Trustee;
David B. Dimitruk, Esq. of the Law Offices of David
B. Dimitruk argued for appellees, James and Rebecca
Wallace and Gloria Suess.

Before: KIRSCHER, PAPPAS and TAYLOR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Appellant, chapter 7² trustee Charles W. Daff ("Trustee"),
2 appeals a judgment from the bankruptcy court determining that the
3 recorded abstract of judgment of appellees, James and Rebecca
4 Wallace ("Wallaces") and Gloria Sues ("Sues")(collectively the
5 "Judgment Creditors") attached to proceeds from the sale of
6 debtor's residence even though it was recorded after the debtor
7 had fraudulently transferred her interest in the residence to her
8 daughter. The bankruptcy court published its decision. See Daff
9 v. Wallace (In re Cass), 476 B.R. 602 (Bankr. C.D. Cal. 2012). We
10 AFFIRM on the narrow basis that the debtor, despite the transfer,
11 held an equitable interest in the Residence to which the Judgment
12 Creditors' judgment lien attached. As a result, the sale proceeds
13 are subject to the Judgment Creditors' claim. We express no
14 opinion concerning the bankruptcy court's determination that under
15 California law a transfer of property in fraud of creditors is
16 "void ab initio" rather than merely "voidable."

17 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

18 A. The defamation lawsuit, the fraudulent transfer, the first 19 bankruptcy case, the state court judgment and appeal, and the abstract of judgment

20 The facts of this case are undisputed. The Judgment
21 Creditors are former next door neighbors of the deceased chapter 7
22 debtor, Catherine Z. Cass ("Cass"). After many years of Cass's
23 daily harassment of her neighbors by posting of defamatory signs
24 about them in her front yard, directing loud music at their homes,
25 making other loud noises to disturb them throughout the night,

26
27 ² Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 operating yard machines while they tried to enjoy their backyards,
2 and leading her dogs to defecate on the Wallaces' front yard
3 without picking up after them, Suess and the Wallaces sued Cass in
4 state court for defamation and nuisance on April 22, 2004
5 ("Defamation Lawsuit"). At that time, Cass owned her residence
6 located in Santa Ana, California ("Residence").

7 One day after filing her answer, Cass executed and recorded a
8 grant deed purporting to transfer title of the Residence to her
9 daughter, Christine Zeman ("Zeman"), and reserving a life estate
10 for herself. Zeman provided no consideration for the transfer.
11 Concurrent with the transfer, Zeman signed a letter agreement
12 wherein she promised to "transfer the [Residence] back to [Cass]
13 upon her request."

14 The trial in the Defamation Lawsuit was scheduled to begin on
15 May 9, 2005, but was stayed once Cass filed a chapter 13
16 bankruptcy case on May 6, 2005. On July 5, 2007, the bankruptcy
17 court dismissed Cass's chapter 13 case as a bad faith filing and
18 enjoined her from filing any further bankruptcy petitions for
19 180 days.

20 After trial of the Defamation Lawsuit, on September 15, 2005,
21 the state court announced its oral ruling against Cass. On
22 October 28, 2005, the state court entered a judgment in favor of
23 the Judgment Creditors on their nuisance and defamation claims for
24 \$320,000, which included an award of \$75,000 for punitive damages
25 and injunctive relief ("State Court Judgment"). Pursuant to the
26 State Court Judgment, the court determined:

27 Among other things, the punitive and exemplary damages are
28 determined by the court to be appropriate based upon
(1) the defendant's malicious and oppressive conduct

1 toward the plaintiffs, which conduct the court finds was
2 established by clear and convincing evidence, (2) the net
3 equity of the residence located at 2420 N. Fairmont Ave.,
4 Santa Ana, California 92706, which is effectively owned by
5 Catherine Cass despite the purported transfer of title to
6 her daughter Christine Zeman without consideration and
7 agreements to support the transfer and which the court
8 took into consideration in determining the amount of
9 punitive and exemplary damages, and (3) the transfer of
10 title to the residence was to avoid the possibility of a
11 judgment that might affect her ability to hold on to the
12 residence (emphasis added).

13
14 The Judgment Creditors recorded an abstract of the State Court
15 Judgment ("Abstract") in Orange County, California on November 1,
16 2005.

17 Cass appealed the State Court Judgment. The California Court
18 of Appeals affirmed the damages award but struck some of the
19 injunctive provisions as unconstitutionally broad.

20 **B. The fraudulent transfer lawsuit, the second bankruptcy case,
21 removal of the fraudulent transfer lawsuit and the avoidance
22 judgment**

23 Immediately after the bankruptcy court dismissed Cass's
24 chapter 13 bankruptcy case and, while the Defamation Lawsuit and
25 appeal were pending, the Judgment Creditors filed another suit
26 against Cass and Zeman in state court on July 8, 2005, seeking to
27 avoid and set aside as fraudulent Cass's transfer of the Residence
28 to Zeman ("Fraudulent Transfer Lawsuit") under CAL. CIV. CODE
("CCC") § 3439 et seq., the California Uniform Fraudulent Transfer
Act ("CUFTA"). The Judgment Creditors asserted that, despite the
transfer, Cass had retained exclusive use, possession and control
of the Residence within the meaning of CCC § 3439.04(b)(2). The
Residence, which was Cass's only asset, was believed to be worth
\$500,000 at the time of the transfer. The Judgment Creditors
prayed for multiple remedies under California law, including an

1 order avoiding and setting aside the transfer and restoring title
2 of the Residence to Cass, an attachment against the Residence or
3 its proceeds, injunctive relief and the appointment of a
4 receiver.³

5 The trial in the Fraudulent Transfer Lawsuit was scheduled to
6 begin on January 8, 2007, but was stayed once Cass filed a
7 chapter 7 bankruptcy case on January 5, 2007. Shortly thereafter,
8 Trustee filed a Notice of Substitution of Bankruptcy Trustee as
9 Plaintiff and Real Party in Interest in the state court and
10 removed the Fraudulent Transfer Lawsuit to the bankruptcy court
11 (now the "Fraudulent Transfer Adversary"). All activity in the
12 Fraudulent Transfer Adversary was initially suspended while Cass
13 pursued her appeal of the State Court Judgment.

14 At a status conference on May 27, 2008, Trustee announced
15 that he, Zeman and the Judgment Creditors had negotiated a
16 stipulation to undo the transfer of the Residence and restore
17 title to Trustee and to dismiss Zeman from the Fraudulent Transfer
18 Adversary. Cass opposed the stipulation. The bankruptcy court
19 noted that because Cass was not a party to it, she could still
20 pursue her appellate rights respecting the State Court Judgment
21 with the California Supreme Court.

22 The Stipulation for Entry of Judgment Avoiding and Recovering
23 Transfer of Real Property ("Stipulation") and separate judgment
24 ("Avoidance Judgment") were filed on May 29, 2008. The Avoidance
25 Judgment avoided and set aside the transfer of the Residence under

26
27 ³ Zeman apparently filed a cross-complaint in the Fraudulent
28 Transfer Lawsuit, but we do not have a copy of it in the record,
and it is not clear as to what claims she asserted.

