

FOR PUBLICATION

FILED & ENTERED

AUG 31 2012

CLERK U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re

CATHERINE Z. CASS,

Debtor.

Case No. 2:12-bk-16090-RK

Chapter 7

Adv. No. 2:12-ap-01235-RK

CHARLES W. DAFF,
Chapter 7 Trustee,

Plaintiff,

vs.

**JAMES WALLACE, REBECCA
WALLACE, and GLORIA SUESS,**

Defendants.

**MEMORANDUM DECISION RE
ADVERSARY COMPLAINT AND
COUNTERCLAIM**

This adversary proceeding came on for trial before the undersigned United States Bankruptcy Judge on April 6, 2012. D. Edward Hays, of the law firm of Marshack Hays LLP, appeared for plaintiff and counterclaim-defendant Charles W. Daff, Chapter 7 Trustee of the bankruptcy estate of Catherine Cass. David B. Dimitruk, Attorney at Law, appeared for defendants and counterclaimants James Wallace, Rebecca Wallace and Gloria Suess.

1 Debtor Catherine Cass (“the Debtor”) filed a voluntary petition for relief under
2 Chapter 7 of the Bankruptcy Code, 11 U.S.C., on January 5, 2007, which commenced
3 this bankruptcy case.¹ Charles Daff is the Chapter 7 Trustee of Debtor’s bankruptcy
4 estate in this case (“Trustee”). In this adversary proceeding,² Trustee seeks declaratory
5 relief regarding the validity, priority, and extent of the judgment lien alleged against the
6 estate held by Defendants James and Rebecca Wallace, and Gloria Sues
7 (“Defendants”). Defendants are judgment creditors of the Debtor. Trustee also seeks
8 avoidance, recovery, and preservation of any lien arising in favor of Defendants upon this
9 court’s entry of a judgment in another adversary proceeding in this bankruptcy case to set
10 aside a fraudulent transfer as a post-petition transfer under 11 U.S.C. § 549. Defendants
11 in their counterclaim seek declaratory and injunctive relief to compel Trustee to complete
12 the process of selling the Debtor’s residence at 2420 N. Fairmont Avenue (“the
13 Residence”) and applying the proceeds of the sale to Defendants’ claims, except for
14 those claims that are superior to Defendants’ November 1, 2005 judgment lien against
15 the Debtor. The court has jurisdiction over this adversary proceeding pursuant to 28
16 U.S.C. §§ 157 and 1334(b), and this is a core proceeding under 28 U.S.C. § 157(b)(2)(A),
17 (K) and (O).

18 The court has set and/or conducted numerous hearings in this adversary
19 proceeding, including status and pretrial conferences, summary judgment motion
20 hearings and trial, on April 10, 2010, September 13, 2010, October 19, 2010, December
21 7, 2010, December 21, 2010, February 9, 2011, March 2, 2011, March 16, 2011, March
22 18, 2012, April 6, 2012 and June 12, 2012. The parties’ respective positions have been
23 supported and opposed by extensive briefing and oral argument, and the court thereafter
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25 ¹ The Debtor’s bankruptcy case was originally filed in the Santa Ana Division of this court and was
26 assigned the case number of SA 07-10031 RK Chapter 7. When the case was transferred to the Los
27 Angeles Division, the case was renumbered as 2:12-bk-16090-RK Chapter 7.

28 ² This adversary proceeding was originally filed in the Santa Ana Division of this court and was assigned
the case number of SA 10-01058 RK. When the case was transferred to the Los Angeles Division, the
adversary proceeding was renumbered as 2:12-ap-01235-RK.

1 took the matter under submission on June 12, 2012 after the last post-trial brief was filed.
2 The court now enters this memorandum decision setting forth its findings of fact and
3 conclusions of law.

4 **FACTS**

5 The facts in this adversary proceeding are undisputed and are established by the
6 stipulated facts in the Joint Pretrial Order (“JPTO”), filed on November 8, 2011, and the
7 stipulated trial exhibits, Exhibits 1-18, as described in the Joint Compendium of Exhibits
8 Filed in Support of Joint Pretrial Order. Prior to this adversary proceeding, there were
9 two relevant lawsuits at hand between Defendants and the Debtor. In the first lawsuit, on
10 April 22, 2004, Defendants brought an action in the Superior Court of California for the
11 County of Orange against the Debtor for defamation and nuisance (“the first lawsuit”),
12 *James Wallace, et al., v. Catherine Cass*, No. 04CC05117 (Superior Court of California,
13 County of Orange). JPTO, Undisputed Facts ¶ 1; see also, Exhibits 4-7. On May 28,
14 2004, the Debtor subsequently recorded a deed in the Orange County Recorder’s Office,
15 purporting to transfer the title of the Residence by transferring a remainder interest in the
16 property to her daughter, Christine Zeman (“Zeman”), without consideration, and
17 reserving a life estate for herself. JPTO, Undisputed Facts ¶ 4; Exhibit 1. On June 6,
18 2004, the Debtor and Zeman made an agreement regarding the deed whereby Zeman
19 promised to transfer the property back to the Debtor upon request. JPTO, Undisputed
20 Facts ¶ 5; Exhibit 2. On May 6, 2005, the Debtor commenced a bankruptcy case by filing
21 a petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C., which stopped
22 the trial that was scheduled for the first lawsuit in state court. JPTO, Undisputed Facts
23 ¶ 6; see, 11 U.S.C. § 301 (a voluntary bankruptcy case under a chapter of the
24 Bankruptcy Code commences upon filing a petition under such chapter and constitutes
25 an order for relief); 11 U.S.C. § 362(a)(1)(automatic stay on litigation to collect a
26 prepetition debt arises upon filing of a bankruptcy petition under § 301). On July 7, 2005,
27 this court by the Honorable James N. Barr, United States Bankruptcy Judge, dismissed
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1 Debtor's Chapter 13 bankruptcy case from this petition as a bad faith filing. JPTO,
2 Undisputed Facts ¶ 7.

