

AUG 26 2011

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-11-1010-PaMkAl  
 )  
 LUPI PAULO EDWARDS, ) Bk. No. LA-10-42638-PC  
 )  
 Debtor. ) Adv. No. LA-10-02659-PC  
 )  
 )  
 LUPI PAULO EDWARDS, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 WELLS FARGO BANK; AMERICAN )  
 HOME MORTGAGE SERVICING, INC.; )  
 T.D. SERVICE COMPANY, )  
 )  
 Appellees. )  
 )

Argued and Submitted on July 22, 2011  
at Pasadena, California

Filed - August 26, 2011

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

Honorable Peter H. Carroll, Chief Bankruptcy Judge, Presiding

Appearances: Nichole Glowin argued for appellees Wells Fargo  
 Bank and American Home Mortgage Service Company,  
 Inc. Lawrence Dreyfuss argued for appellee TD  
 Service Company.

Before: PAPPAS, MARKELL and ALLEY,\*\* Bankruptcy Judges.

\* 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.

\*\* The Honorable Frank R. Alley, Chief U.S. Bankruptcy  
Judge for the District of Oregon, sitting by designation.

1 Chapter 7<sup>1</sup> debtor Lupi Paulo Edwards ("Edwards") appeals the  
2 bankruptcy court's order granting the motion of Appellees Wells  
3 Fargo Bank ("Wells Fargo"), American Home Mortgage Servicing,  
4 Inc. ("AHMS"), TD Service Company ("TD") and Power Default  
5 Services, Inc. ("PDS") (together, "Appellees") to dismiss  
6 Edwards' adversary complaint against them under Civil  
7 Rule 12(b)(6). We AFFIRM.

### 8 **FACTS**

9 This is the second appeal coming before the Panel from  
10 Edwards' bankruptcy case. The first appeal resulted in a  
11 published Opinion affirming the bankruptcy court's order granting  
12 relief from the automatic stay in favor of Wells Fargo, as the  
13 purchaser of a house at a deed of trust foreclosure sale, to  
14 pursue recovery of possession of that house from Edwards.  
15 Edwards v. Wells Fargo Bank, N.A. (In re Edwards), \_\_\_ B.R. \_\_\_,  
16 2011 Bankr. LEXIS 2810 (9th Cir. BAP 2011). Because that Opinion  
17 provides a detailed discussion of the relevant facts and  
18 background of this ongoing dispute, we provide only a summary  
19 here.

20 On July 10, 2006, Edwards purchased a house in Long Beach,  
21 California (the "Property"). To finance the purchase of the  
22 Property, she executed a Note in favor of Aidan West Financial  
23 Group for \$397,000, which was secured by a Deed of Trust. The  
24 grant deed, Note and Deed of Trust were recorded in the Official

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25  
26 <sup>1</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 Records of Los Angeles County ("Official Records").

2 On December 7, 2007, Aidan West transferred all beneficial  
3 interest in the Note and Deed of Trust to Option One Mortgage  
4 Corporation, and the assignment was recorded in the Official  
5 Records. Then, in January 2010, Option One transferred all  
6 beneficial interest under the Note and Deed of Trust to Wells  
7 Fargo, with the assignment recorded in the Official Records on  
8 March 18, 2010. At about the same time, Wells Fargo executed a  
9 Substitution of Trustee, replacing the original trustee under the  
10 Note and Deed of Trust, with Power Default Services, Inc. ("Power  
11 Default"). The substitution was recorded in the Official Records  
12 on February 25, 2010.

13 By January 2010, Edwards had fallen behind in the monthly  
14 mortgage payments for a total of \$24,100.24. Wells Fargo issued  
15 and served a Notice of Default and Election to Sell the Property  
16 on January 25, 2010. Edwards did not cure the default, and the  
17 Substituted Trustee, Power Default, recorded a Notice of  
18 Trustee's Sale relating to the Property on April 26, 2010. On  
19 May 17, 2010, Power Default conducted a foreclosure sale of the  
20 Property, at which time Wells Fargo purchased the Property. A  
21 Trustee's Deed of Sale conveying the Property to Wells Fargo was  
22 recorded on May 20, 2010.

23 Edwards failed to leave the Property after the sale, so  
24 Wells Fargo commenced an unlawful detainer action against her in  
25 state court. Wells Fargo Bank, N.A. v. Edwards, Case no.  
26 10U01639 (Los Angeles Superior Court, June 3, 2010). The state  
27 court granted Wells Fargo's motion for summary judgment and  
28 awarded possession of the Property to Wells Fargo on July 14,

1 2010. On appeal, the state court's judgment was affirmed by the  
2 Appellate Division of the Superior Court in an Opinion. Wells  
3 Fargo Bank, N.A. v. Edwards, case no. BV-029439 (App. Div. Los  
4 Angeles Super. Ct., June 22, 2011).

