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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NOT FOR PUBLICATION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

5	In re:)	BAP No.	CC-11-1221-MkHPa
6	BRIAN W. DAVIES,)	Bk. No.	6:10-bk-37900-SC
7	Debtor.)	Adv. No.	6:11-ap-01001-SC
8	_____)		
9	BRIAN W. DAVIES,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	DEUTSCHE BANK NATIONAL TRUST)		
13	COMPANY, as Trustee of the)		
14	Residential Asset)		
15	Securitization Trust 2007-A5)		
16	Mortgage Pass Through Series)		
17	2007-E, Under the Pooling and)		
18	Servicing Agreement Dated)		
19	March 1, 2007, Its Assigns)		
20	and/or Successors In Interest,)		
21	_____)		
22	Appellee.)		

Argued and Submitted on
November 16, 2011, at Pasadena, California

Filed - January 12, 2012

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding**

*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.

**This case was reassigned from the Honorable Thomas B.
Donovan to the Honorable Scott C. Clarkson on February 2, 2011.

1 Appearances: The Appellant argued pro se. Sarina Saluja of
2 Allen, Matkins, Leck, Gamble, Mallory & Natsis LLP
3 argued on behalf of Appellee Deutsche Bank
National Trust Company.

4 Before: MARKELL, HOLLOWELL, and PAPPAS, Bankruptcy Judges.
5

6 **INTRODUCTION**

7 This appeal arises from an adversary proceeding in Brian W.
8 Davies' ("Davies") Chapter 7¹ bankruptcy case. The bankruptcy
9 court granted Deutsche Bank National Trust Company's ("Deutsche")
10 motion for judgment on the pleadings and denied Davies' motion
11 for judgment on the pleadings or alternatively for summary
12 adjudication and judgment. For the reasons set forth below, we
13 AFFIRM.

14 **FACTS**

15 On November 16, 2006, Davies executed a promissory note (the
16 "Note") in favor of Universal American Mortgage Company of
17 California ("Universal Mortgage"). To secure his payment
18 obligations under the Note, Davies executed a deed of trust (the
19 "Deed of Trust") against real property located in Indio,
20 California (the "Property"). The Deed of Trust named Universal
21 Mortgage as lender and trustee,² and Mortgage Electronic
22

23 ¹Unless specified otherwise, all "Chapter" and "Section"
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037, all "Civil Rule" references are to
27 the Federal Rules of Civil Procedure, 1-86, and all "Evidence
28 Rule" references are to the Federal Rules of Evidence, Rules 101-
1103.

²NDEX West, LLC ("NDEX") succeeded Universal Mortgage as
(continued...)

1 Registration Systems, Inc. ("MERS") as beneficiary, acting solely
2 as nominee for lender and lender's successors and assigns.

3 On August 31, 2010, Davies filed a Chapter 7 bankruptcy
4 petition.

5 **1. The Relief from Stay Proceedings**

6 **a. The First Lift Stay Motion**

7 OneWest Bank, FSB ("OneWest") moved for relief from stay,
8 under Sections 362(d)(1) and 362(d)(2), as to the Property on
9 September 23, 2010 (the "First Lift Stay Motion").

10 In support of its motion, OneWest attached the declaration
11 of Brian Burnett, an employee of OneWest and "one of the
12 custodians of the books, records and files of Movant that pertain
13 to loans and extensions of credit given to Debtor(s) concerning
14 the Property" (the "Burnett Declaration"). The Burnett
15 Declaration listed outstanding principal at \$441,349.36; accrued
16 interest at \$53,222.85; late charges at \$1,673.42; attorney's
17 fees and other costs at \$700.00; and advances (including property
18 taxes and insurance) at \$17,141.96, for a total claim of
19 \$514,087.59. According to Burnett, since the time of the last
20 payment received, November 1, 2008, twenty-one prepetition
21 payments (totaling \$50,203.44) and one postpetition payment
22 (totaling \$2,390.64) had become due but remained unpaid.³

23
24 ²(...continued)
25 trustee on October 16, 2009. A "Notice of Default and Election
26 to Sell under Deed of Trust" was recorded on July 14, 2009. A
27 "Notice of Trustee's Sale," with a sale set for September 1,
28 2010, was recorded on August 9, 2010.

³Davies later testified in subsequent proceedings that he
(continued...)

1 In further support of its motion, OneWest attached a copy of
2 the Deed of Trust and a copy of the Note.⁴ OneWest also included
3 a copy of an assignment of the Deed of Trust. The assignment,
4 dated September 20, 2010, and signed by Brian Burnett on behalf
5 of MERS, assigned the beneficial interest in the Deed of Trust to
6 Deutsche, as Trustee of the Residential Asset Securitization
7 Trust 2007-A5, Mortgage Pass-Through Certificates, Series 2007-E,
8 under the Pooling and Servicing Agreement dated March 1, 2007
9 (the "2010 Assignment").⁵ In addition, OneWest attached a copy
10 of Davies' schedule D to its motion, which listed Universal
11 Mortgage as a secured creditor.⁶

12
13 ³(...continued)
14 made one payment to OneWest in April 2009 and that he made a
15 subsequent payment, which OneWest returned to him. According to
16 him, this was the last time he ever tendered a payment to any
17 entity with respect to the Property. Davies also testified that
18 he had not placed any amounts related to unpaid mortgage payments
19 in a segregated account.

20 ⁴The Note was endorsed three times. The first endorsement,
21 by Universal Mortgage to Opteum Financial Services, LLC ("Opteum
22 Financial") appears on a separate page not part of the original
23 Note. The second endorsement, by Opteum Financial to IndyMac
24 Bank, F.S.B. ("IndyMac") appears on the last page of the original
25 Note. The third endorsement is an endorsement in blank by
26 IndyMac; it too appears on the last page of the original Note.