1 CCC §§ 3439.04⁴ and 3439.07,⁵ recovered it for the benefit of the
2 estate under § 550, and dismissed Zeman's cross-complaint and the
3 Zeman Adversary⁶ with prejudice. All claims against Zeman were
4 now resolved and dismissed with prejudice.

5

6 ⁴ CCC § 3439.04(a)(1), which is the relevant section here,
7 provides:

8 A transfer made or obligation incurred by a debtor is
9 fraudulent as to a creditor, whether the creditor's claim
10 arose before or after the transfer was made or the obligation
11 was incurred, if the debtor made the transfer or incurred the
12 obligation as follows:

13 (1) With actual intent to hinder, delay, or defraud any
14 creditor of the debtor.

15 ⁵ CCC § 3439.07, which sets forth a creditor's remedies,
16 provides in relevant part:

17 (a) In an action for relief against a transfer or obligation
18 under this chapter, a creditor, subject to the limitations in
19 Section 3439.08, may obtain:

20 (1) Avoidance of the transfer or obligation to the
21 extent necessary to satisfy the creditor's claim.

22 (2) An attachment or other provisional remedy against
23 the asset transferred or its proceeds . . .

24 (3) Subject to applicable principles of equity and in
25 accordance with applicable rules of civil procedure, the
26 following:

27 (A) An injunction against further disposition by
28 the debtor or a transferee, or both, of the asset
transferred or its proceeds.

(B) Appointment of a receiver to take charge of the
asset transferred or its proceeds.

(C) Any other relief the circumstances may require.

(b) If a creditor has commenced an action on a claim against
the debtor, the creditor may attach the asset transferred or
its proceeds if the remedy of attachment is available in the
action under applicable law and the property is subject to
attachment in the hands of the transferee under applicable
law.

(c) If a creditor has obtained a judgment on a claim against
the debtor, the creditor may levy execution on the asset
transferred or its proceeds.

⁶ In the Zeman Adversary (07-1094), the Judgment Creditors
alleged claims to deny Cass's discharge and sought a determination
that their lien rights in the Residence were superior to Zeman's.

1 Cass appealed the Stipulation and Avoidance Judgment to the
2 Panel. She alternatively requested that the bankruptcy court
3 reconsider its approval of the Stipulation and Avoidance Judgment.
4 The bankruptcy court denied Cass's request to reconsider.

5 On June 11, 2008, the California Supreme Court denied Cass's
6 petition for review of the appellate court's decision affirming
7 the damages awarded in the State Court Judgment. The State Court
8 Judgment was therefore final.

9 Cass died on February 7, 2009. On June 11, 2009, the Panel
10 dismissed her appeal of the Stipulation and Avoidance Judgment for
11 lack of prosecution.

12 **C. Trustee's adversary proceeding against the Judgment Creditors**

13 **1. Pretrial events**

14 **a. Trustee's complaint, the Judgment Creditors'**
15 **counterclaims, the homestead exemption order and**
16 **the sale of the Residence**

17 On January 27, 2010, Trustee filed a complaint against the
18 Judgment Creditors seeking a declaratory judgment that the
19 Abstract never attached to the Residence ("Declaratory Relief
20 Adversary").⁷ Specifically, Trustee contended that the Judgment
21 Creditors had no judgment lien on the Residence, because Cass had
22 transferred title to it to Zeman before they recorded the
23 Abstract, and any lien against Cass's life estate had terminated
24 upon her death.⁸

25 ⁷ The Declaratory Relief Adversary was initially filed in
26 Santa Ana and assigned case no. 10-1058. When it was transferred
to the Los Angeles Division, it was renumbered 12-1235.

27 ⁸ Trustee had also asserted a claim under § 549, seeking to
28 avoid, recover and preserve any lien that arose postpetition in
(continued...)

1 The Judgment Creditors filed an answer and counterclaim
2 seeking declaratory relief and injunction against Trustee.
3 Specifically, the Judgment Creditors sought a determination that
4 (a) Trustee had to apply the sale proceeds of the Residence to
5 satisfy their claims against Cass, (b) the Abstract was superior
6 to all claims of interest in the Residence and (c) Cass's transfer
7 to Zeman was a fraudulent transfer that nullified and voided that
8 transfer, including the life estate.

9 On May 6, 2010, the bankruptcy court entered an order on
10 Trustee's objection to Cass's claimed homestead exemption
11 ("Homestead Exemption Order"):

12 IT IS HEREBY ORDERED that the Debtor's disputed claim of
13 exemption in her life estate is rendered moot by her
14 death. Upon the Debtor's death, the life estate
15 terminated and no longer constituted property of
16 bankruptcy estate which could be administered by the
17 Trustee for the benefit of creditors. If and when the
18 Trustee sells the Estate's rights in the real property
commonly known as 2420 N. Fairmont Avenue, Santa Ana,
California that were established pursuant to [the
Avoidance Judgment] entered as Docket No. 155 on May 29,
2008, no portion of the proceeds of sale shall constitute
proceeds of the sale of the Debtor's interest in her life
estate.

19 On June 1, 2010, the bankruptcy court entered an order
20 authorizing Trustee to sell the Residence free and clear of all
21 liens, claims and interests for \$321,000, with the caveat that the
22 Judgment Creditors' disputed lien attached to the sale proceeds
23 pending resolution of the Declaratory Relief Adversary.

24

25

26 ⁸(...continued)
27 favor of the Judgment Creditors upon entry of the Avoidance
28 Judgment. Trustee later dropped this claim at trial after the
Judgment Creditors conceded they never contended their judgment
lien arose under such a theory. Therefore, we do not further
discuss the § 549 claim.

1 Ultimately, Trustee received \$292,730.95 in proceeds. After
2 payment of interim compensation and reimbursement of costs for
3 Trustee and his professionals in the amount of \$92,371.66, Trustee
4 held the balance of \$193,459.29 in net sale proceeds.

5 **b. The cross-motions for summary judgment, the order**
6 **denying summary judgment and the appeal of that**
7 **order**

8 Trustee and the Judgment Creditors filed cross-motions for
9 summary judgment in September 2010. The bankruptcy court denied
10 the cross-motions, determining that certain genuine issues of
11 material fact existed for trial. First, as to the parties'
12 conflicting argument whether in California a fraudulent transfer
13 is "voidable" or "void ab initio," the court observed that neither
14 party had cited a California case holding one way or the other
15 under the CUFTA, and the court had not located any such case. The
16 court further determined that a genuine issue of material fact
17 existed as to Cass's retention of control over the Residence after
18 the transfer of the remainder interest to Zeman within the meaning
19 of the CUFTA and the common law, which needed to be resolved at
20 trial. Finally, the parties needed to address at trial the
21 conflict between CAL. CODE CIV. P. ("CCP") § 697.340(a),⁹ which
22 contains an exception for property transfers before judgment is
23 obtained, and case law holding that fraudulent transfers are void.