3 Immediately thereafter, on July 8, 2005, Defendants filed a second lawsuit in the
4 Superior Court against the Debtor and Zeman, to, among other things, set aside the
5 transfer of the Residence as a fraudulent transfer ("the second lawsuit"), *James Wallace,*
6 *et al. v. Catherine Cass, et al.*, No. 05CC08034 (Superior Court of California, County of
7 Orange). JPTO, Undisputed Facts ¶ 8. A copy of the complaint in the second lawsuit,
8 the fraudulent transfer action, was received into evidence as Exhibit 3. Meanwhile, the
9 first lawsuit proceeded to trial in September 2005. JPTO, Undisputed Facts ¶ 9. On
10 October 28, 2005, in the first lawsuit, the Superior Court entered a \$320,000 judgment
11 (which included an award of \$75,000 in punitive damages) in favor of Defendants. JPTO,
12 Undisputed Facts ¶ 10. A copy of the judgment in the first lawsuit was received into
13 evidence as Exhibit 5. In this judgment, the Superior Court found that the Debtor's
14 transfer of the Residence was for the purpose of avoiding having to pay Defendants and
15 therefore, the Superior Court imposed punitive damages against the Debtor. JPTO,
16 Undisputed Facts ¶ 10; Exhibit 5. Defendants subsequently recorded an abstract of that
17 judgment in the Orange County Recorder's Office on November 1, 2005, which is at
18 issue in the instant adversary proceeding. JPTO, Undisputed Facts ¶ 11. A copy of the
19 recorded abstract of judgment in the first lawsuit was received into evidence as Exhibit 6.

20 On December 20, 2005, the Debtor filed a Notice of Appeal from the judgment
21 entered against her in the first lawsuit. JPTO, Undisputed Facts ¶ 12. On January 5,
22 2007, the Debtor filed a voluntary Chapter 7 bankruptcy petition and, pursuant to 11
23 U.S.C. § 362, the trial in the second lawsuit and appeal in the first lawsuit were stayed.
24 JPTO, Undisputed Facts ¶ 14. On April 5, 2007, Trustee of the Debtor's bankruptcy
25 estate substituted in the second lawsuit, the fraudulent transfer action, as the real party-
26 in-interest. JPTO, Undisputed Facts ¶ 17. On April 5, 2007, Trustee removed the
27 second lawsuit, the fraudulent transfer action, from the Superior Court to this bankruptcy
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1 court, *Charles W. Daff, et al. v. Catherine Cass*, No. SA 07-10031 RK Chapter 7; Adv.
2 No. SA 07-01099 RK (Bankr. C.D. Cal.). JPTO, Undisputed Facts ¶ 18.

3 On July 3, 2007, this court in the removed second lawsuit—the fraudulent transfer
4 action – entered an order suspending all bankruptcy matters pending outcome of the
5 Debtor’s appeal from the judgment entered against her in the first lawsuit, the defamation
6 and nuisance action. JPTO, Undisputed Facts ¶ 20. A copy of this order was received
7 into evidence as Exhibit 11. By order entered on August 14, 2007, Defendants obtained
8 relief from the automatic stay so that the Debtor’s appeal could be determined.

9 On March 10, 2008, the California Court of Appeal, Fourth District, Division Three,
10 affirmed the judgment awarding damages in favor of Defendants in the first lawsuit, the
11 defamation and nuisance action. JPTO, Undisputed Facts ¶ 21; Exhibit 12. A copy of
12 the Court of Appeal’s opinion in the first lawsuit was received into evidence as Exhibit 12.

13 On May 28, 2008, a Stipulation for Entry of Judgment Avoiding and Recovering
14 Transfer of Real Property (“the Stipulation”) was filed in the second lawsuit, the fraudulent
15 transfer action, whereby Trustee, Defendants, and the Debtor’s daughter, Zeman, agreed
16 that the title that was purportedly conveyed to Zeman by the Debtor was a fraudulent
17 transfer and should be set aside. Exhibit 10. On May 29, 2008, a Separate Judgment
18 Pursuant to Stipulation Avoiding and Recovering Transfer of Real Property (“the
19 Separate Judgment”) was entered whereby this court approved the Stipulation and
20 ordered that the transfer was “hereby avoided and set aside under California Civil Code
21 §§ 3439.04 and 3439.07.” JPTO, Undisputed Facts ¶ 22. A copy of the Separate
22 Judgment was received into evidence as Exhibit 13. The Separate Judgment provided
23 that all legal title is “recovered by, awarded to, and vested in . . . [Trustee] for the benefit
24 of the . . . bankruptcy estate pursuant to 11 U.S.C. § 550.” JPTO, Undisputed Facts ¶ 22;
25 Exhibit 13.

26 On June 2, 2008, the Debtor subsequently appealed this court’s approval of the
27 Stipulation and the Separate Judgment in the second lawsuit, the fraudulent transfer
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1 action, to the Bankruptcy Appellate Panel of the Ninth Circuit. JPTO, Undisputed Facts
2 ¶ 24. The Debtor also filed a petition for review of the judgment in the first lawsuit, the
3 defamation and nuisance action, with the California Supreme Court, which denied review
4 on June 11, 2008. JPTO, Undisputed Facts ¶ 26.

5 On June 27, 2008, this court entered an order determining that the Stipulation and
6 the Separate Judgment in the second lawsuit were between Trustee, Defendants and the
7 daughter, Zeman, and not the Debtor, and therefore, that the “Debtor’s rights are not
8 prejudiced by the entry of the Stipulation [and that] Debtor still retains her rights to defend
9 in this case and all enforcement actions by the Trustee are suspended until all of Debtor’s
10 state court appeals are resolved.” JPTO, Undisputed Facts ¶ 27. A copy of this order
11 was received into evidence as Exhibit 14.

12 The Debtor died on February 7, 2009. JPTO, Undisputed Facts ¶ 28. On June
13 11, 2009, the Bankruptcy Appellate Panel dismissed the Debtor’s appeal of the
14 Stipulation and the Separate Judgment in the second lawsuit, the fraudulent transfer
15 action. JPTO, Undisputed Facts ¶ 29. After the Debtor’s death, Zeman as the
16 administrator of the Debtor’s probate estate was substituted for Debtor in the second
17 lawsuit, and by stipulation and order entered on December 7, 2011, the court ordered the
18 dismissal of Debtor’s probate estate as a party defendant without prejudice.

19 On December 19, 2011, Trustee and Defendants filed their stipulation for
20 dismissal of the remaining claims in the second lawsuit, the removed fraudulent transfer
21 action. The stipulation provided:

- 22
- 23 1. All remaining claims in this Adversary Proceeding shall be dismissed
24 without prejudice so that the remaining claims between the Trustee and
25 the Judgment Creditors [Defendants] may be adjudicated in the
26 Declaratory Relief Adversary, *Daff v. Wallace, et al.*, Adversary Case
27 No. 8:10-ap-1058-RK;
 - 28 2. The dismissal of this Adversary Proceeding Case No. 8:07-ap-1099-RK
shall not give rise to any adverse legal or other effect on any party or
issue to be determined in Adversary Case No. 8:10-ap-01058-RK;

1 By order entered on December 20, 2011, the court approved this stipulation of Trustee
2 and Defendants for dismissal of all remaining claims in the second lawsuit, the fraudulent
3 transfer action, without prejudice.