27 ⁵The assignment proffered by OneWest was dated September 20,
28 2010 (the "2010 Assignment"), after the August 31, 2010
commencement of Davies' bankruptcy case. Another version of the
assignment, included as an exhibit to Davies' objection, is dated
August 10, 2009, and was recorded on August 20, 2009 (the "2009
Assignment"). This discrepancy remains without explanation.

⁶Davies subsequently amended his bankruptcy schedules. The
most recent amended version of schedule D did not include
Universal Mortgage as a secured creditor. Instead, Universal
Mortgage appeared on Davies' second amended schedule F, as an
(continued...)

1 Davies objected to the First Lift Stay Motion on October 6,
2 2010, challenging OneWest's standing to move for relief from
3 stay.

4 **b. The Amended Lift Stay Motion**

5 On October 19, 2010, OneWest filed an amended motion for
6 relief from stay (the "Amended Lift Stay Motion"). The first
7 page of the accompanying "Notice of Motion" named "OneWest, as
8 servicing agent for Deutsche Bank," and not simply "OneWest" as
9 the movant. All other pages of the Amended Lift Stay Motion
10 simply identified "OneWest" and not "OneWest, as servicing agent
11 for Deutsche Bank" as the movant. Attached to the Amended Lift
12 Stay motion was the same Burnett Declaration that accompanied the
13 First Lift Stay Motion. Other than this declaration, OneWest
14 attached no additional exhibits to this filing.

15 Davies filed an objection to the Amended Lift Stay Motion on
16 November 5, 2010, again challenging OneWest's standing to move
17 for relief from stay.

18 **c. Denial of the Amended Lift Stay Motion**

19 The bankruptcy court heard the Amended Lift Stay Motion on
20 November 18, 2010 and denied the motion, without prejudice, on
21 January 7, 2011. In its order, the bankruptcy court determined
22 that OneWest, and OneWest, as agent for Deutsche, did not have
23 standing to move for relief from stay and that Burnett's
24 Declaration lacked credibility, as he "signed [it] both as an
25 employee of Movant and as an agent for MERS." Bk. Dkt. No. 64.

26
27
28 ⁶(...continued)
unsecured nonpriority creditor with a disputed claim.

1 **2. The Adversary Proceeding**

2 **a. The Complaint**

3 On January 2, 2011, Davies initiated an adversary proceeding
4 (the "Adversary Proceeding")⁷ against Deutsche and various other
5 parties (collectively, the "Defendants"). The complaint (the
6 "Complaint")⁸ stated six causes of action and sought:

7 (1) declaratory relief as to the nature, extent, and
8 validity of Deutsche's interest in the Property,
9 specifically, that the Deed of Trust giving rise to
10 Deutsche's interest in the Property was null and void
11 and that the amount of Deutsche's claim was \$0.00;⁹

12 (2) declaratory relief as to the status of Deutsche's
13 claim, that is, that the Deed of Trust had no value, as
14 being null and void, and that, the amount of Deutsche's
15 "unsecured" claim was \$0.00 (collectively, the
16

17 ⁷In connection with the Adversary Proceeding, the parties
18 submitted several requests for judicial notice. The bankruptcy
19 court took judicial notice of all of the documents those requests
20 identified. Among these documents were copies of SEC filings
21 (including the Pooling and Servicing Agreement) concerning the
22 Residential Asset Securitization Trust ("RAST"), copies of the
23 Note, Deed of Trust, the 2009 Assignment, and documents produced
24 in response to subpoenas issued in the Adversary Proceeding.

25 ⁸In the Complaint, Davies alleged that "[t]he 'Origination
26 Funds' for the 'Note' came from another undisclosed source," that
27 the "indebtedness to this 'Note' remain[ed] uncertain." Compl.
28 ¶ 24.

25 ⁹As to this first declaratory relief claim, Davies alleged
26 "that he holds an interest in the Property free and clear of any
27 interest of defendants, in that the lien evidenced by the 'Deed
28 of Trust' and its subsequent assignments has no value since it is
wholly 'unsecured', and that accordingly, the 'Deed of Trust' is
'null and void.'" Compl. ¶ 82.

1 Declaratory Relief Claims");¹⁰

2 (3) damages for an alleged violation of the noticing
3 requirements set forth in Section 1641(g) of the Truth
4 in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f (the
5 "TILA Claim");

6 (4) damages for fraud in conveyance allegedly arising from
7 the transactions involving the Deed of Trust (the
8 "Fraud Claim");

9 (5) damages for libel (the "Libel Claim"); and

10 (6) quiet title as to the Property (the "Quiet Title
11 Claim").¹¹

12 Adv. Dkt. No. 1.

13 **b. The Bankruptcy Court Dismisses Davies' Claims Without**
14 **Leave to Amend**

15 On April 5, 2011, Deutsche moved for judgment on the
16 pleadings ("Deutsche's Motion for Judgment"), seeking dismissal
17 of Davies' claims. Davies also moved for judgment on the
18 pleadings, or alternatively, summary adjudication and judgment
19 ("Davies' Motion for Judgment") on April 5, 2011.

20 In his motion, Davies argued that issue preclusion and
21 judicial estoppel precluded Deutsche from relitigating the issue
22

23 ¹⁰In connection with the second declaratory relief claim,
24 Davies alleged that "the lien evidenced by the 'Deed of Trust'
25 has no value since it is wholly unsecured" and that "the 'Deed of
26 Trust' and its subsequent assignments are null and void." Compl.
¶ 88.

27 ¹¹With respect to his Quiet Title Claim, Davies alleged that
28 Defendants "claim[ed] an interest adverse to Plaintiff in the
above-described property." Compl. ¶ 116.

1 of standing, as to which the bankruptcy court ruled when it
2 denied OneWest relief from stay. On that basis, Davies contended
3 he was entitled to a declaration that Deutsche held no interest
4 in the Property. Moreover, Davies maintained that if his claims
5 for declaratory relief and fraud "[we]re held to be accurate and
6 Judgment [wa]s in Plaintiff's favor this Claim [the Quiet Title
7 Claim] would be deemed proven and Quiet Title would be the
8 remedy." Davies' Mot. for J. at 13.

9 The bankruptcy court heard both motions on May 3, 2011.¹²
10 On May 10, 2011, the bankruptcy court granted Deutsche's Motion
11 for Judgment and denied Davies' Motion for Judgment.¹³

12 **i. The Declaratory Relief Claims**

13 As to Davies' Declaratory Relief Claims, the bankruptcy
14 court reasoned that "Plaintiff appear[ed] to predicate his
15 declaratory relief claims on his allegation that MERS' Assignment
16 of the Deed of Trust to Defendant was a 'legal nullity' and that
17 Davies s[ought] a determination that the Deed of Trust is 'null
18

19 ¹²Davies submitted an audio recording of the May 3, 2011
20 proceedings to this Panel. We decline to consider the contents
21 of such audio recording, as it is not an official record of the
22 proceeding, and in any event, is irrelevant to our analysis and
resolution of this appeal.

23 ¹³As for Davies' request for summary adjudication, the
24 bankruptcy court determined that the filing did not comply with
25 the Local Bankruptcy Rules for the Central District of
26 California, specifically, Local Rules 7056-1(b) (requiring movant
27 to serve and file his notice of motion and motion at least
28 42 days before the hearing date) and 7056-1(b)(2) (requiring
movant to include a statement of uncontroverted facts and
conclusions of law and proposed summary judgment). The
bankruptcy court denied summary adjudication as to each claim on
that basis.

1 and void.'" Memo. Op. re Deutsche's Mot. for J. at 7. On that
2 basis, the bankruptcy court concluded that the Declaratory Relief
3 Claims "address[ed] the same substantive concerns identified in
4 the sixth claim for relief, the quiet title action." Id. at 7.

5 The bankruptcy court thus dismissed the Declaratory Relief
6 Claims without leave to amend, also rejecting Davies' issue
7 preclusion and judicial estoppel arguments, as the order denying
8 OneWest relief from stay did "not contain any specific findings
9 regarding Defendant Deutsche's standing and ownership interests
10" Id.

11 **ii. The TILA Claim**

12 The bankruptcy court next determined that Davies' TILA Claim
13 was deficient based on his failure to allege that the claimed
14 noncompliance with TILA's notice requirements caused him to incur
15 actual damages. For that reason, the bankruptcy court dismissed
16 the TILA claim. This dismissal originally included leave to
17 amend. But at Davies' request that such leave be waived, the
18 bankruptcy court denied leave to amend.

19 **iii. The Fraud Claim**

20 The bankruptcy court concluded that Davies' Fraud Claim was
21 "indecipherable on its face." Id. at 8. Because the bankruptcy
22 court could not "make out any cognizable legal theory which the
23 Plaintiff is asserting," it dismissed the Fraud Claim without
24 leave to amend. Id. at 8.

25 **iv. The Libel Claim**

26 With respect to the Libel Claim, the bankruptcy court
27 determined that Davies "ha[d] not alleged any specific statements
28 made by Deutsche," that "[t]he only allegation [wa]s with respect

1 to 'conduct,'" and that Davies' "failure to identify and state
2 the substance of the statements" rendered the claim insufficient.
3 Id. at 8. On these grounds, the bankruptcy court dismissed
4 Davies' Libel Claim without leave to amend.

5 **v. The Quiet Title Claim**

6 As to Davies' last claim, the bankruptcy court determined
7 that Davies did not allege "the date as of which determination is
8 sought," include "in his prayer a request to quiet title against
9 adverse claims," or "allege that he can tender the amount
10 borrowed." Id. at 10. In addition, the bankruptcy court
11 concluded that:

12 The quiet title action merely attacks the foreclosure
13 process and does not address a legitimate title dispute.
14 If foreclosure is successful, title will change, and the
15 quiet title claim is an improper means to challenge
foreclosure. Nothing is available to . . . resurrect the
. . . quiet title cause of action, which is subject to
dismissal.

16 Id. at 10 (citing Lopez v. Chase Home Fin., LLC, No. CV F 09-0449
17 LJO GSA, 2009 U.S. Dist. LEXIS 35206 (E.D. Cal. Apr. 9, 2009))
18 (internal quotations omitted). For these reasons, the bankruptcy
19 court dismissed the Quiet Title Claim without leave to amend.

20 **3. The Appeal**

21 On May 6, 2011, Davies timely appealed both the order
22 granting Deutsche's Motion for Judgment and the order denying
23 Davies' Motion for Judgment.¹⁴

25 ¹⁴Though initially premature given that the bankruptcy court
26 did not enter the relevant orders until May 10, 2011, Davies
filed a timely notice of appeal. See Rule 8002(a).

27 After filing his appeal, Davies requested that this Panel
28 take judicial notice of various documents. His first and second
(continued...)

1 exercise of discretion denying leave to amend." Albrecht v.
2 Lund, 845 F.2d 193, 195 (9th Cir. 1988). Even though the above-
3 cited cases refer to the use of the abuse-of-discretion standard,
4 the Ninth Circuit also has held that "[d]ismissal without leave
5 to amend is improper, unless it is clear, upon de novo review,
6 that the complaint could not be saved by any amendment.'" Intri-
7 Plex Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1056 (9th
8 Cir. 2007) (quoting Sparling v. Daou (In re Daou Sys.), 411 F.3d
9 1006, 1013 (9th Cir. 2005)).

10 We review the bankruptcy court's denial of a motion for
11 summary judgment de novo. Boyajian v. New Falls Corp. (In re
12 Boyajian), 564 F.3d 1088, 1090 (9th Cir. 2009); Lopez v.
13 Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103
14 (9th Cir. BAP 2007). Viewing the evidence in the light most
15 favorable to the non-moving party, we determine whether the
16 bankruptcy court correctly found that there are no genuine issues
17 of material fact and that the moving party is entitled to
18 judgment as a matter of law. Jesinger v. Nev. Fed. Credit Union,
19 24 F.3d 1127, 1130 (9th Cir. 1994).

20 We review questions regarding the application of "res
21 judicata, including issue and claim preclusion, de novo, as mixed
22 questions of law and fact in which legal questions predominate."
23 Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir.
24 BAP 2006), aff'd, 506 F.3d 956 (9th Cir. BAP 2007) (citing Robi
25 v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Alary
26 Corp. v. Sims (In re Associated Vintage Grp., Inc.), 283 B.R. 549,
27 554 (9th Cir. BAP 2002)). "Once it is determined that preclusion
28 doctrines are available to be applied, the actual decision to

1 apply them is left to the trial court's discretion." Khaligh,
2 338 B.R. at 823 (citing Robi, 838 F.2d at 321) (further citations
3 omitted).

4 We review a bankruptcy court's application of judicial
5 estoppel for abuse of discretion. Cheng v. K&S Diversified
6 Invs., Inc. (In re Cheng), 308 B.R. 448, 452 (9th Cir. BAP 2004)
7 (citing Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782
8 (9th Cir. 1999)).

9 DISCUSSION

10 **A. The Bankruptcy Court Properly Granted Deutsche's Motion for** 11 **Judgment and Properly Denied Davies' Motion for Judgment**¹⁵

12 The bankruptcy court evaluates motions for judgment on the
13 pleadings under Rule 7012(b), which incorporates Civil Rule
14 12(c). Fed. R. Bankr. P. 7012(b) ("Rule 12(b)-(i) F.R.Civ.P.
15 applies in adversary proceedings."). "Where a [motion under
16 Civil Rule] 12(c) is used to raise the defense of failure to
17 state a claim, the motion for judgment on the pleadings faces the
18 same test as a motion under [Civil Rule] 12(b)(6)." McGlinchy v.
19 Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988).

20 Under Civil Rule 12(b)(6), a claim for relief may be
21 dismissed for "failure to state a claim upon which relief can be
22 granted." Civil Rule 12(b)(6). To avoid dismissal, the facts,
23 when accepted as true, must "state a claim to relief that is
24 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S.

25
26 ¹⁵Davies' failure to provide a statement of uncontroverted
27 facts and conclusions of law, coupled with the deficiencies in
28 Davies' Complaint and Davies' failure to address any defenses
asserted by Deutsche, convinces us that the bankruptcy court
properly denied summary adjudication as to all claims.

1 544, 570, 127 S. Ct. 1955, 1960 (2007). If a party's complaint
2 has "not nudged their claims across the line from conceivable to
3 plausible, their complaint must be dismissed." Id.

4 When evaluating a motion to dismiss, "[t]wo working
5 principles" must be considered: "[f]irst, the tenet that a court
6 must accept a complaint's allegations as true is inapplicable to
7 threadbare recitals of a cause of action's elements when only
8 'supported by mere conclusory statements'"; and "[s]econd,
9 determining whether a complaint states a plausible claim is
10 context-specific requiring the court to draw on its experience
11 and common sense." Ashcroft v. Iqbal, 566 U.S. ___, ___, 129 S.
12 Ct. 1937, 1940 (2009) (citing Twombly, 550 U.S. at 555, 556)).

13 Where a complaint cannot be saved by any amendment,
14 dismissal without leave to amend is proper. Intri-Plex Techs.,
15 Inc., 499 F.3d at 1056 (quoting In re Daou Sys., 411 F.3d at
16 1013).

17 **1. The Declaratory Relief Claims**

18 **a. The Bankruptcy Court Properly Dismissed the** 19 **Declaratory Relief Claims**

20 When an action for declaratory relief is duplicative of the
21 relief sought under another cause of action, dismissal of the
22 declaratory relief claim is proper. Swartz v. KPMG LLP, 476 F.3d
23 756, 766 (9th Cir. 2007) (per curiam) (affirming the district
24 court's dismissal of a request for a declaration as to
25 defendants' liability for damages sought under other causes of
26 action). See also Mangindin v. Wash. Mut. Bank, 637 F. Supp. 2d
27 700, 707-08 (N.D. Cal. 2009) (district court dismissed
28 declaratory relief action where, among the relief sought, was a

1 declaration that defendants' security interest in the subject
2 property was void, which relief plaintiffs sought under other
3 causes of action).

4 Here, the bankruptcy court dismissed Davies' Declaratory
5 Relief Claims because it determined that the relief requested
6 under the Declaratory Relief Claims duplicated the relief request
7 under the Quiet Title Claim. We agree.

8 Davies' goal in bringing the Declaratory Relief claims was
9 to obtain a determination that he owns the Property free and
10 clear of all other claims and interests. The Declaratory Relief
11 Claims request the same relief and under California law this
12 duplicates the cause of action. In Ephraim v. Metropolitan Trust
13 Co. of Cal., 28 Cal. 2d 824, 172 P.2d 501 (1946), for example,
14 the California Supreme Court stated:

15 a complaint which consists of two counts, one to quiet
16 title to real property and the other, as incidental to
17 the first count, to have declared void an instrument
18 under which particular defendants assert title states
19 only one cause of action. . . . And where, as is true
20 in the present pleading, the count to quiet title in
21 regard to particularly named defendants clearly shows
22 that it is based upon the same facts which are pleaded
23 in the cause to remove a cloud, a general demurrer of
24 those defendants should be sustained if the second
25 count reveals a defect in plaintiff's title or does not
26 state a cause of action to remove a cloud.