24 ⁹ CCP § 697.340(a) provides:

25 A judgment lien on real property attaches to all interests in
26 real property in the county where the lien is created
27 (whether present or future, vested or contingent, legal or
28 equitable) that are subject to enforcement of the money
 judgment against the judgment debtor . . . at the time the
 lien was created, but does not reach . . . real property that
 is subject to an attachment lien in favor of the creditor and
 was transferred before judgment (emphasis added).

1 The parties timely filed cross-appeals of the interlocutory
2 summary judgment order and motions for leave. On June 15, 2011,
3 the Panel issued an order denying leave and dismissing the cross-
4 appeals due to the parties' inability to establish the factors
5 necessary to obtain leave to appeal.

6 **2. The trial, the memorandum decision and the judgment in**
7 **favor of the Judgment Creditors**

8 In their filed Joint Pretrial Order ("Joint PTO") and Joint
9 Compendium of Exhibits in support, the parties contended that no
10 issues of material fact were in dispute and that the matter could
11 be decided without any witness testimony. The bankruptcy court
12 approved the Joint PTO on November 8, 2011.

13 On December 19, 2011, Trustee and the Judgment Creditors
14 filed a second stipulation in the Fraudulent Transfer Adversary
15 (the "December 19 Stipulation"), dismissing all remaining claims
16 between the parties not previously dismissed without prejudice so
17 that those claims could be adjudicated in the Declaratory Relief
18 Adversary. Under the December 19 Stipulation, the parties agreed
19 that dismissal of the Fraudulent Transfer Adversary would "not
20 give rise to any adverse legal or other effect on any party or
21 issue to be determined in [the Declaratory Relief Adversary]".
22 The bankruptcy court entered an order on December 20, 2011,
23 approving the December 19 Stipulation (the "December 20 Order").

24 Both parties submitted opening trial briefs, responses and
25 replies in support. In short, Trustee contended that under CCP
26 § 697.340(a) an abstract of judgment has no affect on previously
27 transferred property. Because the Judgment Creditors recorded
28 their Abstract after Cass transferred her remainder interest in

1 the Residence to Zeman, the Abstract attached only to Cass's life
2 estate, which lapsed upon her death and extinguished any existing
3 liens. He further argued that the state court had not determined
4 Cass had an interest in the Residence at the time the Abstract was
5 recorded. As a result, argued Trustee, the Judgment Creditors had
6 no secured claim against the remainder interest in the Residence.

7 The crux of Trustee's argument was that in California
8 fraudulent transfers are voidable, not void ab initio, because the
9 CUFTA superceded the common law that fraudulent transfers are void
10 with a specific provision that such transfers are subject only to
11 "avoidance." Therefore, contrary to the Judgment Creditors'
12 position, the fraudulent transfer of Cass's remainder interest was
13 not automatically void at the moment it occurred, which is the
14 only way the Abstract could have attached and provided the
15 Judgment Creditors with a secured judgment lien. In fact, argued
16 Trustee, the bankruptcy court's prior ruling in the Homestead
17 Exemption Order implicitly found that the transfer was not void,
18 based on its finding that Cass's only interest in the Residence as
19 of the petition date was a life estate; if the transfer had been
20 void, the court would have found that Cass still held a remainder
21 interest in the Residence despite the transfer to Zeman. Thus, it
22 was law of the case that the transfer was "avoided" and never
23 adjudicated to be "void."

24 Alternatively, Trustee argued that even if the transfer could
25 be declared "void," only he had standing to seek such a
26 determination. According to Trustee, because the Avoidance
27 Judgment avoided, recovered and preserved the transfer of the
28 remainder interest in the Residence and vested title in Trustee

1 for the benefit of the estate, the Judgment Creditors lost their
2 right to launch a further attack to establish the transfer was
3 void ab initio and obtain a claim superior to the estate. In
4 addition, claim preclusion further barred the Judgment Creditors
5 from asserting that the transfer was void because the Avoidance
6 Judgment conclusively determined it was "avoidable."

7 The Judgment Creditors essentially argued that their Abstract
8 attached to the Residence when it was filed on November 1, 2005,
9 in one of two ways: (1) Cass was the owner or the equitable owner
10 of the Residence when the Abstract was recorded, so it attached
11 pursuant to CCP § 697.340(a); or (2) because Cass was guilty of a
12 fraudulent transfer, such transfer was "void" and could be
13 disregarded by creditors, so the Abstract attached to the
14 Residence and then to the proceeds, and Trustee's subsequent
15 acquisition of bare title could not defeat the prior recorded
16 Abstract.

17 Specifically, the Judgment Creditors asserted that their
18 Abstract attached to the Residence even though Cass had previously
19 transferred title to it to Zeman because CCP § 697.340(a) dictated
20 that their judgment lien, which they perfected by recording the
21 Abstract, attached immediately to the Residence and subjected it
22 to the satisfaction of the State Court Judgment. Therefore, the
23 question was whether Cass had any interest in the Residence when
24 the Abstract was recorded. The Judgment Creditors argued that the
25 record, particularly the findings by the state court, established
26 her ownership at that time.

27 The Judgment Creditors alternatively argued that the Abstract
28 attached to the fee interest Cass attempted to fraudulently

1 transfer to Zeman because the transfer was void and as though it
2 never occurred. They argued that, contrary to Trustee's position,
3 the CUFTA, particularly CCC § 3439.07(a)(1) and its use of the
4 terms "avoidance" and "avoid," did not displace or expressly
5 supercede the long-established law in California that fraudulent
6 transfers are considered "void." As a result, argued the Judgment
7 Creditors, title and ownership to the Residence remained in Cass,
8 the fraudulent grantor, and Trustee's subsequent acquisition of
9 bare legal title from Zeman (who admitted the transfer was
10 fraudulent by entering into the Stipulation) was subordinate to
11 their prior recorded Abstract. As a result, they were entitled to
12 the balance of the net sale proceeds.

13 The Judgment Creditors rejected Trustee's standing argument,
14 contending that while he was the only party able to prosecute the
15 fraudulent transfer claims, the result of setting aside the
16 transfer did not necessarily invalidate their Abstract. They also
17 rejected Trustee's argument that his recovery and preservation of
18 the Residence for the estate terminated their competing claims,
19 contending that when a trustee recovers fraudulently transferred
20 property, the recovered property still remains subject to whatever
21 secured liens were against it.

22 In response, Trustee contended that the Judgment Creditors
23 were precluded from arguing Cass held an equitable interest in the
24 Residence after the transfer because that argument was outside the
25 scope of the Joint PTO, and therefore it had been waived. Trustee
26 further argued that the issue of whether Cass retained a
27 beneficial interest in the Residence other than a life estate was
28 barred because the bankruptcy court had already ruled in the

1 Homestead Exemption Order that no portion of the sale proceeds
2 were subject to Cass's claimed homestead exemption. Finally,
3 Trustee argued that the Avoidance Judgment, which avoided,
4 recovered and preserved the remainder interest in the Residence,
5 clearly established that the Judgment Creditors' claims of any
6 superior lien rights to Zeman were dismissed with prejudice.