4 ANALYSIS

5 This dispute between the parties in this adversary proceeding is whether
6 Defendants' judgment lien – perfected under state law after the Debtor made a fraudulent
7 transfer of the Residence – attached to the property. To resolve this dispute, the court
8 must address questions of California law of: (1) whether the judgment lien attached to an
9 interest of the Debtor in the Residence; and (2) whether a fraudulent transfer is deemed
10 “void” or “voidable.” In answering these questions, the court finds as a factual matter that
11 Debtor had an equitable interest in the Residence after she made the fraudulent transfer
12 of the property and holds that whether Defendants recorded their abstract of judgment,
13 they perfected a judgment lien under applicable state law which attached to Debtor's
14 equitable interest in the Residence. This result obtains whether a fraudulent transfer is
15 void *ab initio* or voidable under state law. Nevertheless, the court holds that under
16 California law, a fraudulent transfer is void *ab initio*, except to the extent that the
17 California legislature has made it voidable under the California Uniform Fraudulent
18 Transfer Act for good faith purchasers for value. Based on the foregoing, the court will
19 deny relief sought by Trustee and will enter judgment for Defendants.

20 **I. The Parties' Stipulation and “Separate Judgment” Do Not Preclude** 21 **Litigation of Defendants' Claims that Their Judgment Lien Attached to** 22 **Debtor's Residence or that the Transfer was Void Ab Initio**

23 In the second lawsuit, Trustee, Defendants and Zeman executed the Stipulation
24 for Entry of Judgment Avoiding and Recovering Transfer of Real Property, which resulted
25 in the entry of the Separate Judgment by this court on May 29, 2008. Exhibits 10 and 13.
26 Trustee argues that based on the Stipulation and the Separate Judgment, Defendants
27 are now barred from relitigating whether Defendants' judgment lien attached to Debtor's
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1 interest in the Residence or Debtor's fraudulent transfer of the Residence was void *ab*
2 *initio* under several theories: claim preclusion, issue preclusion, the election of remedies
3 doctrine, and judicial estoppel.

4 **A. Claim Preclusion**

5 The Stipulation for Judgment in the fraudulent transfer action was entered on May
6 29, 2008 between Trustee, Defendants and Zeman. Exhibit 10. Pursuant to the
7 Stipulation, the Separate Judgment was entered on May 29, 2008. Exhibit 13. The
8 Separate Judgment provided that "the transfer made by [the Debtor] to Christine
9 Zeman . . . is hereby avoided and set aside." *Id.* Further, the Separate Judgment
10 provided that "all legal title to, and beneficial interest in, [the Residence] . . . is recovered
11 by, awarded to, and vested in the name of [Trustee]." *Id.*

12 Trustee contends that since this court has already adjudicated that the transfer
13 occurred, Defendants are barred by claim and issue preclusion from relitigating whether
14 the judgment lien attached to the Residence or whether the transfer was void *ab initio*.
15 The parties dispute whether the court should look to state or federal law to determine the
16 preclusive effect of the Separate Judgment.

17 As stated above, the Separate Judgment was entered by this court after the action
18 was removed from the California state court. "The preclusive effect of a federal court
19 judgment is determined by federal common law, but the rule of decision differs depending
20 upon whether the federal court's jurisdiction over the issue was based on diversity or
21 federal question." *Halliburton Energy Services, Inc. v. McVay (In re McVay)*, 461 B.R.
22 735, 741 (Bankr. C.D. Ill. 2012), *citing Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).
23 "Under federal common law, a federal diversity judgment is to be accorded the same
24 preclusive effect that would be applied by the state courts in the state in which the federal
25 diversity court sits." *Id.*, *citing Semtek International, Inc. v. Lockheed Martin Corp.*, 531
26 U.S. 497, 508 (2001).

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1 Just as a district court may adjudicate state law matters that have been removed
2 pursuant to 28 U.S.C. § 1441 based on diversity jurisdiction, a bankruptcy court may
3 adjudicate state law matters that have been removed pursuant to 28 U.S.C. § 1452.
4 Similar to a district court exercising its diversity jurisdiction over a removed matter, a
5 bankruptcy court may adjudicate certain state law matters. *Compare* 28 U.S.C. § 1332
6 *with* 28 U.S.C. §§ 157 and 1334. The court sees no reason why the *Semtek* holding
7 should not extend to cases in which a court's jurisdiction is governed by § 1334. Thus,
8 the court must apply the elements of claim preclusion as defined by California law.

9 Claim preclusion, or *res judicata*, "bars relitigation of a cause of action that
10 previously was adjudicated in another proceeding between the same parties or parties in
11 privity with them." *Citizens for Open Government v. City of Lodi*, 205 Cal. App. 4th 296,
12 324 (2012) (citation omitted). To apply, there must be (1) a final judgment on the merits
13 of an action, (2) the second suit must be between the same parties or parties in privity
14 with them, and (3) the second suit must raise the same claim that was raised in the first
15 action. *Id.* (citation omitted).

16 The first element for claim preclusion that there was a final judgment on the merits
17 of the earlier lawsuit is met. In the removed fraudulent transfer action, Adv. No. SA 07-
18 01099 RK, this court entered the Separate Judgment pursuant to the parties' Stipulation
19 for Entry of Judgment Avoiding and Recovering Transfer of Real Property. Exhibits 10
20 and 13. The Separate Judgment became a final judgment when the remaining claims in
21 the removed fraudulent transfer action, the second lawsuit, were dismissed by stipulation
22 and order on December 20, 2011. Fed. R. Bankr. P. 7054(a), incorporating by reference,
23 Fed. R. Civ. P. 54(a)-(c) (see especially Fed. R. Civ. P. 54(b) governing a judgment on
24 multiple claims or involving multiple parties: in this case, the Separate Judgment did not
25 become final until all of the claims and rights and liabilities of all of the parties were
26 resolved since the court did not expressly determine that there was no just reason for
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1 delay of entry of the Stipulated Judgment as a final judgment as to some, but not all, of
2 the claims or parties in the adversary proceeding).