27 Ephraim, 28 Cal. 2d at 833, 172 P.2d at 507 (citations omitted).

28 See also Dabney v. Philleo, 38 Cal. 2d 60, 68, 237 P.2d 648, 653
(1951) (when quiet title and declaratory relief action based upon
same facts, only one cause of action stated).

Here, Davies' Declaratory Relief Claims are wholly
derivative of his quiet title claim; were he to quiet title in
the manner requested, it would be pointless to separately declare

1 that result. Since Ephraim and Dabney require collapsing the two
2 claims into one cause of action, the dismissal of the Declaratory
3 Relief Claims reaches the sensible result that Davies should not
4 be able to simultaneously seek to quiet title and a declaratory
5 judgment as to that same title.¹⁶

6 The Declaratory Relief Claims are functionally equivalent to
7 the Quiet Title Claim in another respect. We acknowledge that
8 Davies presents his Declaratory Relief Claims as claims that
9 typically arise in the bankruptcy context, i.e., a request for a
10 determination as to the validity and extent of a lien or the
11 status of a creditor's claim. However, Davies seeks a
12 declaration that the Deed of Trust is null and void and that, to
13 the extent Deutsche asserts an interest in the Property based on
14 that Deed of Trust or on a claim arising from that Deed of Trust,

16 ¹⁶In those California cases in which declaratory relief has
17 been allowed along with a quiet title action, there has been some
18 form of remedy requested in the declaratory relief action that
19 could not be granted in a quiet title action alone. See, e.g.,
20 Ephraim, 28 Cal. 2d 824, 172 P.2d 501 (quiet title action joined
21 with declaratory relief action as to cancellation of instruments
22 purporting to transfer property in trust); Marra v. Aetna Const.
23 Co., 15 Cal. 2d 375, 101 P.2d 490 (1940) (quiet title action as
24 to ownership joined with declaratory relief action as to
25 enforceability of prior deed covenants that allegedly ran with
26 the land).

27 We also do not believe that California's 1980 codification
28 of the quiet title action disturbs the precedential effect of
Ephraim and Dabney and the other decisions cited. The 1980
codification essentially preserved the common law cause of
action, and strengthened it by permitting the action to be in
rem, thus binding unknown parties as well as those that are
named. See, e.g., Cal. Civ. Proc. Code §§ 762.060-762.070
(unknown defendants). This enlargement of the relief permitted
buttresses Ephraim's and Dabney's holdings, as the quiet title
action is thus even more the single repository of the type of
relief provided.

1 it has no interest or claim. In short, the Declaratory Relief
2 Claims reduce to a challenge against any interest of, or claim
3 by, Deutsche that arises from that Deed of Trust, which are the
4 same claims and interests that are the subject of the Quiet Title
5 Claim.

6 Finally, Davies' own allegations support our
7 characterization of these claims. Davies alleged "that he holds
8 an interest in the Property free and clear of any interest of
9 defendants, in that the lien evidenced by the 'Deed of Trust' and
10 its subsequent assignments has no value since it is wholly
11 'unsecured', and that accordingly, the 'Deed of Trust' is 'null
12 and void.'" Compl. ¶ 82. He also alleged that "the lien
13 evidenced by the 'Deed of Trust' has no value since it is wholly
14 unsecured" and that "the 'Deed of Trust' and its subsequent
15 assignments are null and void." Compl. ¶ 88. He further alleged
16 that Defendants "claim[ed] an interest adverse to Plaintiff in
17 the above-described property" based on that "legal nullity."
18 Compl. ¶¶ 79, 116. These are allegations that would be at issue
19 in any quiet title action.

20 Davies himself seems to have conceded our point - that his
21 Declaratory Relief Claims are duplicative of his Quiet Title
22 Claim - in his Motion for Judgment, maintaining that if his
23 claims for declaratory relief and fraud "[we]re held to be
24 accurate and Judgment [wa]s in Plaintiff's favor this Claim [the
25 Quiet Title Claim] would be deemed proven and *Quiet Title would
26 be the remedy.*" Davies' Mot. for J. at 13 (emphasis supplied).

27 Davies' Declaratory Relief and Quiet Title Claims relate to
28 the same Property. They involve the same interests. Davies'

1 objective under each cause of action is the same - to quiet
2 title. To that end, an action to quiet title as governed by
3 California law is the appropriate vehicle; an equivalent request
4 for declaratory relief is not. For these reasons, we conclude
5 that the Declaratory Relief Claims are redundant of the relief
6 sought under the Quiet Title Claim. While Davies may have
7 demonstrated some ingenuity in his attempt to use a claim for
8 declaratory relief as an additional apparatus by which to obtain
9 the same relief sought under another cause of action, the law
10 does not accommodate such ingenuity. We therefore conclude that
11 the bankruptcy court properly dismissed Davies' Declaratory
12 Relief Claims.

13 **b. The Bankruptcy Court did not Err When it Denied**
14 **Davies Leave to Amend the Declaratory Relief**
15 **Claims**

16 We do not see how any amendment could save the Declaratory
17 Relief Claims from being subsumed under the Quiet Title Claim.
18 As we have discussed above, the Declaratory Relief Claims are
19 neither independent nor distinct from the Quiet Title Claim. We
20 therefore conclude that the bankruptcy court properly denied
21 leave to amend as to the Declaratory Relief Claims.

22 **2. The TILA Claim**

23 **a. The Bankruptcy Court Properly Dismissed the TILA**
24 **Claim**

25 TILA requires that "not later than 30 days after the date on
26 which a mortgage loan is sold or otherwise transferred or
27 assigned to a third party, the creditor that is the new owner or
28 assignee of the debt shall notify the borrower in writing of such
transfer." 15 U.S.C. § 1641(g)(1). The notice must include:

- 1 (A) the identity, address, telephone number of the new
creditor;
2 (B) the date of transfer;
3 (C) how to reach an agent or party having authority to
act on behalf of the new creditor;
4 (D) the location of the place where transfer of ownership
of the debt is recorded; and
5 (E) any other relevant information regarding the new
creditor.

6 Id. Actions under TILA "may be brought . . . within one year
7 from the date of the occurrence of the violation." 15 U.S.C.
8 § 1640(e). See also Consumer Solutions Reo LLC v. Hillery, 658
9 F. Supp. 2d 1002, 1007-08 (N.D. Cal. 2009) (dismissing TILA
10 damages claim as barred by the one-year statute of limitations).

11 Davies' TILA Claim was barred by the one-year statute of
12 limitations on such claims.¹⁷ Contrary to Davies' suggestion
13 that the date of the 2010 Assignment should be used for the
14 purposes of his TILA Claim, the bankruptcy court properly took
15 judicial notice of the fact that the 2009 Assignment from MERS to
16 Deutsche was dated August 10, 2009, and recorded on August 20,
17 2009. See Mack v. S. Bay Beer Distribs. Inc., 798 F.2d 1279,
18 1282 (9th Cir. 1986) (stating that "matters of public record" are
19 subject to judicial notice), overruled in part on other grounds
20 by, Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104

21
22 ¹⁷The bankruptcy court did not rely on the statute of
23 limitations in reaching its decision. Rather, it dismissed the
24 TILA claim based on Davies' failure to plead actual damages. As
25 we may affirm the bankruptcy court's decision on any grounds
26 fairly supported by the record, see Wirum v. Warren (In re
27 Warren), 568 F.3d 1113, 1116 (9th Cir. 2009) (citations omitted),
28 we affirm the bankruptcy court's decision to dismiss Davies' TILA
claim on the grounds that the claim was time barred. For this
reason, we need not address Davies' argument that the bankruptcy
court erred when it determined that to state a cause of action
under TILA, a plaintiff must plead actual damages.

1 (1991); Rosenfeld v. JP Morgan Chase Bank, N.A., 732 F. Supp. 2d
2 952, 959 (N.D. Cal. 2010) (taking judicial notice of documents
3 routinely recorded in a county's official records). Any alleged
4 violation of TILA would thus have occurred in September 2009.
5 The Complaint was filed on January 7, 2011, well outside of the
6 statute of limitations period, which lapsed in September 2010.
7 We therefore conclude that the bankruptcy court properly
8 dismissed Davies' TILA Claim.

9 **b. The Bankruptcy Court did not Err When it Denied**
10 **Davies Leave to Amend the TILA Claim**

11 The bankruptcy court originally dismissed Davies' TILA claim
12 with leave to amend but subsequently denied leave to amend on
13 Davies' request. On that basis, we conclude that the bankruptcy
14 court properly denied leave to amend as to the TILA Claim.

15 Were Davies' waiver somehow insufficient to insulate the
16 bankruptcy court's denial of leave to amend from reversal,
17 however, Davies' TILA Claim was barred by the one-year statute of
18 limitations on such claims. Thus, any amendment would be futile,
19 as no amendment could cure this defect. Therefore, we conclude
20 that the bankruptcy court's denial of leave to amend was also
21 proper on these grounds.

22 **3. The Fraud Claim¹⁸**

23 **a. The Bankruptcy Court Properly Dismissed the Fraud**
24 **Claim**

25
26

¹⁸Davies' Complaint describes this cause of action as "fraud
27 in conveyance." We read this to mean "fraud" as under California
28 law since we cannot otherwise decipher the legal theory to which
these allegations supposedly relate.

1 "Under California law, the indispensable elements of a
2 fraud claim include a false representation, knowledge of its
3 falsity, intent to defraud, justifiable reliance, and damages."
4 See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir.
5 2003) (internal quotations and citations omitted).

6 Davies' allegations as to this claim were as follows: "that
7 neither 'MERS' nor [Deutsche] paid any consideration for the
8 'Promissory Note;'" "that if [Deutsche] purchased the 'Promissory
9 Note' and paid 'MERS,' such assignment would constitute
10 fraudulent conveyance"; that the Defendants committed fraud by
11 processing falsified assignments of the Deed of Trust; and that
12 Deutsche falsely represented that they were entitled to payment
13 under the Note and that other representations regarding MERS were
14 false. Compl. ¶¶ 102-105. Davies also alleged that "[i]n
15 reliance on these representations, [he] was induced to make
16 payments to these Defendants when they were not entitled to such
17 money." Compl. ¶ 106.

18 Davies did not specify the dates on which any of these
19 alleged fraudulent representations occurred. He did not provide
20 any details as to the content of these alleged
21 misrepresentations. In fact, Davies himself refers to some of
22 these transactions as "unknown" or having occurred by "an unknown
23 mechanism." Compl. ¶¶ 14, 16.

24 Davies similarly did not provide specific dates on which he
25 made payments, which he made allegedly as a result of the
26 fraudulent representations at issue, the amounts of these
27 payments, or the methods of payment. In short, Davies'
28 allegations did not include, as the heightened pleading standard

1 for fraud requires, "the who, what, when, where, and how of the
2 misconduct charged." See Vess, 317 F.2d at 1106 (internal
3 quotations and citations omitted). See also Civil Rule 9(b) ("In
4 alleging fraud . . . a party must state with particularity the
5 circumstances constituting fraud"). For these reasons,
6 we conclude that the bankruptcy court properly dismissed the
7 Fraud Claim.

8 **b. The Bankruptcy Court did not Err When it Denied**
9 **Davies Leave to Amend the Fraud Claim**

10 Even if Davies' allegations satisfied the applicable
11 heightened pleading requirements, however, Davies could not offer
12 any additional allegations to state a cause of action for fraud.
13 The fact that any and all payments he tendered on the Note pre-
14 date the August 2009 Assignment to Deutsche is fatal to any claim
15 of fraud. We do not see how, if Davies made no payments after
16 the 2009 Assignment, he can establish that he justifiably relied
17 on any allegedly fraudulent representations made in connection
18 with that assignment. For this reason, we conclude that the
19 bankruptcy court properly denied leave to amend as to the Fraud
20 Claim.

21 **4. The Libel Claim**

22 **a. The Bankruptcy Court Properly Dismissed the Libel**
23 **Claim**

24 Under California law, "[l]ibel is a false and unprivileged
25 publication by writing, printing, picture, effigy, or other fixed
26 representation to the eye, which exposes any person to hatred,
27 contempt, ridicule, or obloquy, or which causes him to be shunned
28 or avoided, or which has a tendency to injure him in his

1 occupation." Cal. Civ. Code § 45. "Publication means
2 communication to some third person who understands the defamatory
3 meaning of the statement and its application to the person to
4 whom reference is made." Smith v. Maldonado, 72 Cal. App. 4th
5 637, 645, 85 Cal. Rptr. 2d 397, 402 (1999).

6 In the Complaint, Davies alleged that "[t]he conduct of
7 Defendants constitutes libel that tends to defame, disparage, and
8 injure Plaintiff in his business and reputation and has also
9 caused pain and suffering," that "such libel has occurred on a
10 continuing basis from approximately July 2009 through the
11 present," and that such conduct was "willful, fraudulent,
12 malicious and oppressive." Compl. ¶ 112.

13 We agree with the bankruptcy court that conduct is
14 insufficient to support a cause of action for libel under
15 California law. Without allegations as to any communications, of
16 which the Complaint is entirely devoid, we conclude that the
17 bankruptcy court properly dismissed the Libel Claim.

18 **b. The Bankruptcy did not Err When it Denied Davies**
19 **Leave to Amend the Libel Claim**

20 Even if Davies had alleged publication in a manner that
21 satisfied one of the predicates to state a cause of action for
22 libel, we do not see how such publication would give rise to the
23 type of injury contemplated by the statute. We are not prepared
24 to conclude that any communication relating to the events in this
25 case would support a cause of action for libel under California
26 law. For these reasons, we conclude that any amendment as to
27 this claim would be futile and that the bankruptcy court properly
28 denied Davies leave to amend the Libel Claim.

1 **5. The Quiet Title Claim**

2 **a. The Bankruptcy Court Properly Dismissed the Quiet**
3 **Title Claim**

4 To state a cause of action to quiet title under California
5 law, a plaintiff must provide a verified complaint, which
6 includes:

7 (a) A description of the property that is the subject of
8 the action. . . . In the case of real property, the
9 description shall include both its legal description and
its street address or common designation, if any.

10 (b) The title of the plaintiff as to which a
determination under this chapter is sought and the basis
11 of the title. . . .

12 (c) The adverse claims to the title of the plaintiff
against which a determination is sought.

13 (d) The date as of which the determination is sought. If
14 the determination is sought as of a date other than the
date the complaint is filed, the complaint shall include
15 a statement of the reasons why a determination as of that
date is sought.

16 (e) A prayer for the determination of the title of the
17 plaintiff against the adverse claims.

18 Cal. Civ. Proc. Code § 761.020. “[U]nder California law, a
19 plaintiff seeking to quiet title in the face of a foreclosure
20 must allege tender or an offer to tender of [sic] the amount
21 borrowed.” Manqindin, 637 F. Supp. 2d at 712 (citations
22 omitted). See also Nool v. Homeq Servicing, 653 F. Supp. 2d
23 1047, 1056 (E.D. Cal. 2009) (“A mortgagor of real property
24 cannot, without paying his debt, quiet his title against the
25 mortgagee.”) (citation omitted).

26 Among other deficiencies in Davies’ Complaint, the
27 bankruptcy court determined that Davies’ failure to allege tender
28 or an offer of tender of the amount borrowed rendered this claim

1 deficient. We agree. Even if the other allegations in Davies'
2 Complaint otherwise stated a claim to quiet title, this failure
3 in and by itself would be sufficiently fatal to this cause of
4 action. For this reason, we conclude that the bankruptcy court
5 properly dismissed the Quiet Title Claim.

6 **b. The Bankruptcy Court did not Err When it Denied**
7 **Davies Leave to Amend the Quiet Title Claim**

8 Davies has filed a Chapter 7 bankruptcy petition. Any
9 allegation that he is able to tender the amount borrowed would be
10 wholly inconsistent with his bankruptcy filing and his bankruptcy
11 schedules, which reflect that he is insolvent. Moreover, Davies
12 has not made payments since April 2009 nor has he placed any
13 amounts relating to unpaid mortgage payments in a segregated bank
14 account. For these reasons, any amendment to the Complaint as to
15 this claim, specifically as to whether Davies is able to tender
16 the amount borrowed, would be futile. We thus conclude that the
17 bankruptcy court properly denied leave to amend as to the Quiet
18 Title Claim.