7 The trial on Trustee's complaint and the Judgment Creditors'
8 counterclaims was held on April 6, 2012. As an initial
9 housekeeping matter, all exhibits in the Joint Compendium of
10 Exhibits were admitted into evidence, and all stipulated facts in
11 the Joint PTO were deemed established. After hearing oral
12 argument from the parties, the bankruptcy court requested further
13 briefing from the parties. The parties timely submitted the
14 ordered post-trial briefs, and the trial was continued to June 12,
15 2012.

16 At the continued trial on June 12, 2012, the bankruptcy court
17 announced that it was taking the matter under submission.

18 The bankruptcy court entered its Memorandum Decision in favor
19 of the Judgment Creditors and dismissing Trustee's complaint on
20 August 31, 2012. The court found that Cass retained an equitable
21 interest in the Residence despite the fraudulent transfer to
22 Zeman. Therefore, when the Judgment Creditors recorded their
23 Abstract, they perfected a judgment lien under California law,
24 which attached to Cass's equitable interest in the Residence.
25 In re Cass, 476 B.R. at 608. This result was obtained whether a
26 fraudulent transfer is void or void ab initio under state law.
27 Id. Nevertheless, the court held that under California law, a
28 fraudulent transfer is void ab initio, except to the extent that

1 the CUFTA has made it voidable for good faith purchasers for
2 value. Id. Trustee had not established that the CUFTA changed
3 the common law that fraudulent transfers are "void" as to the
4 transferor's creditors. Id. at 617-18. Any cases relied upon by
5 Trustee either were distinguishable on the facts or applied law of
6 another state, which was substantively different from California.
7 Id. at 616-19. Accordingly, Trustee was to apply the sale
8 proceeds from the Residence to satisfy the Judgment Creditors'
9 claims against Cass, except those interests superior to their
10 November 1, 2005 judgment lien. Id. at 618-19.¹⁰

11 On October 5, 2012, the bankruptcy court entered an amended
12 judgment against Trustee's complaint and in favor of the Judgment
13 Creditors on their counterclaims (the "Declaratory Relief
14 Judgment").¹¹

15 Trustee timely appealed the Declaratory Relief Judgment on
16 October 9, 2012. On that same date, he also filed a motion for
17 stay pending appeal in the bankruptcy court. The Judgment
18 Creditors opposed the motion. The bankruptcy court denied the
19 motion for stay pending appeal for Trustee's failure to
20 demonstrate that he would suffer irreparable injury. For these

21

22

23 ¹⁰ The bankruptcy court rejected Trustee's contention that
24 various preclusion doctrines barred litigation of the Judgment
25 Creditors' claims that the Abstract attached to the Residence or
that the transfer was void ab initio. In re Cass, 476 B.R. at
610-13.

26

27 ¹¹ The original judgment was entered on October 4, 2012, but
28 Trustee had lodged an objection to the form of that judgment
because it included what he contended were impermissible findings
that had been separately stated in the memorandum decision. The
bankruptcy court agreed and entered the amended judgment, which
had deleted all findings.

1 same reasons, the BAP motions panel denied Trustee's emergency
2 motion for stay pending appeal on November 9, 2012.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
5 and 157(b)(2)(F) and (K). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **III. ISSUES**

8 1. Could the Judgment Creditors seek a determination as to
9 whether their judgment lien attached to the Residence?

10 2. Did the bankruptcy court abuse its discretion by not applying
11 issue preclusion or judicial estoppel?

12 3. Did the bankruptcy court err in determining that Cass
13 retained an equitable interest in the Residence to which their
14 judgment lien attached despite the purported transfer of her
15 remainder interest to Zeman?

16 **IV. STANDARDS OF REVIEW**

17 We review de novo the bankruptcy court's conclusions of law
18 and review for clear error its findings of fact. McDonald v.
19 Checks-N-Advance, Inc. (In re Ferrell), 539 F.3d 1186, 1189 (9th
20 Cir. 2008)(per curiam).

21 We review a bankruptcy court's interpretation of California
22 law de novo in order to determine if it correctly applied the
23 substantive law. Kipperman v. Proulx (In re Burns), 291 B.R. 846,
24 849 (9th Cir. BAP 2003); Astaire v. Best Film & Video Corp.,
25 116 F.3d 1297, 1300 (9th Cir. 1997)(issues of state law are
26 reviewed de novo).

27 We review questions regarding the application of "res
28 judicata, including issue and claim preclusion, de novo, as mixed

1 questions of law and fact in which legal questions predominate.”
2 Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir.
3 BAP 2006), aff’d, 506 F.3d 956 (9th Cir. 2007)(citations omitted).
4 “Once it is determined that preclusion doctrines are available to
5 be applied, the actual decision to apply them is left to the trial
6 court’s discretion.” Id. at 823 (citations omitted).

7 We review a bankruptcy court’s application of judicial
8 estoppel for abuse of discretion. Cheng v. K&S Diversified Invs.,
9 Inc. (In re Cheng), 308 B.R. 448, 452 (9th Cir. BAP 2004)(citing
10 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th
11 Cir. 1999)). Likewise, we review a bankruptcy court’s
12 interpretation of its own order for an abuse of discretion.
13 Arenson v. Chi. Mercantile Exch., 520 F.2d 722, 725 (7th Cir.
14 1975). A bankruptcy court abuses its discretion if it applied the
15 wrong legal standard or its findings were illogical, implausible
16 or without support in the record. TrafficSchool.com, Inc. v.
17 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

18 V. DISCUSSION

19 A. The Judgment Creditors could seek a determination in the 20 Declaratory Relief Adversary about whether their judgment lien attached to the Residence.

21 Under § 541(a)(1), as of the commencement of the bankruptcy
22 case, a debtor’s interest in property, whether a legal or an
23 equitable interest, becomes property of the bankruptcy estate.
24 Property of the estate also includes any interest in property
25 recovered under § 550¹² and any interest in property that is

26 _____
27 ¹² Section 550(a) provides:

28 (a) Except as otherwise provided in this section, to the
(continued...)

1 preserved for the benefit of the estate under § 551.¹³ Section
2 541(a)(3), (a)(4).

3 Section 550 allows the trustee to recover fraudulently
4 transferred property for the benefit of the estate to the extent
5 that a transfer is avoided as fraudulent under either §§ 544 or
6 548. Once a trustee recovers an asset for the estate through one
7 of the enumerated transfer or lien avoidance provisions, § 551
8 automatically preserves the asset for the benefit of the estate.
9 Heintz v. Carey (In re Heintz), 198 B.R. 581, 584 (9th Cir. BAP
10 1996)(citing The Retail Clerks Welfare Trust v. McCarty (In re Van
11 De Kamp's Dutch Bakeries), 908 F.2d 517, 520 (9th Cir. 1990));
12 In re Schmiel, 319 B.R. 520, 529 (Bankr. E.D. Mich. 2005)(once the
13 transfer of an asset is avoided, § 551 automatically returns that
14 "stick" to the "bundle" that makes up estate property and
15 preserves it for the benefit of the estate).

16 Facing an expired statute of limitations problem precluding
17 an avoidance action under § 548, Trustee proceeded under § 544 to
18 avoid Cass's fraudulent transfer of the Residence to Zeman.