3 The second element for claim preclusion that the subsequent lawsuit must be
4 between the same parties and parties in privity with them is met. The parties in the earlier
5 lawsuit (the removed fraudulent transfer lawsuit, or defendant's second lawsuit against
6 the Debtor) were Trustee, Defendants, and Zeman. *Id.* The parties in the subsequent
7 lawsuit (i.e., the instant adversary proceeding) were Trustee and Defendants. Thus, the
8 same parties are involved in both lawsuits, Trustee and Defendants.

9 However, the third element for claim preclusion, that the subsequent lawsuit must
10 raise the same claim that was raised in the earlier lawsuit, is not met. In the earlier
11 lawsuit, Defendants alleged claims to avoid and set aside the fraudulent transfer and for
12 attachment (or other provisional remedies) against the Debtor's property. Exhibit 3. (The
13 prayer for relief in Defendants' Complaint in the second lawsuit, the fraudulent transfer
14 action, makes it clear that they were asserting multiple claims to set aside a fraudulent
15 transfer and for attachment of their lien. *Id.* at 8-9.) Only the Defendants' fraudulent
16 transfer avoidance claim was decided in the prior lawsuit by the Separate Judgment in
17 that action. Defendants' remaining claims, including their attachment claim, were not
18 decided in that lawsuit because those claims were dismissed without prejudice by the
19 order approving the stipulation for dismissal of the second lawsuit on December 20, 2011.

20 In their answer in this adversary proceeding, filed on March 3, 2010, Defendants
21 have raised as a defense to Trustee's adversary Complaint for (1) Declaratory Relief re:
22 Validity, Priority and Extent of Alleged Judgment Lien, and (2) Avoidance, Recovery and
23 Preservation of Unauthorized Post-Petition Transfer, filed on January 27, 2010, that the
24 fraudulent transfer from Debtor to Zeman was void and that their judgment lien attached
25 to Debtor's property. Answer, filed on March 3, 2010, at 4-5. In their Counterclaim, filed
26 on March 3, 2010, Defendant also alleged a claim for declaratory relief that the fraudulent

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1 transfer from Debtor to Zeman was void and that their judgment lien attached to Debtor's
2 property. Counterclaim, filed on March 3, 2010, at 6-8.

3 The Separate Judgment in the earlier lawsuit, the fraudulent transfer action, did not
4 adjudicate the claims at issue in this action. Specifically, the Separate Judgment did not
5 address, let alone adjudicate, (1) whether the judgment lien from the recorded abstract of
6 judgment attached to the Debtor's property, (2) whether the judgment lien is superior to
7 Trustee's interests, or (3) whether the transfer from the Debtor to Zeman was void or
8 voidable. The Separate Judgment did not state that Defendants lost their rights to their
9 claims for declaratory and injunctive relief as such other claims were expressly dismissed
10 without prejudice. But perhaps more significantly, Defendants had already perfected their
11 judgment lien under applicable state law by recording the abstract of judgment and did
12 not need to bring a separate claim to perfect their lien. California Code of Civil Procedure
13 § 697.310(a). Because the Separate Judgment did not adjudicate all of Defendants'
14 claims in the second lawsuit, the Separate Judgment does not end the action as to
15 Defendants' claims in this adversary proceeding, and Defendants may defend their
16 judgment lien in this adversary proceeding. Indeed, Trustee and Defendants expressly
17 acknowledged the right of Defendants to litigate their other claims raised in the earlier
18 lawsuit, the fraudulent transfer action, in their stipulation in that lawsuit that such claims
19 would be dismissed without prejudice so those claims can be adjudicated in this instant
20 lawsuit and that the dismissal of that lawsuit, i.e., the final judgment in that lawsuit, "shall
21 not give rise to any adverse legal or other effect on any party or issue to be determined in
22 Adversary Case No. 8:10-ap-01058-RK" (i.e., this instant lawsuit now renumbered 2:12-
23 ap-01235 RK). Therefore, the court holds that Defendants' claims are not barred by claim
24 preclusion.

25 **B. Issue Preclusion**

26 Just as for claim preclusion, the court must apply the elements of issue preclusion
27 as defined by California law. *In re McVay*, 461 B.R. at 741. Issue preclusion, or
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1 collateral estoppel, “precludes relitigation of issues argued and decided in prior
2 proceedings.” *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990). To apply, the party
3 asserting issue preclusion bears the burden of establishing the following five
4 requirements: (1) the issue sought to be precluded from relitigation must be identical to
5 that decided in a former proceeding, (2) this issue must have been actually litigated in the
6 former proceeding, (3) it must have been necessarily decided in the former proceeding,
7 (4) the decision in the former proceeding must be final and on the merits, and (5) the
8 party against whom preclusion is sought must be the same as, or in privity with, the party
9 to the former proceeding. *Id.*

10 For the reasons stated above, the Separate Judgment in the earlier lawsuit, the
11 fraudulent transfer action, did not adjudicate the issues relating to Defendants’ claims of
12 whether the judgment lien from the recorded abstract of judgment in the defamation and
13 nuisance action attached to the Debtor’s property, whether the judgment lien is superior
14 to Trustee’s interests and whether the fraudulent transfer from Debtor to Zeman was
15 void. As discussed above, Trustee specifically stipulated that such claims were
16 dismissed without prejudice in that lawsuit so that such claims can be adjudicated in this
17 lawsuit and that the dismissal of the claims from that lawsuit “shall not give rise to any
18 adverse legal or other effect on any party or issue” to be determined in this lawsuit. See
19 Stipulation for Dismissal of Adversary Proceeding, Case No. 8:07-ap-01099-RK, filed on
20 December 19, 2011. Thus, Trustee has not met his burden of establishing by a
21 preponderance of the evidence that the elements for issue preclusion that the issue was
22 actually and necessarily decided in the prior litigation have been met.³ Therefore, the
23 court holds that Defendants’ claims are not barred by issue preclusion.

24 _____
25 ³ Similarly, Trustee’s contention that the court’s order in this bankruptcy case denying Debtor’s claimed
26 homestead exemption in her life estate interest in the Residence precludes the Defendants from asserting
27 that they had perfected a judgment lien based on post-transfer recordation of the abstract of judgment as a
28 matter of issue preclusion is flawed. First, there was no judgment on the merits because the court denied
the claimed exemption as moot in light of the death of the Debtor. Second, the issue of the perfection of
Defendants’ judgment lien was not an issue decided in the prior litigation over the claimed homestead
exemption and was not actually and necessarily decided in the court’s denial of the claimed homestead
exemption.