19 **B. The Bankruptcy Court Properly Determined the Doctrines of**
20 **Issue Preclusion and Judicial Estoppel did not Apply**

21 **1. Issue Preclusion**

22 Federal common law determines the preclusive effect of a
23 federal judgment. Taylor v. Sturgell, 553 U.S. 880, 891 (2008);
24 W. Sys., Inc. v. Ulloa, 958 F.2d 864, 871 n.11 (9th Cir. 1992)
25 (citing Robi, 838 F.2d at 322). The party asserting issue
26 preclusion must establish that (1) the issue was actually decided
27 by a court in an earlier action, (2) the issue was necessary to
28 the judgment in that action, and (3) there was a valid and final

1 judgment. New Hampshire v. Maine, 532 U.S. 742, 748 (2001)
2 (citing Restatement (Second) of Judgments §§ 17, 27 (1980))
3 (further citations omitted).

4 The bankruptcy court properly rejected Davies' argument that
5 the order denying relief from stay on standing grounds precluded
6 Deutsche from advocating its position here. As has been
7 previously explained by this Panel:

8 Relief from stay proceedings . . . are primarily
9 procedural; they determine whether there are sufficient
10 countervailing equities to release an individual creditor
11 from the collective stay. One consequence of this broad
12 inquiry is that a creditor's claim or security is not
13 finally determined in the relief from stay proceeding.
14 Johnson v. Righetti (In re Johnson), 756 F.2d 738, 740-41
15 (9th Cir. 1985) ("Hearings on relief from stay are thus
16 handled in a summary fashion. The validity of the claim
17 or contract underlying the claim is not litigated during
18 the hearing."); Grella v. Salem Five Cent Sav. Bank,
19 45 F.3d 26, 33 (1st Cir. 1994) ("We find that a hearing
20 on a motion for relief from stay is merely a summary
21 proceeding of limited effect"); First Fed. Bank
22 v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir.
23 BAP 2004).

24 Veal, 450 B.R. at 914. For this reason, we conclude that the
25 bankruptcy court properly determined that the order denying
26 relief from stay on standing grounds did not have issue
27 preclusive effect.

28 **2. Judicial Estoppel**

29 "Judicial estoppel is an equitable doctrine that precludes a
30 party from gaining an advantage by asserting one position, and
31 then later seeking an advantage by taking a clearly inconsistent
32 position." Hamilton, 270 F.3d at 782 (citing Rissetto v.
33 Plumbers & Steamfitters Local 343, 94 F.3d 597, 600-01 (9th Cir.
34 1996)). The aim of the doctrine is not only to prevent a party
35 from gaining an advantage by asserting inconsistent positions,

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

5 We have tried to parse Davies' arguments that Deutsche is
6 somehow judicially estopped from asserting its position in this
7 case. First, Davies argues that Deutsche's position in the lift
8 stay proceedings, based on an assignment from MERS, as nominee
9 for Universal Mortgage, is inconsistent with Deutsche's current
10 position: that it is the beneficiary under the Deed of Trust.
11 Second, Davies argues that Deutsche, "as Trustee holds title for
12 the benefit of a Trust that has been closed for over 3 years.
13 Such inconsistency is judicially stopped [sic] by the judicial
14 finding . . . that [Deutsche] has no legal standing." Davies'
15 Mot. for J. at 8. Third, Davies argues that Deutsche is
16 judicially estopped from denying a principal-agent relationship
17 between it and OneWest. This last argument is based on a case as
18 to which this Panel denied judicial notice on October 6, 2011.
19 See supra note 14.

20 To the extent the first two arguments are mere variants of
21 Davies' argument before the bankruptcy court, we agree with the
22 bankruptcy court that Davies did not satisfy the predicates
23 necessary to assert judicial estoppel. Thus, the bankruptcy
24 court properly declined to apply the doctrine in this case.

25 We also conclude that Davies' third argument fails, but for
26 a different reason. Davies presents it for the first time on
27 appeal. By failing to demonstrate that he properly presented
28 this argument to the bankruptcy court, he has waived the

1 argument, and we need not address the merits here. See Ellsworth
2 v. Lifescape Med. Assocs., P.C. (In re Ellsworth), 455 B.R. 904,
3 919 (9th Cir. BAP 2011) (citing Golden v. Chicago Title Ins. Co.
4 (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v.
5 Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998),
6 aff'd, 205 F.3d 1350 (9th Cir. 1999) (unpublished table
7 decision)).¹⁹

8 CONCLUSION

9 For the reasons set forth above, we AFFIRM the bankruptcy
10 court's order granting Deutsche's Motion for Judgment and the
11 bankruptcy court's order denying Davies' Motion for Judgment.
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16
17 ¹⁹On appeal, Davies also argues for the first time that the
18 doctrine of laches somehow applies in this case: "[L]aches also
19 appl[ies] as the parties and the issues are the same. The
20 determination made with findings of fact as an appealable
21 decision, and Deutsche Bank sat complacently while watching from
22 the sidelines." June 2011 Aplt. Opening Br. at 39. The record
23 does not show that Davies offered this argument to the bankruptcy
24 court, and we need not entertain it here. See Ellsworth, 455
25 B.R. at 919 (citations omitted).

26 However, even if Davies had properly raised the argument
27 before the bankruptcy court, laches is typically available as a
28 defense to a party against whom an action is brought. See Jarrow
Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th
Cir. 2002) ("Laches is an equitable time limitation on a party's
right to bring suit . . . , resting on the maxim that one who
seeks the help of a court of equity must not sleep on his
rights.") (internal citations and citations omitted). See also
Fed. R. Civ. P. 8(c) (listing laches as an affirmative defense).
Given that Davies initiated the Adversary Proceeding from which
this appeal arises, we consider this argument rather odd and
misplaced.