5 Edwards filed a chapter 7 bankruptcy petition on August 5,  
6 2010. She listed the Property on her Schedule A; she did not  
7 list any secured claims against the Property on Schedule D.  
8 Nowhere in her bankruptcy schedules or Statement of Financial  
9 Affairs did Edwards disclose that she holds a claim for damages  
10 or other relief as against Wells Fargo or any of the other  
11 appellees here.

12 The Motion for Relief from Stay and the BAP Opinion

13 As reflected in our Opinion, on August 16, 2010, Wells Fargo  
14 moved for relief from the automatic stay under § 362(d)(1) to  
15 pursue recovery of possession of the Property. Wells Fargo  
16 asserted that Edwards had no right to continued possession of the  
17 Property because it was now the lawful owner of record of the  
18 Property, and because an unlawful detainer judgment had been  
19 entered in state court awarding it possession of the Property.

20 The bankruptcy court held a hearing on the relief from stay  
21 motion on September 9, 2010. The court advised the parties that  
22 it had read the pleadings and would grant the motion.

23 Wells Fargo has made a prima facie case for relief from  
24 the automatic stay. . . . A judgment was entered by a  
25 State Court, which determined the right of possession  
26 to that property based upon evidence that was presented  
27 to that State Court judge. I am not about to question  
28 that judgment.

27 Tr. Hr'g 2:23-3:6 (September 9, 2010). The bankruptcy court  
28 entered its order granting Wells Fargo relief from the automatic

1 stay on September 13, 2010.

2 Edwards appealed the bankruptcy court's decision to grant  
3 stay relief to this Panel. In the Opinion, the Panel affirmed  
4 the bankruptcy court. The Panel also addressed and disposed of  
5 the argument Edwards continues to make in the present appeal,  
6 that the foreclosure sale was improper, fraudulent, illegal and  
7 invalid:

8 Once a California state court grants an unlawful  
9 detainer judgment in a favor of a foreclosure sale  
10 purchaser, the original trustor or borrower is  
11 foreclosed under the doctrine of claim preclusion from  
12 arguing that the foreclosure sale itself was improper.  
13 See Freeze v. Salot, 122 Cal. App. 2d 561, 565-66,  
14 266 P.2d 140, 142-43 (1954) (after defendant obtained a  
15 judgment against plaintiff in an unlawful detainer  
16 action, res judicata precluded plaintiff's re-  
17 litigation of wrongful foreclosure claims in subsequent  
18 lawsuit). . . . Edward's complaint, much like her  
19 argument before this panel, seemingly advances the same  
20 state law claims that she asserted (or should have  
21 asserted) before the State Court. As previously  
22 discussed, the State Court rendered judgment in favor  
23 of Wells Fargo in the unlawful detainer action.  
24 Edwards was therefore precluded from continuing to  
25 assert that the Foreclosure Sale was improper,  
26 fraudulent, illegal and invalid in her bankruptcy case.

27 Id. at 14:23-15:7 (emphasis added).

#### 28 The Adversary Proceeding

On the same day as the hearing in the bankruptcy court on  
the stay relief motion, Edwards commenced an adversary proceeding  
against Appellees, challenging the validity of the foreclosure  
proceedings on the Property. The complaint alleged that the  
foreclosure of the Property was unlawful, fraudulent, illegal and  
invalid. Among other relief, Edwards sought \$12 million in  
damages from Appellees.

Wells Fargo and AMHS moved to dismiss the complaint on  
October 12, 2010, under Civil Rule 12(b)(6). They argued that

1 (1) Edwards was in default and could not legally sue for wrongful  
2 foreclosure; (2) Edwards was required to tender the amount of the  
3 secured debt to maintain a claim for irregularity in the  
4 foreclosure sale; (3) the foreclosure sale is presumptively  
5 valid; and (4) Edwards' claims were improperly pled and lacked  
6 the specificity required to state a claim for relief.

7 Edwards responded to the motion to dismiss on October 26,  
8 2010, generally denying the asserted grounds for dismissal.  
9 Wells Fargo filed a reply to Edward's response on November 2,  
10 2010.

11 The bankruptcy court conducted a hearing on the dismissal  
12 motion on November 9, 2010. Ruling on the record, the court  
13 granted the motion, and dismissed the adversary proceeding under  
14 Civil Rule 12(b)(6) because Edwards' complaint failed to state a  
15 claim for relief against Appellees. Specifically, the bankruptcy  
16 court ruled that any claim for damages for a wrongful foreclosure  
17 that occurred prior to Edwards bankruptcy filing was property of  
18 the bankruptcy estate. Therefore, the bankruptcy court reasoned,  
19 the chapter 7 trustee would be the sole real party in interest  
20 (the court used the term "standing") to prosecute such a claim.  
21 Unless and until the trustee abandoned that claim, the court  
22 noted, Edwards had no legal right to assert it.