1 **C. Election of Remedies and Judicial Estoppel**

2 Trustee argues that under the election of remedies doctrine, Defendants are
3 barred from seeking a remedy of voidness given their previous election to stipulate to
4 entry of the Separate Judgment in the earlier lawsuit, the removed fraudulent transfer
5 action. Similarly, Trustee also argues that Defendants are judicially estopped from
6 arguing that the transfer was ineffective or void *ab initio* by their judicial admissions that
7 the fraudulent transfer occurred.

8 Defendants oppose both of Trustee’s arguments by contending that there is
9 nothing clearly inconsistent about their positions. Defendants argue that the remedy they
10 sought in the Stipulation was to subject their claim to the actual ownership of the
11 Residence. See *Kinney v. Vallentyne*, 15 Cal. 3d 475, 479 n.6 (1975) (“If the transfer is
12 in fraud of the creditor, the creditor may follow the property into the hands of the
13 transferee even if the transfer took place before the [judgment] lien attached.”).

14 The doctrine of election of remedies prevents a party from obtaining double
15 redress for a single wrong. *Latman v. Burdette*, 366 F.3d 774, 781 (9th Cir. 2004). The
16 doctrine “refers to situations where an individual pursues remedies that are legally or
17 factually inconsistent.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974). As a
18 general rule, three elements must be present for a party to be bound to an election of
19 remedies: (1) two or more remedies must have existed at the time of the election,
20 (2) these remedies must be repugnant and inconsistent with each other, and (3) the party
21 to be bound must have affirmatively chosen, or elected, between the available remedies.
22 *Latman*, 366 F.3d at 782; see also 25 Am. Jur. 2d *Election of Remedies* § 19 (2012)
23 (“Under the election-of-remedies doctrine, a plaintiff is only required to elect between two
24 remedies when those remedies are inconsistent.”).

25 Under the theory of judicial estoppel:

26 [W]here a party assumes a certain position in a legal proceeding, and
27 succeeds in maintaining that position, he may not thereafter, simply
28 because his interests have changed, assume a contrary position,

1 especially if it be to the prejudice of the party who has acquiesced in the
position formerly taken by him.

2 *New Hampshire v. Maine*, 532 U.S. 749, 751 (2001), quoting *Davis v. Wakelee*, 156 U.S.
3 680, 689 (1895).

4 The court concludes that Trustee's arguments fail because the remedy stipulated
5 to by Defendants and the remedies now sought are not inconsistent. With regard to
6 relief from fraudulent transfers, it is established that creditors may seek multiple
7 remedies. California Civil Code § 3439.07 provides:

8 (a) In an action for relief against a transfer or obligation under this chapter,
9 a creditor . . . may obtain: (1) Avoidance of the transfer or obligation to the
10 extent necessary to satisfy the creditor's claim. (2) An attachment or other
provisional remedy against the asset transferred

11 According to the Legislative Committee's Comment 6 to California Civil Code, § 3439.07,
12 "[t]he remedies specified in this section . . . are cumulative." Also, as noted by a
13 prominent treatise on the subject, "In an appropriate case, a creditor may apparently *both*
14 sue to avoid the transfer *and* attach or execute on the transferred asset." 1 Ahart,
15 *California Practice Guide: Enforcing Judgments and Debts*, ¶ 3:350 at 3-109 (2012),
16 citing Comment 6 to California Civil Code, § 3439.07 (emphasis in original); *Id.*, ¶¶ 3:342
17 – 3:349 at 3-106 – 3-108.

18 In the second lawsuit, Defendants sought several remedies under their cause of
19 action for relief from a fraudulent transfer. Their requests for relief included the following:
20 (1) for an order avoiding and setting aside the transfer from Cass to Zeman and restoring
21 title to Cass, so that the Cass Residence could be levied upon and sold in order to satisfy
22 the plaintiffs' claims against Cass, and (2) for an attachment or other provisional remedy
23 against the Cass residence or its proceeds. Exhibit 3, Complaint for Relief from
24 Fraudulent Transfer at 6-7, filed on July 8, 2005.

25 In the Stipulation entered on May 29, 2008, Defendants, Trustee, and Zeman
26 agreed to "avoid[] the Transfer and recover[] the Property for the benefit of the
27 Estate" Thus, the Separate Judgment based on the Stipulation did not address the
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1 claims whether the Defendants' judgment lien—resulting from the recorded abstract of
2 judgment in their first lawsuit against Debtor for defamation and nuisance—attached to
3 the Debtor's property, (2) whether the judgment lien is superior to Trustee's interests, or
4 (3) whether the transfer from the Debtor to Zeman was void or voidable. As discussed
5 herein, in their stipulation in the earlier lawsuit, the parties specifically preserved those
6 claims and issues for adjudication in this adversary proceeding.

7 Defendants now request a declaration from the court such that,

8 (1) the Trustee has an affirmative obligation to complete the process of
9 causing the Residence to be sold and applying the proceeds of that sale
10 'to satisfy the plaintiffs' claims against Cass,' as the complaint alleges in
11 the Second Lawsuit that the Trustee removed to this court, (2) the
12 abstract of judgment that was recorded in their favor on November 11,
2005 is superior to the claims of interest that the Trustee has asserted
that he has in the residence, and (3) the purported transfer by Catherine
Cass to her daughter was a fraudulent transfer that nullified and voided
that transfer including the life estate.

13 Defendants' First Amended Counterclaim at 7-8, filed on June 2, 2010.

14 Therefore, because the remedies sought are not inconsistent, and because the
15 Stipulation and the Separate Judgment in the fraudulent transfer action did not address
16 whether Defendants' judgment lien from the defamation and nuisance action attached to
17 Debtor's residence, the court concludes that Defendants' claims are not barred by the
18 election of remedies doctrine. The court further concludes that judicial estoppel does not
19 apply here because Defendants have not taken inconsistent litigation positions in the
20 earlier lawsuit and in this one.

21 **II. DEFENDANTS' JUDGMENT LIEN ATTACHED TO THE SUBJECT**
22 **PROPERTY UPON RECORDATION OF THE ABSTRACT OF THE**
23 **JUDGMENT**

24 "[A] judgment lien on real property is created under this section by recording an
25 abstract of a money judgment with the county recorder." California Code of Civil
26 Procedure, § 697.310(a). Further, "[a] judgment lien on real property attaches to all
27 interest in real property in the county where the lien is created (whether present or future,
28 vested or contingent, legal or equitable) . . . but does not reach . . . real property that is

1 subject to an attachment lien in favor of the creditor and was transferred before
2 judgment.” California Code of Civil Procedure, § 697.340(a).