19
20 ¹²(...continued)
21 extent that a transfer is avoided under section 544, 545,
22 547, 548, 549, 553(b), or 724(a) of this title, the trustee
23 may recover, for the benefit of the estate, the property
24 transferred, or, if the court so orders, the value of such
25 property, from--
26 (1) the initial transferee of such transfer or the
27 entity for whose benefit such transfer was made; or
28 (2) any immediate or mediate transferee of such initial
transferee.

26 ¹³ Section 551 provides:
27 Any transfer avoided under section 522, 544, 545, 547, 548,
28 549, or 724(a) of this title, or any lien void under section
506(d) of this title, is preserved for the benefit of the
estate but only with respect to property of the estate.

1 Section 544 is what conferred standing to Trustee in place of the
2 Judgment Creditors to prosecute the Fraudulent Transfer Adversary.
3 See Gen. Elec. Capital Auto Lease, Inc. v. Broach (In re Lucas
4 Dallas, Inc.), 185 B.R. 801, 804 (9th Cir. BAP 1995)(trustee lacks
5 standing to assert independent state law created fraudulent
6 transfer claims and can only do so by way of § 544(b)). Under
7 § 544(b)(1), a trustee "may avoid any transfer of an interest of
8 the debtor in property . . . that is voidable under applicable
9 law" - i.e., state law. The transfer here was avoidable by
10 Trustee as a fraudulent transfer under California law,
11 specifically, the CUFTA, found in CCC §§ 3439 et seq. See Kupetz
12 v. Wolf, 845 F.2d 842, 845 (9th Cir. 1988)(Section 544(b) permits
13 a trustee to stand in a creditor's shoes to assert any state law
14 claims that a creditor may have.).

15 Trustee argues that the bankruptcy court erred when it
16 entered judgment in favor of the Judgment Creditors because their
17 claims as to whether they held an interest in the Residence, that
18 the transfer was void ab initio, or that their purported lien
19 attached to the Residence were cut off once he avoided, recovered
20 and preserved the Residence for the benefit of the estate under
21 §§ 550 and 551. He further argues that because the Residence was
22 preserved under § 551, their judgment lien disappeared. Trustee
23 also argues that he was the only party with standing to seek
24 avoidance of the fraudulent transfer and recovery of the
25 Residence.

26 It is undisputed that Trustee was the only party with
27 standing to prosecute what became the Fraudulent Transfer
28 Adversary against Cass and Zeman. See Estate of Spirtos v. One

1 San Bernardino Cnty. Super. Ct., 443 F.3d 1172, 1776 (9th Cir.
2 2006); In re PWS Holding Corp., 303 F.3d 308 (3d Cir. 2002), cert.
3 denied, 538 U.S. 924 (2003)(although individual creditors may be
4 permitted to bring a fraudulent transfer action derivatively on
5 behalf of the estate, they have no standing to prosecute such an
6 action in their own right and for their own benefit, even if they
7 would have had standing to do so outside of bankruptcy). However,
8 Trustee fails to cite any authority supporting his contention
9 that, because a trustee has avoided and recovered property
10 initially subject to a secured creditor's fraudulent transfer
11 lawsuit, such creditor loses all rights to any claims or defenses
12 it may have. The bankruptcy court rejected this argument at
13 trial. We disagree that Quarre v. Saylor (In re Saylor), 178 B.R.
14 209 (9th Cir. BAP 1995), aff'd 108 F.3d 219 (9th Cir. 1997)
15 supports Trustee's position. Saylor did not address the lien
16 rights of a judgment creditor, as that was not an issue in the
17 case. Saylor merely held that a judgment creditor did not have
18 standing to prosecute an exception to discharge claim under
19 § 523(a)(6) based on an alleged fraudulent transfer of real
20 property.

21 To the extent Trustee argues that the Judgment Creditors
22 dismissed their claims by entering into the Stipulation and
23 Avoidance Judgment, we reject this argument for the same reasons
24 articulated by the bankruptcy court, which we explain in more
25 detail below. As for Trustee's policy argument that recovered
26 property is not intended to benefit just one creditor but is to be
27 equitably shared by them all, this policy pertains to unsecured
28 creditors, not secured ones. See generally §§ 507 and 726.

1 Trustee also fails to cite any authority holding that, once a
2 fraudulently transferred property is avoided under state law and
3 recovered and preserved under §§ 550 and 551, a secured creditor's
4 perfected judgment lien (or other perfected security interest)
5 disappears. Section 551 does not operate to somehow make a
6 secured creditor's perfected lien disappear upon the trustee's
7 later avoidance of the transfer. In re Mathiason, 129 B.R. 173,
8 177 (Bankr. D. Minn. 1991) aff'd, 16 F.3d 234 (8th Cir. 1994).
9 That statute is intended to prevent junior lienholders from
10 improving their position at the expense of the estate when a
11 senior lien is avoided. Id. (citing S.Rep. No. 989, 95th Cong.,
12 2d Sess. 91 (1978), U.S.Code Cong. & Admin.News 1978, p. 5787)).
13 "It is not intended to strip from recovered property, interests
14 equal or senior to the transfer avoided." Id. Assuming that the
15 Judgment Creditors had a perfected senior lien in the Residence,
16 which we believe they did, Trustee took the Residence subject to
17 that senior lien. Trustee also offers no argument to counter
18 California law that perfected judgment liens are extinguished only
19 by the recording of an acknowledgment of satisfaction of the
20 underlying judgment or by the judgment creditor's release of the
21 lien. CCP § 697.400(a), (c).

22 Accordingly, the bankruptcy court did not err by allowing the
23 Judgment Creditors to assert their claims against Trustee or raise
24 any defenses thereto.

25 **B. The bankruptcy court did not abuse its discretion when it**
26 **determined that issue preclusion and judicial estoppel did**
not preclude the Judgment Creditors' claims.

27 Although Trustee asserted the doctrines of claim preclusion,
28 issue preclusion, judicial estoppel, law of the case and election

1 of remedies before the bankruptcy court and in his statement of
2 issues on appeal in his opening brief, he provides argument only
3 as to the doctrines of issue preclusion and judicial estoppel.
4 Therefore, we address only these two, as he has waived any right
5 to assert the other doctrines. See McLain v. Calderon, 134 F.3d
6 1383, 1384 n.2 (9th Cir. 1998)(issue mentioned in statement of
7 issues but not discussed in brief is considered waived).

8 **1. Issue preclusion as to the Avoidance Judgment**

9 "The preclusive effect of a federal court judgment is
10 determined by federal common law, but the rule of decision differs
11 depending upon whether the federal court's jurisdiction over the
12 issue was based on diversity or federal question." Haliburton
13 Energy Servs., Inc. v. McVay (In re McVay), 461 B.R. 735, 741
14 (Bankr. C.D. Ill. 2012)(citing Taylor v. Sturgell, 553 U.S. 880,
15 891 (2008)). "Under federal common law, a federal diversity
16 judgment is to be accorded the same preclusive effect that would
17 be applied by the state courts in the state in which the federal
18 diversity court sits." Id. (citing Taylor, 553 U.S. at 891 n.4);
19 Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508
20 (2001)). "For judgments in federal question cases, federal common
21 law supplies the rule of decision." Id. (citing Taylor, 553 U.S.
22 at 891).

23 The bankruptcy court applied California issue preclusion law
24 to the Avoidance Judgment, which avoided the fraudulent transfer
25 of the Residence under California law by Trustee under § 544(b).
26 Trustee recovered and preserved the Residence for the benefit of
27 the estate under §§ 550 and 551. Both the Avoidance Judgment and
28 Homestead Exemption Order were entered by the bankruptcy court.

1 Hence, we have two judgments entered by a federal court deciding
2 what were ultimately federal questions, although rooted in state
3 law. Therefore, we conclude that federal issue preclusion law
4 should have been applied in this case. Nonetheless, whether
5 federal or California issue preclusion law¹⁴ applied, the result is
6 the same. The Judgment Creditors were not precluded from seeking
7 a determination that their judgment lien attached to the
8 Residence.

9 Issue preclusion "bars 'successive litigation of an issue of
10 fact or law that was actually litigated and resolved in a valid
11 court determination essential to that prior judgment,' even if the
12 issue recurs in the context of a different claim." Taylor,
13 553 U.S. at 892 (quoting New Hampshire v. Maine, 532 U.S. 742,
14 748-49 (2001)). As the party asserting issue preclusion, Trustee
15 had the burden of establishing all elements required for its
16 application. Palm v. Klapperman (In re Cady), 266 B.R. 172, 183
17 (9th Cir. BAP 2001)(citing Watson v. Shandell (In re Watson),
18 192 B.R. 739, 747 (9th Cir. BAP 1996); Berr v. FDIC (In re Berr),
19 172 B.R. 299, 306 (9th Cir. BAP 1994)). Under the federal
20 standard, four elements must be met for issue preclusion to apply:
21 (1) The issue sought to be precluded must be the same as that
22

23 ¹⁴ California issue preclusion law is virtually identical to
24 federal law. In California, the party asserting issue preclusion
25 must establish the following five elements: (1) the issue sought
26 to be precluded from relitigation must be identical to that
27 decided in a former proceeding; (2) this issue must have been
28 actually litigated in the former proceeding; (3) it must have been
necessarily decided in the former proceeding; (4) the decision in
the former proceeding must be final and on the merits; and (5) the
party against whom preclusion is sought must be the same as, or in
privity with, the party to the former proceeding. Lucido v.
Super. Ct., 51 Cal.3d 335, 341 (Cal. 1990)(citations omitted).

1 involved in the prior action; (2) the issue must have been
2 actually litigated; (3) it must have been determined by a valid
3 and final judgment; and (4) the determination must have been
4 essential to the final judgment. Id. (citing In re Berr, 172 B.R.
5 at 306).

6 Trustee argues that the bankruptcy court should have applied
7 issue preclusion to the Avoidance Judgment and ruled that the
8 Judgment Creditors were precluded from seeking a determination
9 that the transfer was "void ab initio." Specifically, he contends
10 the bankruptcy court erred in finding that the Avoidance Judgment
11 did not adjudicate the same issues as the instant Declaratory
12 Relief Adversary when the Avoidance Judgment established that the
13 transfer occurred, was "avoided," and restored all ownership
14 interests in the Residence to Trustee for the benefit of the
15 estate.

16 In deciding that Trustee had not met his burden of
17 establishing the elements for issue preclusion to the Avoidance
18 Judgment, the bankruptcy court was interpreting its own order. We
19 accord substantial deference to a court's interpretation of its
20 own orders and will not overturn that interpretation unless we are
21 convinced it amounts to an abuse of discretion. Marciano v. Fahs
22 (In re Marciano), 459 B.R. 27, 35 (9th Cir. BAP 2011). See
23 Hallett v. Morgan, 296 F.3d 732, 739-40 (9th Cir. 2002)(special
24 consideration is given to the trial court's interpretation of its
25 own orders); Colonial Auto Ctr. v. Tomlin (In re Tomlin), 105 F.3d
26 933, 941 (4th Cir. 1997)(the bankruptcy judge who has presided
27 over a case from its inception is in the best position to clarify
28 the court's rulings).

1 We are not convinced that the bankruptcy court's
2 interpretation of the Avoidance Judgment was an abuse of
3 discretion. It determined that the Avoidance Judgment did not
4 address, let alone adjudicate, the issues related to the Judgment
5 Creditors' claims of: (1) whether the judgment lien from the
6 recorded Abstract attached to the Residence; (2) whether the
7 judgment lien is superior to Trustee's interests; or (3) whether
8 the transfer from Cass to Zeman was void or voidable. In re Cass,
9 476 B.R. at 610-11. It further found that the Avoidance Judgment
10 did not eliminate the Judgment Creditors' rights to their claims
11 for declaratory and injunctive relief. Id. at 611. To the
12 contrary, the parties expressly agreed in the December 19
13 Stipulation that those claims would be dismissed without prejudice
14 in the Fraudulent Transfer Adversary so they could be adjudicated
15 in this action, and that the dismissal of those claims would not
16 give rise to any adverse legal or other effect on any party or
17 issue to be determined in this action. Id. Accordingly, Trustee
18 had not established that the issue was actually and necessarily
19 decided. We see no abuse of discretion in the bankruptcy court's
20 decision.

21 For these same reasons, we also reject Trustee's argument
22 that issue preclusion foreclosed the Judgment Creditors from
23 claiming that the Abstract attached to any equitable interest in
24 the Residence, other than Cass's life estate. Because the parties
25 had agreed to dismiss the remaining claims between them so that
26 those claims/issues could be decided in the Declaratory Relief
27 Adversary, the Judgment Creditors could seek a determination of
28 whether the Abstract attached to any interest Cass had at the time

1 it was recorded, equitable or otherwise.

2 **2. Issue preclusion as to the Homestead Exemption Order**

3 The bankruptcy court rejected Trustee's "flawed" contention
4 that the Homestead Exemption Order precluded the Judgment
5 Creditors from asserting they had perfected a judgment lien based
6 on a post-transfer recordation of the Abstract. In re Cass,
7 476 B.R. at 612 n.3. To be precise, the court determined that
8 issue preclusion did not apply because: (1) the Homestead
9 Exemption Order was not a judgment on the merits because the court
10 denied Cass's claimed exemption as moot in light of her death; and
11 (2) the perfection issue was not actually litigated in the
12 homestead exemption litigation and was not actually and
13 necessarily decided in the court's denial of the claimed homestead
14 exemption. Id.

15 Trustee argues that the Homestead Exemption Order necessarily
16 determined Cass did not have an interest in the previously
17 transferred remainder interest in the Residence because, if it
18 had, such interest would have been subject to the homestead
19 exemption. He fails to address the bankruptcy court's other
20 finding that the perfection issue was not actually litigated in
21 the context of the homestead exemption.

22 In deciding that Trustee had not met his burden of
23 establishing the elements for issue preclusion to the Homestead
24 Exemption Order, the bankruptcy court was interpreting its own
25 order, and we give substantial deference to that interpretation.
26 In re Marciano, 459 B.R. at 35. Again, Trustee has not convinced
27 us that the bankruptcy court abused its discretion in determining
28 the Homestead Exemption Order did not preclude the Judgment

1 Creditors from asserting they had perfected their judgment lien.
2 We also note that, although it is not the basis for our decision,
3 Trustee did not provide in the record any of the underlying
4 documents filed in the homestead exemption matter to support his
5 contention about what the bankruptcy court "necessarily decided."
6 We further reject Trustee's contention that Cass's remainder
7 interest would have been subject to a homestead exemption. A
8 debtor who has voluntarily transferred property in fraud of
9 creditors prepetition, which is later recovered, loses any
10 exemption in that recovered property. Hitt v. Glass
11 (In re Glass), 164 B.R. 759, 762 (9th Cir. BAP 1994); § 522(g).¹⁵

12 **3. Judicial estoppel as to the Avoidance Judgment**

13 "Judicial estoppel is an equitable doctrine that precludes a
14 party from gaining an advantage by asserting one position, and
15 then later seeking an advantage by taking a clearly inconsistent
16 position." Hamilton, 270 F.3d at 782 (citing Rissetto v. Plumbers
17 & Steamfitters Local 343, 94 F.3d 597, 600-01 (9th Cir. 1996)).
18 The doctrine is aimed at not only preventing a party from gaining
19 an advantage by asserting inconsistent positions, but also
20 ensuring "the orderly administration of justice and . . . the

21 ¹⁵ Section 522(g) provides:

22 Notwithstanding sections 550 and 551 of this title, the
23 debtor may exempt under subsection (b) of this section
24 property that the trustee recovers under section 510 (c)(2),
25 542, 543, 550, 551, or 553 of this title, to the extent that
26 the debtor could have exempted such property under subsection
27 (b) of this section if such property had not been
28 transferred, if—

- 26 (1) (A) such transfer was not a voluntary transfer of such
27 property by the debtor; and
- 27 (B) the debtor did not conceal such property; or
- 28 (2) the debtor could have avoided such transfer under
subsection (f)(1)(B) of this section.

1 dignity of judicial proceedings," and to "protect against a
2 litigant playing fast and loose with the courts." Russell v.
3 Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).

4 Trustee contends the Judgment Creditors were judicially
5 estopped from asserting the inconsistent position that the
6 fraudulent transfer was void and had never occurred when they
7 sought a judgment in state court "avoiding" the transfer and
8 restoring title to Cass, thereby admitting Cass had no equitable
9 interest in the Residence and that her transferred interest had to
10 be restored for their lien to attach. Trustee further argues that
11 the Judgment Creditors failed to preserve in the Avoidance
12 Judgment, which avoided the transfer under CCC §§ 3439.04 and
13 3439.07, the argument that the transfer could later be attacked as
14 void ab initio under CCC § 3439.10.

15 The bankruptcy court determined that judicial estoppel did
16 not apply because the Judgment Creditors had not taken
17 inconsistent positions in the Fraudulent Transfer Adversary and in
18 the Declaratory Relief Adversary. In re Cass, 476 B.R. at 613.
19 We agree. First, judicial estoppel generally applies only to bar
20 a party from making a factual assertion in a legal proceeding
21 which directly contradicts an earlier assertion made in the same
22 proceeding or a prior one. Russell, 893 F.2d at 1037. The
23 Judgment Creditors' request for relief of "avoiding" and setting
24 aside the fraudulent transfer is not a factual assertion, and
25 their complaint did not admit that Cass had no equitable interest
26 in the Residence. In fact, the Judgment Creditors alleged that
27 the transfer was a "fraudulent transfer within the meaning of
28 common law of fraudulent transfers and within the meaning of [CCC]

1 §§ 3439.04 and 3439.05, and should be avoided and set aside.”
2 California common law treats such transfers void as to creditors.
3 Hence, their position was not inconsistent from the earlier suit.
4 As for Trustee’s second argument, the bankruptcy court found, and
5 we agree, that the Judgment Creditors preserved their remaining
6 claims in the December 19 Stipulation and December 20 Order.

7 Accordingly, the bankruptcy court properly declined to apply
8 the doctrine of judicial estoppel in this case.

9 **C. The bankruptcy court did not err when it determined that Cass
10 had an equitable interest in the Residence to which the
11 judgment lien attached upon recordation of the Abstract.**

12 **1. Governing California law**

13 The CUFTA permits defrauded creditors to reach property in
14 the hands of a transferee. Fidelity Nat’l Title Ins. Co. v.
15 Schroeder, 179 Cal.App.4th 834, 840 (Cal. Ct. App. 2009)(citing
16 Mejia v. Reed, 331 Cal.4th 657, 663 (Cal. 2003)). It is
17 undisputed that Cass’s transfer of the Residence to Zeman was a
18 fraudulent transfer, and that Zeman was not a good faith
19 transferee under CCC § 3439.08.¹⁶ It is also undisputed that the
20 transfer was avoided under CCC §§ 3439.04 and 3439.07.

21 A judgment lien on real property is created by recording an
22 abstract of a money judgment with the county recorder.
23 CCP § 697.310(a); Weeks v. Pederson (In re Pederson), 230 B.R.
24 158, 160 (9th Cir. BAP 1999)(in California the recording of an
25 abstract of a money judgment in the county creates a judgment lien

26 ¹⁶ CCC § 3439.08(a) provides:

27 A transfer or an obligation is not voidable under paragraph
28 (1) of subdivision (a) of Section 3439.04, against a person
who took in good faith and for a reasonably equivalent value
or against any subsequent transferee or obligee.

1 on real property, which attaches to all debtor's interests in real
2 property in the county). Under CCP § 697.340(a), a recorded
3 judgment lien on real property attaches to all interests the
4 judgment debtor has in real property in the county where the lien
5 is created, including equitable interests, and subjects that
6 property to enforcement of the money judgment.

7 **2. Analysis**

8 The bankruptcy court initially found "as a factual matter"
9 that Cass had an equitable interest in the Residence after she
10 made the transfer to which the Judgment Creditors' lien attached
11 upon recording of the Abstract. In re Cass, 476 B.R. at 608.
12 Elaborating on this point, the court explained that Cass retained
13 an equitable interest in the Residence based on the agreement that
14 Zeman would reconvey title to Cass upon demand:

15 For all intents and purposes, the Residence was the
16 Debtor's property. She continued to enjoy the right to
17 use the property through her retention of the life estate
18 in the property, and she continued to control Zeman's
19 right to dispose of the property, as evidenced by the side
20 agreement between Debtor and Zeman to re-convey the
remainder interest. On this record, the court finds by a
preponderance of the evidence that the Debtor retained an
equitable interest in the Residence after she purportedly
transferred a remainder interest to her daughter.

21 Id. at 616. The bankruptcy court then held that because Cass had
22 at least an equitable interest in the Residence, despite the
23 purported transfer of the remainder interest to Zeman, and because
24 CCP § 697.340(a) provides that a judgment lien attaches to all
25 interests in real property, including equitable interests, the
26 Judgment Creditor's judgment lien attached to this interest when
27 they recorded the Abstract per CCP § 697.310(a). Id. at 616-17.

28 Trustee contends that the Abstract did not attach under

1 CCP § 697.340(a), because it was not filed until after the
2 transfer and, because the transfer was not avoided until May 29,
3 2008, the Abstract had nothing to which it could attach at the
4 time of recordation in 2005 other than Cass's life estate, which
5 lapsed upon her death. Trustee further argues that the Judgment
6 Creditors did not plead a constructive or resulting trust in the
7 Fraudulent Transfer Lawsuit, and the Avoidance Judgment did not
8 establish a constructive or resulting trust based on any alleged
9 equitable interest Cass retained in the Residence to which the
10 Abstract could attach.

11 The bankruptcy court did not address the issue of
12 constructive or resulting trusts in its decision. It determined,
13 as a matter of fact, that Cass retained an equitable interest in
14 the Residence because Zeman had agreed to reconvey the remainder
15 interest to Cass upon demand. Trustee has not disputed this fact.
16 He argues, however, in his reply brief, that the bankruptcy court
17 failed to cite any authority to support its conclusion that Cass
18 held an equitable interest in the Residence to which the Abstract
19 could have attached. Although we are free to reject this argument
20 because it was not raised in Trustee's opening brief, we exercise
21 our discretion to address it. See Smith v. Marsh, 194 F.3d 1045,
22 1052 (9th Cir. 1999)(issues not raised in appellant's opening
23 brief are deemed waived). We preface our discussion by noting
24 that we apply California law to determine the nature and extent of
25 a debtor's interest in property. See Butner v. United States,
26 440 U.S. 48, 54 (1979).

27 Under California law, a transferee of property transferred in
28 fraud of creditors by the transferor holds only nominal or bare

1 legal title to the property conveyed; the transferor retains the
2 beneficial and equitable interest in the conveyed property, which
3 remains liable to the debts of creditors. Sasaki v. Kai,
4 56 Cal.App.2d 406, 410 (Cal. Ct. App. 1942)(citing McAlvay v.
5 Consumer's Salt Co., 112 Cal.App. 383, 394 (Cal. Ct. App. 1931));
6 Alhambra Bldg. & Loan Assn. v. DeCelle, 47 Cal.App.2d 409, 412
7 (Cal. Ct. App. 1941)(grantee holds "mere naked legal title" of
8 fraudulently conveyed property when he holds it in secret trust
9 for the judgment debtor, who remains the beneficial owner of the
10 property); 30 Cal. Jur. 3d ENFORCEMENT OF JUDGMENTS § 118 (2013)
11 ("Where only nominal title is conveyed to a third party by the
12 judgment debtor, the debtor's beneficial interest in the property
13 is liable for the debts of subsequent creditors as well as those
14 existing at the time of the transfer."). See also Breeden v.
15 Smith, 120 Cal.App.2d 622, 664-66 (Cal. Ct. App. 1953)(although in
16 the context of a homestead exemption, the court recognized that a
17 judgment debtor who transfers his interest in property to the
18 transferee to hold in secret trust in fraud of creditors but who
19 remains in exclusive possession of that property retains full
20 equitable interest in the property; transferee holds only bare
21 legal title); and Putnam Sand & Gravel Co., Inc. v. Albers,
22 14 Cal.App.3d 722, 726 (Cal. Ct. App. 1971)(holding same); and
23 Tarlesson v. Broadway Foreclosure Invs., LLC, 184 Cal.App.4th 931,
24 937 (Cal. Ct. App. 2010)(citing Breeden and Albers and holding
25 same). This result is based on the principle that "one cannot be
26 the equitable owner of property and still have it exempt from his
27 debts." Sasaki, 56 Cal.App.2d at 410 (quoting McAlvay,
28 112 Cal.App. at 394).

1 Accordingly, we agree with the bankruptcy court that Cass
2 retained an equitable interest in the Residence, despite the
3 purported transfer. Because CCP § 697.340(a) provides that a
4 perfected judgment lien attaches to all debtor's interests in real
5 property, including equitable interests, the Judgment Creditor's
6 judgment lien attached to this equitable interest when they
7 recorded the Abstract per CCP § 697.310(a) on November 1, 2005.

8 As for Trustee's resulting trust theory, we fail to see where
9 he raised this argument before the bankruptcy court. As such, we
10 treat it as waived. See Ellsworth v. Lifescape Med. Assocs., P.C.
11 (In re Ellsworth), 455 B.R. 904, 919 (9th Cir. BAP 2011)(failing
12 to demonstrate that argument was properly raised to the bankruptcy
13 court can result in waiver).¹⁷

14 We also disagree with Trustee that the bankruptcy court erred
15 in considering the state court's comments that Cass "effectively
16 owned" the Residence to conclude that Cass had an equitable
17 interest in the Residence to which the Judgment Creditors' lien
18 could attach. Because these comments by the state court in the

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20 ¹⁷ Even if we did address this issue, we disagree with Trustee
21 that under Schroeder, supra at 29, which did not involve a CUFTA
22 claim, the Judgment Creditors were required to plead a resulting
23 trust cause of action if they wanted a ruling that the Abstract
24 attached to any equitable interest created by the resulting trust.
25 Schroeder did not hold that a creditor must plead a cause of
26 action for a resulting (or constructive) trust in order for an
27 abstract of judgment to attach to a fraudulent debtor's equitable
28 interest in property. Further, even if the Judgment Creditors
were required to plead this equitable remedy, because this case
was tried on the merits, the bankruptcy court could have afforded
such relief whether they requested it or not. See Am. Motorists
Ins. Co. v. Cowan, 127 Cal.App.3d 875, 883 (Cal. Ct. App. 1982)
(after a trial on the merits the court may afford any form of
relief supported by the evidence and as to which the parties were
on notice, whether requested in the pleadings or not)(citing
CCP § 580 and 3 Witkin, Cal. Procedure PLEADING, §§ 374, 376,
pp. 2038, 2039-40)(2d ed. 1971)).

1 Defamation Lawsuit were part of the undisputed facts in the Joint
2 PTO, which were deemed established at trial, the bankruptcy court
3 was well within its discretion to consider them. Further, nothing
4 in the bankruptcy court's decision indicates that it relied solely
5 on these comments to reach the conclusion that Cass owned an
6 equitable interest in the Residence at the time the Abstract was
7 recorded. To the contrary, the bankruptcy court reached this
8 conclusion on its own findings and application of California law.

9 **VI. CONCLUSION**

10 We conclude that Cass held an equitable interest in the
11 Residence at the time the Judgment Creditors recorded their
12 Abstract, and that equitable interest was subject to attachment by
13 her creditors. Because their perfected judgment lien attached to
14 Cass's equitable interest in the Residence pursuant to
15 CCP § 697.340(a), Trustee took the Residence subject to the
16 Judgment Creditors' senior interest when he avoided and recovered
17 it. As a result, the Declaratory Relief Judgment is AFFIRMED, and
18 Trustee must apply the sale proceeds from the Residence to satisfy
19 the Judgment Creditors' claims against Cass, except those
20 interests superior to their November 1, 2005 judgment lien.

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