23 The bankruptcy court further ruled that Edwards was  
24 judicially estopped from prosecuting the claim in the adversary  
25 proceeding against Appellees. This conclusion followed from  
26 what the court considered to be Edwards' knowing failure to  
27 properly disclose the existence of the claim in her bankruptcy  
28 schedules.

1 Finally, the bankruptcy court observed that if the claim  
2 were abandoned by the trustee, she would be free to pursue it in  
3 state court.

4 The bankruptcy court directed that the adversary proceeding  
5 should be dismissed "without prejudice." Tr. Hr'g 18-22. On  
6 November 10, 2010, the court entered an order dismissing the  
7 adversary proceeding under Civil Rule 12(b)(6); the order noted  
8 that the court had stated its findings of fact and conclusions of  
9 law on the record at the hearing on November 9, 2010.

10 Edwards filed a timely appeal on November 18, 2010.

#### 11 JURISDICTION

12 The bankruptcy court had jurisdiction under 28 U.S.C.  
13 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
14 § 158.

#### 15 ISSUE

16 Whether the bankruptcy court erred in dismissing the  
17 adversary proceeding under Civil Rule 12(b)(6).

#### 18 STANDARD OF REVIEW

19 We review the bankruptcy court's dismissal of an adversary  
20 proceeding under Civil Rule 12(b)(6) de novo. N.M. State Inv.  
21 Council v. Ernst & Young LLP, 641 F.3d 1089, 1094 (9th Cir.  
22 2011); Transcorp/Avant v. Pioneer Liquidating Corp. (In re  
23 Consol. Pioneer Mortg. Entities), 205 B.R. 422, 424 (9th Cir. BAP  
24 1997).

#### 25 DISCUSSION

26 The bankruptcy court concluded that, because the claims for  
27 damages stated in the complaint were on account of an allegedly  
28 wrongful foreclosure that occurred before Edwards filed her

1 bankruptcy petition, those claims became property of the  
2 bankruptcy estate on the filing of the petition. As a result,  
3 the bankruptcy court concluded, the chapter 7 trustee, and not  
4 Edwards, was the only party with standing to pursue the claims,<sup>2</sup>  
5 and that unless and until the trustee abandoned the claim,  
6 Edwards could not assert them. We agree with the bankruptcy  
7 court.<sup>3</sup>

8 The claims asserted against Appellees in Edwards' complaint  
9 for wrongful and fraudulent foreclosure relate to the pre-  
10 petition foreclosure proceedings and sale of the Property, and to  
11 the unlawful detainer action. Because these events occurred  
12 before bankruptcy, any claims against Appellees arising from them  
13 became property of the estate when Edwards filed her chapter 7  
14 bankruptcy petition. As discussed below, the chapter 7 trustee,  
15 not Edwards, has the exclusive authority to prosecute these  
16 claims on behalf of the estate.

17 Under § 541(a)(1), "[t]he commencement of a case [under the  
18 Bankruptcy Code] creates an estate . . . comprised of all legal  
19 or equitable interests of the debtor in property as of the  
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21 <sup>2</sup> For a discussion of prudential standing and real party in  
22 interest status in this context, see In re Edwards, 2011 Bankr.  
23 LEXIS 2810 at \* 8-9. See also Lopez v. Specialty Restaurants  
24 Corp. (In re Lopez), 283 B.R. 22, 32 (9th Cir. BAP 2002) (Klein,  
25 J., concurring) ("[I]n the case of an omitted cause of action  
26 [from the schedules], the trustee is the real party in interest  
[to prosecute the claim] and the more correct defenses are that  
the action is not being prosecuted by the real party in interest  
and that the debtor lacks standing.").

27 <sup>3</sup> Because we affirm on the basis of lack of standing, we  
28 express no position on the bankruptcy court's decision to dismiss  
based upon judicial estoppel.



1 commencement of the case." Legal claims and causes of action  
2 held by a debtor against others existing at the time of the  
3 bankruptcy filing become property of the estate, and must be  
4 listed in the debtor's bankruptcy schedules. City & County of  
5 San Francisco v. PG&E Corp., 433 F.3d 1115, 1126 (9th Cir. 2006);  
6 Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705,  
7 708 (9th Cir. 1986).

8 That Edwards failed to schedule the claims against Appellees  
9 does not prevent them from becoming property of the estate. An  
10 unscheduled asset, whether by accident or intent, is property of  
11 the estate, and remains so even after the bankruptcy case is  
12 closed, unless explicitly abandoned by the trustee. Cusano v.  
13 Klein, 264 F.3d 936, 946 (9th Cir. 2001).

14 Under these facts, Edwards could not prosecute the claims  
15 against Appellees. Section 323(a) provides that "[t]he trustee  
16 in a case is the representative of the estate." The Ninth  
17 Circuit has held "that the bankruptcy code endows the bankruptcy  
18 trustee with the exclusive right to sue on behalf of the estate."  
19 Estate of Spirtos v. One San Bernadino County Super. Ct. Case  
20 Numbered SPR 02211, 443 F.3d 1172, 1175 (9th Cir. 2006) (citing  
21 Parker v. Wendy's Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir.  
22 2004) ("[A] trustee, as the representative of the bankruptcy  
23 estate, is the proper party in interest, and is the only party  
24 with standing to prosecute causes of action belonging to the  
25 estate."); United States ex rel. Gebert v. Transp. Admin. Servs.,  
26 260 F.3d 909, 909, 914-15 (8th Cir. 2001) (holding that only the  
27 trustee has standing to bring a claim on behalf of the estate);  
28 Wieburg v. GTE Sw. Inc., 272 F.3d 302, 306-07 (5th Cir. 2001)

1 (finding that a trustee is the real party in interest and has  
2 exclusive standing to assert claims that are the property of the  
3 bankruptcy estate)). And as noted above, an unscheduled claim  
4 against another remains property of the bankruptcy estate unless  
5 and until it is abandoned by the trustee. An abandonment  
6 requires an affirmative act of the trustee, or some other clear  
7 evidence of the trustee's intent to abandon the property. Pace  
8 v. Battley (In re Pace), 146 B.R. 562, 566 (9th Cir. BAP 1992);  
9 see also, § 554(a) ("After notice and a hearing, the trustee may  
10 abandon any property of the estate that is burdensome to the  
11 estate or that is of inconsequential value and benefit to the  
12 estate.").

13 The claims Edwards attempted to assert in her adversary  
14 complaint against Appellees all arose prepetition, and  
15 consequently, they were property of the bankruptcy estate.  
16 Though unscheduled, those claims remain in the estate unless  
17 abandoned by the trustee. No evidence has been offered to show  
18 that the trustee ever abandoned the claims, and under the Code  
19 and Ninth Circuit precedent, the trustee has the exclusive  
20 authority, and is the sole real party in interest, to prosecute  
21 any legal actions on behalf of the estate as to those claims.

22 The bankruptcy court correctly concluded that Edwards did  
23 not have the legal authority to assert the claims in the  
24 adversary complaint against Appellees for the alleged unlawful or  
25 fraudulent foreclosure, or to recover any damages. Therefore,  
26 the bankruptcy court did not err by dismissing the complaint for  
27 failure to state a claim for relief under Civil Rule 12(b)(6).  
28 Quarre v. Saylor (In re Saylor), 178 B.R. 208, 214 (9th Cir. BAP

1 1995) (lack of standing to bring an action is a "subspecies" of  
2 dismissal for failure to state a claim under Civil Rule  
3 12(b)(6)).<sup>4</sup>

4 **CONCLUSION**

5 We AFFIRM the order of the bankruptcy court dismissing the  
6 adversary proceeding.<sup>5</sup>

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13 <sup>4</sup> We affirm the bankruptcy court's order dismissing the  
14 adversary proceeding because debtor lacked standing to prosecute  
15 the claims asserted in the complaint. Furthermore, in our  
16 earlier Opinion in In re Edwards, the Panel rejected Edward's  
17 principal argument in this appeal, that the foreclosure sale was  
18 improper, fraudulent, illegal and invalid: "As previously  
19 discussed, the State Court rendered judgment in favor of Wells  
20 Fargo in the unlawful detainer action. Edwards was therefore  
21 precluded from continuing to assert that the Foreclosure Sale was  
22 improper, fraudulent, illegal and invalid in her bankruptcy  
23 case." 2011 Bankr. LEXIS 2810 at \*18. Arguably, we could  
24 reject Edwards' appeal here, and decline to revisit this same  
25 issue, under the doctrine of law of the case. Lucas Auto. Eng'g,  
26 Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 766 (9th Cir.  
27 2001); Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir. 1995)  
28 (holding that one panel of an appellate court in this circuit  
will not reconsider questions that another panel has previously  
decided in the same case); Ball v. Payco-Gen. Am. Credits, Inc.  
(In re Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995) (conforming  
BAP practices to principles of stare decisis followed by the  
court of appeals). But because the Opinion was released only  
shortly before argument in this appeal, and the parties had no  
opportunity to address whether law of the case should be applied  
here, we do not rely upon that basis to affirm in this appeal.

<sup>5</sup> Edwards other arguments in this appeal are without merit,  
and we decline to address them.