3 The law of creditors’ rights regarding fraudulent transfers is a bit of a patchwork in
4 this area. A creditor has remedies under common law as well as the California Uniform
5 Fraudulent Transfer Act (“CUFTA”), which was adopted on January 1, 1987. Both case
6 law and the CUFTA recognize that remedies available to a creditor are cumulative.

7 **A. Common Law Fraudulent Transfer Remedies**

8 It is a deeply rooted principle of case law that a fraudulent transfer is inherently
9 wrong, and is thus, void:

10 [T]he law is well settled, that a conveyance made with intent to defraud
11 creditors is void, though there may have been a full and valuable
12 consideration paid therefor. The fraud taints and vitiates it. And it will not
13 be allowed to stand even as security for advances actually made. The sale
14 and conveyance of all this property being but one transaction, and it being
found that the sale as to a part of the property was made for the purpose of
defrauding creditors, the Court below would have been justified in holding
the whole transacting fraudulent and void. The fraud would taint the whole.

15 *Swinford v. Rogers*, 23 Cal. 233, 235-236 (1863) (internal citations omitted); *see also*, 11
16 *Miller & Starr, California Real Estate* § 32:52 at 99 (3d ed. 2011) (“Any transfer by the
17 judgment debtor that is a fraud on creditors is void as to them.”), *citing inter alia*, *First*
18 *National Bank of Los Angeles v. Maxwell*, 123 Cal. 360, 371 (1899).

19 California case law has well established that a judgment lien attaches to real
20 property that is fraudulently transferred by treating the transfer as void in the first place,
21 and not just voidable. *Bull v. Ford*, 66 Cal. 176, 177 (1884) (“The conveyance to
22 defendant being void as against Alvarado’s creditors, the creditors were authorized to
23 levy upon and sell the property as if no conveyance had ever been made by their
24 debtor.”) (citations omitted); *Hassen v. Jonas*, 373 F.2d 880, 883 (9th Cir. 1967) (“The
25 effect of [§ 3439.07] that transfers within the statute are fraudulent is that such transfers
26 are deemed void as to creditors.”); *First National Bank of Los Angeles v. Maxwell*, 123
27 Cal. at 371 (holding that the title and ownership of the property remains in the fraudulent
28

1 grantor as fully as though no transfer had been attempted); *McGee v. Allen*, 7 Cal. 2d
2 468, 473 (1936) (holding that a judgment is a lien on property of the judgment debtor
3 fraudulently conveyed)(citation omitted); *Liuzza v. Bell*, 40 Cal. App. 2d 417, 429 (1940)
4 (“In fraudulent transactions, for the protection of creditors it has been held that ownership
5 and title remain in the grantor.”); *Kinney v. Vallentyne*, 15 Cal. 3d at 479 n.6 (“If the
6 transfer is in fraud of the creditor, the creditor may follow the property into the hands of
7 the transferee even if the transfer took place before the [judgment] lien attached.”).
8 Because the fraudulent transfer is disregarded, a perfected judgment lien reaches the
9 interest of a judgment debtor in property that has been fraudulently transferred to
10 another—even if the transfer took place before the judgment lien attached.

11 **B. Reconciling Common Law Fraudulent Transfer Remedies with**
12 **the CUFTA**

13 Trustee argues that the CUFTA, California Civil Code § 3439.01 *et seq.*, changed
14 the common law such that an alleged fraudulent transfer is voidable, not void *ab initio*.
15 Under the CUFTA, in an action for relief, a creditor may obtain various remedies. A
16 creditor may: (1) avoid the transfer or obligation to the extent necessary to satisfy the
17 creditor’s claim, (2) levy on the fraudulently transferred property by way of attachment
18 against the asset, (3) obtain an injunction against further disposition of the asset; and
19 (4) appoint a receiver to take charge of the asset. California Civil Code § 3439.07(a); see
20 *also*, 1 Ahart, *California Practice Guide: Enforcing Judgments and Debts*, ¶¶ 3:331 –
21 349.5 at 3-103 – 3-108. Trustee points to the use of the word “avoidance” to indicate a
22 change in the law by the legislature to treat all fraudulent transfers as voidable as
23 opposed to void. However, CUFTA itself does not explicitly declare whether a fraudulent
24 transfer is void or merely voidable.

25 Regarding the remedies available pursuant to the CUFTA, in *Cortez v. Vogt*, the
26 California Court of Appeal stated that “the remedies of the [Uniform Fraudulent Transfer
27 Act] and its predecessor, the Uniform Fraudulent Conveyance Act, are cumulative to the
28 remedies applicable to fraudulent conveyances that existed before the uniform laws went

1 into effect.” 52 Cal. App. 4th 917, 929 (1997). With respect to fraudulent transfers, the
2 court noted that a fraudulent grantee “holds only an apparent title, a mere cloak under
3 which is hidden the hideous skeleton of deceit, the real owner being the scheming and
4 shifty judgment debtor” *Id.* at 936. Furthermore, the court stated that the CUFTA
5 “is remedial and as such should be liberally construed,” and that “the objective of the act
6 is to enhance and not to impair the remedies of the creditor.” *Id.* at 937; *see also Fidelity*
7 *National Title Insurance Co. v. Schroeder*, 179 Cal. App. 4th 834, 849 (2009))
8 (“California recognizes that common law causes of action are not preempted by the
9 [C]UFTA and remain available remedies.”), *citing inter alia*, California Civil Code,
10 § 3439.10 and *Macedo v. Bosio*, 86 Cal.App.4th 1044, 1051 (2001); *Jhaveri v.*
11 *Teitelbaum*, 176 Cal. App. 4th 740, 755 (2009) (finding that the CUFTA is not the
12 exclusive remedy by which fraudulent transfers may be attacked; they may also be
13 challenged by way of a common law action based on fraud); *see also 2 Ahart, California*
14 *Practice Guide: Enforcing Judgments and Debts*, ¶ 6:170 at 6B-8 (“A transfer of property
15 in fraud of creditors may be disregarded and the property levied upon.”).

16 After the enactment of the CUFTA, in *Casey v. Gray*, the California Court of
17 Appeal held that “the abstract does not attach until it is recorded and it therefore cannot
18 affect previously transferred property.” 13 Cal. App. 4th 611, 614 (1993). Based on this
19 language, Trustee argues that Defendants’ abstract of judgment did not attach to the
20 remainder interest in the Residence, but only to Debtor’s life estate. Trustee also argues
21 that on November 1, 2005, when Defendants recorded their abstract of judgment, the
22 Debtor’s only interest in the property was a life estate—the Debtor had previously
23 transferred the remainder interest in the property to her daughter. According to Trustee,
24 because the life estate lapsed upon the Debtor’s death on February 7, 2009, Defendants’
25 lien lapsed as well. Therefore, Trustee argues that Defendants’ recordation failed to
26 create any lien attaching to the remainder interest transferred by the Debtor to her
27 daughter.

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1 However, the case at bar involves a fraudulent transfer, which was not an issue in
2 Casey, and is therefore distinguishable. In Casey, the court held that a judgment lien
3 from an abstract of judgment does not attach to “previously transferred property.” *Id.*
4 The court defined property as previously transferred, “if the **purchase price is paid** and
5 **no equitable interest is retained**, notwithstanding that some formality of transfer is
6 incomplete at the time the abstract is recorded.” *Id.* (emphasis added). For two reasons,
7 the Residence does not fit the definition of “previously transferred property.” First, no
8 purchase price was paid. Second, the Debtor retained an equitable interest in the
9 property because her daughter agreed to return the title to the Debtor at any time. For all
10 intents and purposes, the Residence was the Debtor’s property. She continued to enjoy
11 the right to use the property through her retention of the life estate in the property, and
12 she continued to control Zeman’s right to dispose of the property, as evidenced by the
13 side agreement between Debtor and Zeman to re-convey the remainder interest. On this
14 record, the court finds by a preponderance of the evidence that the Debtor retained an
15 equitable interest in the Residence after she purportedly transferred a remainder interest
16 to her daughter.⁴⁴ The court further rejects Trustee’s contention that Defendants failed to
17 preserve the issue of whether Debtor had an equitable interest in the Residence in the
18 joint pretrial order since that issue was preserved in one or more of the contested issues
19 of law identified in the joint pretrial order, i.e., JPTO, Contested Issues of Law, ¶¶ 6, 7, 8,
20 9, 10 and 11. Therefore, for the foregoing reasons, the court concludes that the
21 Residence was not previously transferred within the meaning of Casey and that Casey is
22 inapposite because it did not address the issue of a fraudulent transfer.

23 Allowing the judgment lien to attach to the fraudulently transferred property
24 appropriately remedies the substance of the transaction here; the Debtor was the real

25 _____
26 ⁴⁴ The Superior Court in assessing punitive damages against the Debtor and in favor of Defendants in the
27 defamation and nuisance action considered the Residence to be the Debtor’s property after the transfer,
28 stating “AND I CAN SAY IF I COULD FIND, IF THIS WERE A CRIMINAL CASE, BEYOND A
REASONABLE DOUBT THAT THE TRANSFER OF THIS HOUSE WAS TO AVOID THE POSSIBILITY OF
A JUDGMENT THAT MIGHT EFFECT HER ABILITY TO HOLD ON TO THIS HOUSE. . . .” JPTO,
Undisputed Facts ¶ 9; Exhibit 4 at 20.

1 owner of the Residence and had at least an equitable interest in the property. See
2 *Fidelity National Title Insurance Co. v. Schroeder*, 179 Cal. App. 4th at 849, *citing*,
3 California Code of Civil Procedure § 697.340(a) (“California law provides that a judgment
4 lien attaches to *all* interests in real property, including *equitable* interests.”) (italics in
5 original). Thus, it is the view of this court that if Debtor had an equitable interest in the
6 Residence, despite the purported transfer of a remainder interest to her daughter,
7 Defendants’ judgment lien attached to this interest when they perfected the judgment lien
8 by recording an abstract of judgment pursuant to California Code of Civil Procedure,
9 § 697.310(a). *Id.* Thus, the court agrees with Defendants’ argument that “[w]hether the
10 transfer was void or void ab initio is an issue for this Court to determine in this trial and
11 even if the Court were to conclude that the transfer were not void or void ab initio, the
12 abstract of judgment still attached to Mrs. Cass’s equitable ownership of the Residence.”
13 *See Responsive Trial Brief by James and Rebecca Wallace and Gloria Suess*, filed on
14 February 16, 2012, at 15.

15 Trustee’s position exalts form over substance and ignores the liberal remedial
16 policies of the CUFTA and case law. Trustee’s restrictive reading of CUFTA, namely that
17 a judgment lien creditor has no rights or remedies until the fraudulent transfer is avoided,
18 is not supported by California law as provided in the applicable statutes and case law,
19 and would have the effect of perpetuating the fraud of the sham transfer by Debtor to
20 Zeman. This restrictive view would, in fact, nullify the effectiveness of the other remedies
21 provided by CUFTA to defeat a fraudulent transfer, such as attachment and levy pursuant
22 to a perfected judgment lien, because a successful avoidance action would be needed to
23 perfect these other remedies according to Trustee. Nowhere is such an intent to
24 condition other fraudulent transfer remedies on an avoidance action expressed in CUFTA
25 or in its legislative history.

26 It appears that the use of the word “avoidance” in the language of California Civil
27 Code § 3439.07(a)(1) was not intended to mean that fraudulent transfers are merely
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1 “voidable,” as the Trustee argues. Instead, it appears that the legislature intended it to be
2 a limited exception to the general rule that, by nature, fraudulent transfers are void *ab*
3 *initio*, in order to restrict the ability of a creditor in an avoidance action to set aside a
4 fraudulent transfer to a good faith purchaser for reasonably equivalent value. See
5 California Civil Code, § 3439.08(d) (“Notwithstanding voidability of a transfer or an
6 obligation under [the CUFTA], a good faith transferee . . . is entitled, to the extent of the
7 value given the debtor for the transfer or obligation, to the following: (1) A lien on or a
8 right to retain any interest in the asset transferred. . . .”). Thus, if the transferee of the
9 property is a good faith purchaser who gives reasonably equivalent value, the transfer is
10 not voidable in an avoidance action. If the transferee is *not* a good faith purchaser for
11 reasonably equivalent value—like Zeman in this case—the transfer is void and the
12 creditor may seek to set it aside in an avoidance action. Defendants’ recorded abstract
13 of judgment became a lien on the Residence, unless the property had been conveyed by
14 the Debtor to an innocent purchaser for value before the abstract of judgment was
15 recorded. California Code of Civil Procedure §§ 697.310(a) and 697.340(a); California
16 Civil Code §§ 3439.07(a)(1) and 3439.08; see *also*, 11 Miller & Starr, *California Real*
17 *Estate* § 32:52 at 99 (“The subsequently recorded abstract of judgment becomes a lien
18 on the property, unless the property has been conveyed by the fraudulent grantee to an
19 innocent purchaser for value before the abstract of judgment was recorded.”), *citing inter*
20 *alia*, *First National Bank of Los Angeles v. Maxwell*, 123 Cal. at 371 and *Fly v. Cline*, 49
21 Cal. App. 414, 419 (1920).

22 Nevertheless, in addressing the question of whether a fraudulent transfer is void or
23 voidable under the CUFTA, the court observes that there is no indication in the CUFTA’s
24 language or in its legislative history that the California legislature intended to change the
25 common law and establish fraudulent transfers in general as voidable instead of void.
26 Following CUFTA’s enactment in 1987, courts and other authorities continue to recognize
27 that a creditor has cumulative remedies with respect to a fraudulent transfer as discussed
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1 herein. See, e.g., *Fidelity National Title Insurance Co. v. Schroeder*, 179 Cal. App. 4th at
2 849; *Jhaveri v. Teitelbaum*, 176 Cal. App. 4th at 755; 1 Ahart, *California Practice Guide:*
3 *Enforcing Judgments and Debts*, ¶¶ 3:342 – 3:350 at 3-106 – 3-109 and ¶ 6:170 at 6B-8.

4 In addition, the court has considered the parties' arguments based on *Quarre v.*
5 *Saylor (In re Saylor)*, 108 F.3d 219 (9th Cir. 1997), and agrees with the Defendants.
6 *Saylor* is distinguishable from the present case. In *Saylor*, the Ninth Circuit affirmed the
7 Ninth Circuit BAP's holding that a judgment creditor did not have standing to prosecute a
8 non-dischargeability claim under 11 U.S.C. § 523(a)(6) based on an alleged fraudulent
9 transfer of real property. 108 F.3d at 221. The present case, in contrast, does not
10 involve a claim under 11 U.S.C. § 523(a)(6) regarding the dischargeability of a debt. The
11 judgment creditor in *Saylor* was not asserting any lien rights as a judgment creditor,
12 which is different from this case because the judgment creditor in this case is asserting a
13 lien claim rather than a debt dischargeability claim. 108 F.3d at 220-222. The question
14 of the lien rights of a judgment creditor was not determined by the *Saylor* court, nor was
15 the question whether a fraudulent transfer is "void" or "voidable" under California law
16 determined, and therefore, *Saylor* is inapposite to this case.

17 Similarly, the opinion in *Retail Clerks Welfare Trust v. McCarty (In re Van de*
18 *Kamp's Dutch Bakeries)*, 908 F.2d 517 (9th Cir. 1989), is not determinative of the
19 outcome in this case. *Van de Kamp's* involved an interpretation of Washington law which
20 provided that a fraudulent conveyance is good as between the parties and passes title,
21 so that union pension funds had to bring a lawsuit and obtain a judgment in state court to
22 perfect their statutory liens for unpaid benefit contributions in fraudulently conveyed
23 property. 908 F.2d at 518-520. The bankruptcy trustee avoided a fraudulent transfer and
24 preserved the transfer for the benefit of the bankruptcy estate under 11 U.S.C. §§ 548
25 and 551 over the objection of these competing lien creditors because under Washington
26 law, they had not perfected their liens prepetition. *Id.* The instant case is distinguishable
27 because it involves the law of another state, California, which has a different substantive
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1 outcome because as discussed herein, in California, fraudulent transfers are void as to
2 creditors and a perfected judgment lien may attach to an equitable interest in property
3 that has been fraudulently transferred. See *Connelly v. Marine Midland Bank, N.A.*, 61
4 B.R. 748, 749-750 (W.D.N.Y. 1986) (avoided and preserved interest inferior to perfected
5 interest), cited in *In re Van de Kamp's Dutch Bakeries*, 908 F.2d at 519 and n.2 (also
6 noting "well-established principle that a trustee who avoids an interest succeeds to the
7 priority that interest enjoys over competing interests"). The court in *Van de Kamp's*
8 simply did not consider the same legal questions presented here.

9 Therefore, for the foregoing reasons, the court holds that under applicable
10 California law, the judgment lien perfected by Defendants' recorded abstract of judgment
11 attached to the Debtor's Residence on November 1, 2005, that the recordation of the
12 abstract of judgment perfected Defendants' judgment lien against the Residence which
13 was fraudulently transferred property, and that the fraudulent transfer from the Debtor to
14 Zeman was void. Accordingly, the court concludes that Trustee must apply the proceeds
15 of the sale of the Debtor's Residence in this bankruptcy case to satisfy Defendants'
16 claims against the Debtor, except those that are superior to Defendants' November 1,
17 2005 judgment lien.

18 **CONCLUSION**

19 For the foregoing reasons, the court will deny and dismiss the adversary complaint
20 of Trustee and will enter judgment for Defendants on their counterclaim against Trustee.

21 This memorandum decision constitutes the court's findings of fact and conclusions
22 of law.

23 In issuing this memorandum decision, the court takes no position regarding the
24 effect of this ruling, if any, on other pending proceedings, such as Trustee's motion for
25 surcharge under 11 U.S.C. § 506(c).

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Counsel for Defendants is ordered to submit a proposed judgment consistent with
this memorandum decision within 30 days of entry of the decision.

IT IS SO ORDERED.

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DATED: August 31, 2012

United States Bankruptcy Judge

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NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM DECISION RE ADVERSARY COMPLAINT AND COUNTERCLAIM** was entered on the date indicated as “Entered” on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (“NEF”) – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of **July 2, 2012**, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below:

- Charles W Daff (TR) cdaff@epiqtrustee.com, cdaff@ecf.epiqsystems.com, c122@ecfcbis.com
- D Edward Hays ehays@marshackhays.com, ecfmarshackhays@gmail.com
- Martina A Slocomb mslocomb@marshackhays.com, ecfmarshackhays@gmail.com
- United States Trustee (SA) ustpreion16.sa.ecf@usdoj.gov
- Wendy D Vierra wendy.vierra@boe.ca.gov

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Via U.S. Mail:
Attorney for Defendants
David B Dimitruk
5 Corporate Park Suite 220
Irvine, CA 92606

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an “Entered” stamp, the party lodging the judgment or order will serve a complete copy bearing an “Entered” stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below: