

judgment on the pleadings
FRCP 12(c)
wrongful foreclosure
judicial notice
FRE 201
judicial estoppel
ORS 86.780
ORS 86.770(1)
Oregon Trust Deed Act (OTDA)
declaratory judgment
violation of automatic stay
§ 362(k)
violation of order granting
relief from stay
breach of contract
Fair Debt Collection Practices
Act (FDCPA)
15 U.S.C. § 1692
ORS 646.639
Unlawful Trade Practices Act
(UTPA)
ORS 646.638(1)
elder abuse
ORS 124.100(2)
intentional infliction of
emotional distress

Harris v. Wells Fargo Bank, Adversary No. 12-3113
James E. Harris, Case No. 09-39428

10/04/2013 elp

Unpublished

Debtor filed this action for wrongful foreclosure and other relief relating to the servicing and foreclosure of the trust deed on debtor's house. Defendants sought judgment on the pleadings on all claims, and debtor sought partial summary judgment on some of the claims.

The court took judicial notice of a number of documents related to the deed of trust. The court first held that debtor was judicially estopped from pursuing prepetition claims, because he had failed to disclose any of those claims in his bankruptcy schedules, and had not sought to amend to include the claims. In fact, he had moved to reopen his case to obtain a discharge the day after he had filed an action in state court for wrongful foreclosure.

As for the postpetition nonjudicial foreclosure, debtor waited too long to challenge the sale. Debtor did not bring his

wrongful foreclosure action until six months after the foreclosure sale had occurred and the trustee had recorded the trustee's deed. Under Oregon law, the recording of a trustee's deed is final as to a bona fide purchaser. Because the sale to a BFP had occurred and the deed recorded before debtor brought this action, the foreclosure sale was final and could not be set aside.

The court then considered debtor's other claims. The motion for judgment on the pleadings was granted on debtor's claim for declaratory judgment, because it merely duplicated his other claims. Debtor was not entitled to damages for his claims for violation of the automatic stay or of the order granting relief from stay, because the damages he sought arose from the foreclosure sale, which could not be challenged after the sale was final.

The court rejected debtor's argument that his breach of contract claim should survive defendants' motion; the damages he sought were caused by his default and the final foreclosure sale, which could no longer be challenged.

Debtor's claims under the state and federal Fair Debt Collection Practices Acts survived to the extent that he sought damages for postpetition conduct. He was required to replead facts to support his allegation of damages for multiple known instances of wrongful conduct.

Debtor's remaining claims failed. The claim for violation of the Oregon Unlawful Trade Practices Act was barred because debtor was judicially estopped from claiming damages for prepetition conduct, the damages he sought for postpetition conduct were caused by his default, and emotional distress damages are not recoverable under the UTPA. The claim for elder abuse failed because it was based on his claim that the foreclosure was wrongful, and it was too late for debtor to challenge the foreclosure. The claim for intentional infliction of emotional distress failed, because much of the conduct of which debtor complained occurred prepetition, and debtor is judicially estopped from seeking those damages, and the alleged postpetition conduct was not an extraordinary transgression of the bounds of socially tolerable conduct that would be actionable under state law.

The court remanded the wrongful eviction and counterclaim for ejectment to state court.

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9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:)
12 JAMES E. HARRIS,) Bankruptcy Case No.
13 Debtor.) 09-39428-elp7
14 _____)
15 JAMES E. HARRIS,) Adversary No. 12-3113
16 Plaintiff,) MEMORANDUM OPINION
17 v.)
18 WELLS FARGO BANK, N.A.; SAND CANYON)
19 CORPORATION; AMERICAN HOME MORTGAGE)
20 SERVICING, INC.; FIDELITY NATIONAL)
21 TITLE INSURANCE COMPANY; and)
22 EVERETT CUSTOM HOMES, INC.,)
23 Defendants.)

24 Debtor James Harris ("debtor") brought this action, originally in
25 state court and then removed to bankruptcy court, seeking damages and
26 other relief related to what he alleges was a wrongful foreclosure of his
property. The Fourth Amended Complaint ("FAC") alleges eleven causes of

1 action arising under state and federal law.¹ Defendants, who are the
2 lender, its successors, the trust deed trustee, the title company, and
3 the purchaser at the foreclosure sale, all move for judgment on the
4 pleadings on all claims.² Debtor seeks partial summary judgment on some
5 of the claims on the issues of whether the foreclosure was wrongful,
6 reserving for trial other allegations and the determination of damages.

7 FACTS

8 The documents attached to the FAC show the following.

9 In 2005, debtor borrowed \$160,000 from eHome Credit Corp. ("eHome")
10 to refinance residential real property. The loan was evidenced by a
11 promissory note ("the note"), FAC Exh. 1, and was secured by a deed of
12 trust. FAC Exh. 2.

13 Shortly thereafter, Popular Warehouse Lending, LLC ("PWL") sent a
14 Bailee Letter to Option One Mortgage Corporation ("Option One"), in which
15 it, at the request of eHome, offered to sell the note to Option One.
16 Option One purchased the note, and eHome issued a Corporation Assignment

18 ¹ Debtor alleges claims for declaratory relief, quiet title,
19 unlawful foreclosure, violations of the bankruptcy stay and relief from
20 stay and confirmation orders, breach of contract, federal and state
21 unlawful debt collection practices, unlawful business and trade
22 practices, elder abuse, wrongful eviction, and intentional infliction of
23 emotional distress.

24 ² Defendant Sand Canyon Corporation, the successor in interest to
25 Option One Mortgage Corporation, filed a motion for judgment on the
26 pleadings. Debtor has resolved his claims with Sand Canyon, and the
claims against that defendant have been dismissed. Sand Canyon
accordingly withdrew its motion for judgment on the pleadings and debtor
withdrew his motion for partial summary judgment as to Sand Canyon.
Therefore, any reference to "defendants" in this memorandum opinion will
refer to all defendants except Sand Canyon.

1 of Deed of Trust to Option One. That trust deed, dated September 19,
2 2005, was recorded on April 9, 2007. FAC Exh. 5.

3 Early in 2006, debtor's loan was pooled with other loans and
4 securitized in the Option One Mortgage Loan Trust 2006-1. In connection
5 with the securitization, Option One entered into a Pooling and Servicing
6 Agreement with Option One Mortgage Acceptance Corporation ("OOMAC") and
7 Wells Fargo Bank, N.A. ("Wells Fargo"). That agreement provided that
8 OOMAC assigned to Wells Fargo as trustee the pool of mortgage notes,
9 including debtor's. FAC Exh. 6. On January 20, 2006, Option One and
10 OOMAC entered into a Mortgage Loan Purchase Agreement ("Purchase
11 Agreement") through which Option One sold and assigned to OOMAC all of
12 its right, title and interest in the mortgage loans contained on a
13 schedule of loans, including debtor's mortgage loan. FAC Exh. 6 at 6.
14 That agreement also provided that Option One would, on behalf of OOMAC,
15 deliver to the trustee the original mortgage notes that were being sold.
16 Two years later, on July 23, 2008, Option One executed an Assignment of
17 Deed of Trust transferring debtor's trust deed to Wells Fargo as trustee
18 for the Option One Mortgage Loan Trust 2006-1. FAC Exh. 7. That
19 assignment was recorded a week later. Id.

20 In the meantime, debtor defaulted on the loan and, in June 2007,
21 First American Title Insurance Company ("First American") began the non-
22 judicial foreclosure process. FAC Exh. 8 at 5. Debtor alleges that he
23 filed a state court action to stop the foreclosure. In any event, in
24 late 2008, debtor entered into a loan modification agreement with
25 American Home Mortgage Servicing, Inc. ("AHMSI") as servicer on the loan.
26 Debtor alleges that his state court action was settled or dismissed.

1 In July 2009, debtor again defaulted, and non-judicial foreclosure
2 proceedings were again initiated. Before the foreclosure sale could
3 occur, debtor filed a chapter 13 petition in November 2009 to stop the
4 foreclosure. His chapter 13 plan, which provided for cure of the
5 mortgage default through the plan, was confirmed in March 2010.

6 In December 2010, after debtor failed to make required adequate
7 protection payments, debtor stipulated to relief from the automatic stay
8 in this court to allow Wells Fargo to foreclose on the property. FAC
9 Exh. 17, 18. Fidelity National Title Insurance Company ("Fidelity") as
10 successor trustee sold the property on May 9, 2011, at a foreclosure sale
11 to Everett Custom Homes, Inc. ("Everett") for \$195,000, a bona fide
12 purchaser.³ The trustee's deed was issued and was recorded on May 18,
13 2011. FAC Exh. 21.

14 Debtor alleges various types of misconduct by Wells Fargo, AHMSI,
15 and Fidelity in connection with the servicing of the loan and the
16 foreclosure of the property. Among other things, he alleges that,
17 throughout the life of the loan (both pre- and postpetition) and
18 including in connection with the loan modification, defendants provided
19 improper customer service, and improperly added interest, fees, and costs
20 that were not authorized under the loan documents. He also alleges that
21 the attempted and completed foreclosures were improper because there were
22 unrecorded assignments of the trust deed in violation of Oregon law, and
23 because the foreclosures were based on falsely recorded assignments of
24 the trust deed.

25
26 ³ Debtor does not allege or argue that Everett was not a bona fide purchaser.

1 On May 20, 2011, debtor converted his chapter 13 case to chapter 7.
2 In his conversion documents, he stated his intention to surrender the
3 real property that had been foreclosed. He did not list in his schedules
4 any claims against any of the defendants in this case.

5 The bankruptcy case was closed in August 2011 without entry of
6 discharge, because debtor failed to file his financial management
7 certificate.

8 Three months later (and six months after the foreclosure sale), on
9 November 14, 2011, debtor filed a wrongful foreclosure action in state
10 court. The next day, debtor moved to reopen his bankruptcy case. The
11 case was reopened, debtor filed his financial management certificate, and
12 discharge was entered and the case closed again on November 15, 2011.

13 In late 2011, Everett commenced a forcible entry and detainer
14 ("FED") action to evict debtor. The wrongful foreclosure and FED actions
15 were consolidated in state court. On motion of Fidelity, the bankruptcy
16 case was reopened and debtor's complaint removed to this court. After
17 the pleadings were completed, defendants moved for judgment on the
18 pleadings on all claims, and debtor moved for partial summary judgment.

19 LEGAL STANDARDS FOR MOTIONS

20 A party may move for judgment on the pleadings after the pleadings
21 are closed. Fed. R. Civ. P. 12(c); Fed. R. Bankr. P. 7012. The court
22 shall not grant a motion under this rule "unless the movant clearly
23 establishes that no material issue of fact remains to be resolved and
24 that [the movant] is entitled to judgment as a matter of law." 5C Wright
25 & Miller, Federal Practice and Procedure § 1368 at p. 223 (3d ed. 2004).

26 Where a motion under Fed. R. Civ. P. 12(c) is used to raise the

1 defense of failure to state a claim, "the motion for judgment on the
2 pleadings faces the same test as a motion under [Fed. R. Civ. P.]
3 12(b)(6)." McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir.
4 1988). In ruling on a motion to dismiss for failure to state a claim,
5 the court must accept as true all of the allegations in the complaint and
6 construe them in the light most favorable to the plaintiff. NL
7 Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

8 Matters outside the scope of the complaint are not generally
9 considered; however, a document is not outside the scope of the complaint
10 if the complaint specifically refers to the document and if there is no
11 question as to its authenticity. Branch v. Tunnell, 14 F.3d 449, 453
12 (9th Cir. 1994), overruled on other grounds by Galbraith v. County of
13 Santa Clara, 307 F.3d 1119 (9th Cir. 2002).

14 A party is entitled to summary judgment on a claim or part of a
15 claim "if the movant shows that there is no genuine dispute as to any
16 material fact and the movant is entitled to judgment as a matter of law."
17 Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056.

18 DISCUSSION

19 I. REQUEST FOR JUDICIAL NOTICE

20 In connection with debtor's Motion for Partial Summary Judgment and
21 his response to Fidelity's Motion for Judgment on the Pleadings, he asks
22 that the court take judicial notice of a number of documents: (1) the
23 September 6, 2005, deed of trust; (2) the Pooling and Servicing Agreement
24 for the Option One Mortgage Trust 2006-1; (3) the Mortgage Loan Purchase
25 Agreement for the Option One Trust; (4) the deed of trust assignment from
26 eHome Credit Corp. to Sand Canyon Corp. dated September 19, 2005; (5) the

1 deed of trust assignment from Sand Canyon to Wells Fargo, dated July 23,
2 2008; (6) the Notice of Default and Election to Sell dated July 2, 2009;
3 (7) the Affidavit of Mailing recorded on November 10, 2009; (8) documents
4 from debtor's bankruptcy case, Case No. 09-39428, including Docket #1, 2,
5 23, 25, 27, and 29; (9) the Affidavit of Mailing recorded on January 24,
6 2011; and (10) the trustee's deed recorded on May 18, 2011. He seeks
7 judicial notice only that the documents were filed or recorded and that
8 they say what they say. He does not seek judicial notice that the
9 statements in those documents are true.

10 In connection with defendants' Motion for Judgment on the Pleadings,
11 debtor asks for judicial notice of Docket #77 from debtor's bankruptcy
12 case, which is the trustee's Motion and Notice of Intent to Settle and
13 Compromise.

14 The only opposition to the requests for judicial notice was filed by
15 Fidelity, which is really an opposition to the characterization of the
16 bankruptcy trustee's Motion and Notice of Intent to Settle and Compromise
17 as an abandonment of any interest in the claims set out in the FAC.

18 Federal Rule of Evidence 201 provides that the court may take
19 judicial notice of facts that are not subject to a reasonable dispute
20 because they either are "generally known within the trial court's
21 territorial jurisdiction" or are facts that "can be accurately and
22 readily determined from sources whose accuracy cannot reasonably be
23 questioned." Fed. R. Evid. 201(b). The court must take judicial notice
24 if requested by a party who supplies the court with the necessary
25 information. Fed. R. Evid. 201(c)(2).

26 The documents of which debtor seeks judicial notice are not subject

1 to a reasonable dispute; the fact of filing and recording and that the
2 documents contain the information that they contain can be accurately and
3 readily determined. Fidelity's argument that debtor mischaracterizes the
4 effect of the trustee's Motion and Notice of Intent to Settle and
5 Compromise does not defeat judicial notice; it relates to the
6 significance the court should give to the document. Debtor's Requests
7 for Judicial Notice are granted, with the limitation that they establish
8 that the documents were either filed or recorded and that they say what
9 they say.

10 II. FIDELITY'S MOTION FOR JUDGMENT ON THE PLEADINGS

11 Fidelity seeks judgment on the pleadings on various grounds.
12 Because its arguments that it did not breach any duty to debtor are
13 disposed of by my later determination that debtor cannot now attack the
14 foreclosure sale, I will not discuss those arguments separately.

15 1. Standing

16 Defendants⁴ argue that debtor lacks standing to pursue these claims,
17 because the claims belong to the bankruptcy estate, not to debtor.
18 Debtor responds that, to the extent the claims belonged to the estate,
19 the trustee has released those claims to debtor. In support, he points
20 to the bankruptcy trustee's Motion and Notice of Intent to Settle and
21 Compromise and Order Thereon, entered in debtor's bankruptcy case on
22 December 13, 2012.

23 The order approving debtor's settlement with the bankruptcy trustee
24 confirms that the bankruptcy trustee has released to debtor any interest

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26 ⁴ The argument was originally raised only by Fidelity, but the
other defendants have joined in Fidelity's argument.

1 he had in the claims in this adversary proceeding, reserving only a right
2 to payment of \$15,000 if debtor prevails in this litigation.⁵ Debtor has
3 standing to pursue the claims.

4 2. Judicial Estoppel

5 Defendants next argue that debtor is judicially estopped from
6 pursuing these wrongful foreclosure claims, because he failed to disclose
7 them in his bankruptcy case.

8 "Judicial estoppel is an equitable doctrine that precludes a party
9 from gaining an advantage by asserting one position, and then later
10 seeking an advantage by taking a clearly inconsistent position."
11 Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir.
12 2001). The doctrine is applied "not only to prevent a party from gaining
13 an advantage by taking inconsistent positions, but also because of
14 'general consideration[s] of the orderly administration of justice and
15 regard for the dignity of judicial proceedings,' and to 'protect against
16 a litigant playing fast and loose with the courts.'" Id. (citations
17 omitted).

18 In considering whether to apply judicial estoppel, the court looks
19 at whether the party's later position is clearly inconsistent with its
20 earlier position, whether the court accepted the party's earlier
21 position, and whether the party asserting the inconsistent position would
22 gain an unfair advantage or impose an unfair detriment on the opposing
23 party if not estopped. Id. at 782-783. In a bankruptcy case, "a party
24 is judicially estopped from asserting a cause of action not raised in a

25
26 ⁵ The trustee has now sold whatever interest he retained in this
adversary proceeding to Fidelity. Case No. 09-39428, Doc. #79.

1 reorganization plan or otherwise mentioned in the debtor's schedules or
2 disclosure statements." Id. at 783.

3 Accurate and complete disclosure is of paramount importance in
4 bankruptcy cases.

5 "The courts will not permit a debtor to obtain relief from the
6 bankruptcy court by representing that no claims exist and then
7 subsequently to assert those claims for his own benefit in a
8 separate proceeding. *The interests of both the creditors, who plan
9 their actions in the bankruptcy proceeding on the basis of
information supplied in the disclosure statements, and the
bankruptcy court, which must decide whether to approve the plan of
reorganization on the same basis, are impaired when the disclosure
provided by the debtor is incomplete.*"

10 Id., 270 F.3d at 785 (quoting In re Coastal Plains, Inc., 179 F.3d 197,
11 208 (5th Cir. 1999) (alteration in original; quoting Rosenshein v.
12 Kleban, 918 F.Supp. 98, 104 (S.D.N.Y. 1996)).

13 A "debtor's duty to disclose potential claims as assets does not end
14 when the debtor files schedules, but instead continues for the duration
15 of the bankruptcy proceeding." Hamilton at 785. "Judicial estoppel will
16 be imposed when the debtor has knowledge of enough facts to know that a
17 potential cause of action exists during the pendency of the bankruptcy,
18 but fails to amend his schedules or disclosure statements to identify the
19 cause of action as a contingent asset." Id. at 784.

20 The basic rule applying judicial estoppel when a debtor fails to
21 disclose a claim in the bankruptcy case might not apply when the omission
22 was inadvertent or a result of a mistake. Quin v. County of Kauai Dep't
23 of Transp., 2013 WL 3814916 at *3 (9th Cir. July 24, 2013). Where a
24 debtor fails to disclose an asset in the schedules and obtains a
25 discharge, "it makes sense to apply a presumption of deliberate
26 manipulation" of the bankruptcy system. Id. at *4. Where, however, a

1 debtor who failed to disclose an asset and received a discharge later
2 reopens the closed case to amend the schedules to include the omitted
3 asset, "and allows the bankruptcy court to re-process the bankruptcy with
4 the full and correct information, a *presumption* of deceit no longer"
5 applies, and the court must determine whether the debtor had the
6 subjective intent to conceal. Id. at *4 and *7.

7 In this case, debtor took positions in the bankruptcy case that are
8 inconsistent with the prepetition claims he asserts here. He did not
9 list his claims against defendants in the original schedules he filed in
10 his bankruptcy case, despite the fact that much of the conduct about
11 which debtor now complains occurred prepetition. He was aware at that
12 time of the servicing issues of which he complains; he alleges that he
13 had sued AHMSI prepetition about those issues. He knew that defendants
14 had commenced foreclosure proceedings, and he also knew that defendants
15 were adding fees and charges to his balance, because the two notices of
16 foreclosure included the charges. He knew that he had entered into a
17 loan modification and that he was in the alleged vulnerable state he now
18 says made the loan modification agreement unconscionable.

19 Upon conversion of the case to chapter 7 after the nonjudicial
20 foreclosure was completed, debtor was instructed to file a complete set
21 of schedules, "detailing the debtor(s)' status as of [the] conversion
22 date[.]" Order Converting Chapter 13 Case to Case Under Chapter 7 (Case
23 No. 09-39428, Doc. 36). Despite the fact that all of the conduct of
24 which debtor complains in this adversary complaint occurred before
25 conversion, he failed to list any potential claims against defendants in
26 the conversion documents.

1 Debtor's case was closed without discharge. The day before he moved
2 to reopen the case to obtain his discharge, he had filed the state court
3 action challenging the foreclosure sale. Yet he still did not disclose
4 the claims he had already asserted in state court. In fact, he never has
5 sought to reopen this case to amend his schedules to include those
6 claims. This complaint came to this court because defendant Fidelity
7 removed the state court action to this court.

8 Debtor's failure at any time during the bankruptcy case to list any
9 of the claims he asserts here is inconsistent with his claims in this
10 adversary proceeding, filed in state court the day before he reopened his
11 bankruptcy case to obtain his bankruptcy discharge, that he is entitled
12 to invalidate the foreclosure sale and to an award of damages, including
13 \$10 million in punitive damages.⁶ Filing the state court complaint
14 demonstrates that he was aware of the claims before he obtained his
15 discharge.

16 The court "accepted" debtor's position that he had no prepetition
17 claims when it granted a discharge, based on the representation that this
18 was a no-asset case. The court's acceptance by granting a discharge does
19 not apply to the postpetition conduct of which debtor complains, which
20 was not property of the bankruptcy estate, see § 348(f) (upon conversion,

21
22 ⁶ The original state court complaint, filed pro se six months
23 after the foreclosure sale, sought to enjoin transfer of the property.
24 Although debtor did not initially seek damages, the complaint alleged
25 that defendants had engaged in fraud and misrepresentation and that their
26 loan servicing was defective, including a failure to provide an
accounting, which caused debtor stress. Debtor filed an amended and
second amended complaint alleging the same claims that were restated in a
third amended complaint filed after debtor obtained the assistance of
counsel.

1 property of the estate includes property of the estate that remains in
2 debtor's possession or control as of the date of conversion).

3 It would be unfair for debtor to be able to represent to the court,
4 the bankruptcy trustee, and creditors that he did not have any
5 prepetition claims against defendants, while obtaining a discharge of his
6 debts and pursuing the claims on his own behalf instead of for the
7 benefit of his creditors.

8 Debtor argues that his failure to disclose the claims was
9 inadvertent and that failing to disclose them was not a strategic
10 decision to seek an advantage over the creditors. These arguments are
11 not persuasive. Debtor's complaint seeks damages for prepetition conduct
12 in loan servicing conduct, adding unauthorized charges, commencing
13 foreclosure actions, and entering into a loan modification agreement.
14 This is conduct about which he would have been aware at the time he filed
15 his bankruptcy petition to stop the foreclosure. He certainly knew about
16 the claims by the time he asked for his discharge, because he had already
17 filed his lawsuit in state court alleging much of the same alleged
18 misconduct. He never sought to reopen his case to disclose the claims;
19 instead, he reopened his case to allow him to obtain a discharge
20 immediately after he had asserted the claims in state court.

21 I agree with debtor that judicial estoppel should not apply to
22 postpetition claims, because those claims were not property of the
23 estate. Debtor did not gain a bankruptcy advantage by failing to
24 disclose postpetition claims. Debtor will be estopped from pursuing any
25 of the claims that arose prepetition; he will not be estopped from
26 pursuing postpetition claims.

1 Debtor also argues that applying judicial estoppel in this case
2 would create a shield for creditors' unlawful behavior, because claims
3 are often unknown or not accrued when a debtor files bankruptcy. The
4 court should not, he says, bar the claims as a matter of law.

5 Application of judicial estoppel in this case is a matter of
6 discretion and equity, not a matter of law. Debtor's conduct throughout
7 the bankruptcy case belies any argument that his failure to disclose
8 prepetition claims against these defendants was inadvertent or mistaken.
9 Further, it is appropriate to apply the presumption of deliberate
10 manipulation, in light of debtor's failure ever to make a voluntary
11 disclosure of these claims to the court, the trustee, and his creditors.
12 Even without the presumption, there is no evidence from which the court
13 could conclude that debtor's failure to disclose was an innocent mistake
14 or occurred through inadvertence.

15 Contrary to debtor's argument, applying judicial estoppel here will
16 not create malpractice traps for bankruptcy attorneys. If counsel or the
17 debtor knows that there are potential claims against lenders or
18 servicers, the claims must be listed in the schedules. If the claims are
19 not listed initially because of an emergency filing, the schedules must
20 be amended to add those claims. It is not the failure to disclose the
21 claims in the initial filing that results in the application of judicial
22 estoppel here; it is debtor's failure to disclose once he knew he had the
23 claims. This was, at the latest, the day before he received his
24 discharge, when he filed his state court action.

25 Debtor also argues that failure to disclose these claims should not
26 bar him from pursuing those claims later, because a trustee would have

1 little interest in pursuing such claims against creditors. Whether the
2 trustee would be interested in pursuing the types of claims debtor
3 asserts here is for the trustee to decide, and the information on which
4 the trustee relies to make that decision comes from the debtor's
5 schedules. If the claims are disclosed, the trustee can make an
6 assessment of whether to pursue them on behalf of the estate and can
7 abandon those claims to the debtor if the trustee determines that they
8 are not worth pursuit. The only way for the trustee to make that
9 determination is if the debtor discloses the existence of the potential
10 claims, as the Bankruptcy Code requires.

11 Application of judicial estoppel in this case will not result in the
12 creditors losing out on any potential recovery. See Quin, at *6, *7
13 (raising concern that application of judicial estoppel in bankruptcy case
14 would detrimentally affect innocent creditors). The trustee entered into
15 a settlement with debtor, obtaining a payment in return for a release of
16 his claims. The trustee has now sold his interest to Fidelity.
17 Therefore, the creditors did benefit through the trustee's settlement.

18 The documents in this case demonstrate that debtor was seeking
19 relief from the state court at the same time he was seeking and obtained
20 a discharge in bankruptcy. Whether he knew of potential wrongful
21 foreclosure claims when he filed his case in 2009, he certainly knew of
22 those claims by the time he obtained his discharge, as he had already
23 filed his state court action. Because debtor failed to disclose any of
24 his prepetition claims in his bankruptcy schedules and obtained a
25 discharge of his debts, I conclude that he is estopped from asserting the
26 prepetition claims alleged in his FAC.

1 3. Collateral Attack

2 Fidelity argues that debtor's action is a collateral attack on or a
3 request for reconsideration of this court's order granting relief from
4 stay to allow foreclosure. I disagree. Debtor argues that the order
5 granting relief from stay, FAC Exh. 18 p.2, allowed defendants to
6 foreclose "to the extent permitted by applicable nonbankruptcy law," and
7 that the foreclosure was not permitted by applicable nonbankruptcy law.
8 His argument is that defendants violated the order, not that the order
9 granting relief was incorrect or should be set aside.

10 III. DEFENDANTS'⁷ MOTION FOR JUDGMENT ON THE PLEADINGS

11 1. Wrongful foreclosure

12 Debtor alleges that defendants' foreclosure was wrongful, and
13 therefore the foreclosure sale can be set aside, because there were
14 assignments of the deed of trust that were not recorded as required by
15 the Oregon Trust Deed Act ("OTDA"). Defendants argue that they did not
16 wrongfully foreclose but, even if they did, once the trustee's deed is
17 recorded, a nonjudicial foreclosure sale is final and a borrower can no
18 longer challenge the sale. Debtor argues that the sale may be set aside,
19 because the failure to record deprived the trustee of the authority to
20 sell the property.

21 Because I conclude that debtor cannot challenge a foreclosure after
22 the foreclosure sale to a bona fide purchaser has occurred and the
23 trustee's deed has been recorded, because the sale is final under state
24 law, I need not reach the question of whether any assignments of the

25
26 ⁷ This section addresses the arguments raised by defendants Wells
Fargo, AHMSI, and Everett.

1 trust deed were properly recorded as required in the OTDA.⁸

2 In the absence of a statute that expressly voids an agreement of
3 sale that was the result of a nonjudicial foreclosure sale conducted in
4 violation of the foreclosure statutes, the court looks at the intent of
5 the legislature to determine the effect of the sale. Staffordshire
6 Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or. App. 528,
7 540 (2006).

8 The legislature has provided guidance about the finality of such a
9 sale after the trustee's deed is recorded. ORS 86.780 provides:

10 When the trustee's deed is recorded in the deed records of the
11 county or counties where the property described in the deed is
12 situated, the recitals contained in the deed and in the affidavits
13 required under ORS 86.750 (3) and (4) shall be prima facie evidence
in any court of the truth of the matters set forth therein, but the
recitals shall be conclusive in favor of a purchaser for value in
good faith relying upon them.

14 In other words, as to a good faith purchaser for value, a recorded
15 trustee's deed following a nonjudicial foreclosure sale is final.

16 Consistent with this declaration of finality is ORS 86.770(1), which
17 provides that, if "a trustee sells property covered by a trust deed, the
18 trustee's sale forecloses and terminates the interest in the property
19 that belongs to a person to which notice of the sale was given[.]" Thus,
20 under the OTDA, the sale forecloses the debtor's interest, and the
21 recorded trust deed is final as to a bona fide purchaser for value.

22
23
24 ⁸ I note, however, that since these motions were argued, the
25 Oregon Supreme Court has held that the statutory nonjudicial foreclosure
26 requirement of ORS 86.735(1) that any assignments of the deed of trust
must be recorded does not apply to assignments that occur by operation of
law (as debtor alleges here). See Brandrup v. ReconTrust Co., 353 Or.
668 (2013); Niday v. GMAC Mortg., LLC, 353 Or. 648 (2013).

1 Debtor argues that the bona fide purchaser statute does not apply,
2 because the defect alleged here, the lack of recording of assignments of
3 the trust deed, deprived the trustee of the authority to sell and thus,
4 under Staffordshire Investments, the sale is invalid.

5 In Staffordshire Investments, the buyer at a non-judicial
6 foreclosure sale sued for breach of contract, seeking to require the
7 trustee of the trust deed to deliver the trustee's deed. The deed had
8 not yet been recorded.

9 The defendant (the trustee that had conducted the foreclosure sale)
10 argued that it could not deliver the deed because it had learned that,
11 before the sale occurred, the debtor had entered into a forbearance
12 agreement and thus was not in default on the loan. Because one of the
13 requirements for sale under ORS 86.735 is that there is a default by the
14 grantor, ORS 86.735(2), it argued that the sale agreement was invalid and
15 it could not deliver the trustee's deed to the buyer.

16 The Court of Appeals held that, "[b]ecause the preconditions to [the
17 trustee's] exercise of the power of sale under ORS 86.735(2) were not
18 satisfied, we conclude that [the trustee] lacked the statutory authority
19 to sell the property." Id. at 540.

20 The question then became the effect of the trustee's lack of
21 authority on its agreement with the purchaser at the sale. The court
22 concluded that the lack of sale authority meant that the sale agreement
23 was invalid. The OTDA, the court said,

24 confers upon a trustee the power to sell property securing an
25 obligation under a trust deed in the event of default, without the
26 necessity for judicial action. However, the trustee's power of sale
is subject to strict statutory rules designed to protect the
grantor, including provisions relating to notice and reinstatement.

1 Id. at 542. Voiding the sale agreement under the circumstances of that
2 case would not, the court said, "frustrate the legislature's objective to
3 provide a quick and efficient remedy for creditors against defaulting
4 buyers." Id.

5 The court, however, also went on to explain and limit its decision:

6 First, there is nothing in the language of that section [ORS
7 86.735(2)] or, indeed, elsewhere in the Act, to indicate that the
8 legislature intended the auction to be final *in the absence of legal*
9 *authority to sell the property*. Moreover, although certainty is an
10 important component of the nonjudicial foreclosure sale remedy, we
11 do not agree with plaintiff's statement, based on ORS 86.755(3),
12 that "[t]he Oregon statutory scheme * * * provide[s] that the
13 auction is final with the close of that auction[.]" Plaintiff
14 correctly notes that ORS 86.755(3) provides that the trustee shall
15 execute and deliver the trustee's deed within 10 days following
16 payment of the price bid; however, under ORS 86.780, the statutory
17 presumption of finality does not arise until the trustee's deed is
18 issued and recorded. We have not had occasion to squarely confront
19 the question of the significance of the execution and recording of
20 the trustee's deed on the finality of a nonjudicial sale, and it is
21 not necessary for us to do so here, except to note that, if the
22 agreement to postpone the sale is discovered before the trustee's
23 deed is executed, voiding the contract furthers the purpose of the
24 Act to protect the grantor from unauthorized sales without unduly
25 prejudicing the creditor's remedy envisioned by the Act.

26 Id. at 542-43 (emphasis in original; footnotes omitted). Where the
defect in the foreclosure sale "goes to the substance of the challenged
agreement[,]" and that defect is discovered before the trustee's deed is
executed, the contract of sale between the trustee and the buyer is void.

Id. at 543.

Staffordshire Investments did not discuss what would have happened
if the trustee's deed in that case had been recorded. In fact, the court
specifically distinguished the situation where the trustee's deed has not
been recorded from one where it has been recorded. 209 Or. App. at 543-
44. Given the language of ORS 86.780, that the recital in the trustee's

1 deed required by ORS 86.775 "of the facts concerning the default" is
2 conclusive as to a good faith purchaser for value, it is apparent that,
3 if the trustee's deed had been issued to a good faith purchaser for value
4 and recorded in Staffordshire Investments, the result in that case would
5 have been different; the sale would have been final, despite the mistake
6 about default.

7 ORS 86.780 provides for finality as to the bona fide purchaser at
8 the time the trustee's deed is recorded. It provides that the recitals
9 in the trustee's deed are conclusive as to a bona fide purchaser for
10 value. This gives clear indication that the legislature recognizes that
11 foreclosure sales must become final at some point, and that the point of
12 finality is the recording of the trustee's deed.

13 I recognize that the recitals contained in the trustee's deed do not
14 cover all four of the preconditions for sale set out in ORS 86.735. The
15 trustee's deed must describe the property conveyed, recite the facts
16 concerning the default, the notice given, the conduct of the sale, and
17 receipt of the purchase price from the buyer. ORS 86.775. The deed need
18 not recite that all assignments of the trust deed have been recorded.
19 Nonetheless, I conclude that the combination of ORS 86.770(1) and ORS
20 86.780 indicates that the legislature intends that the nonjudicial
21 foreclosure sale be final when there is a sale to a bona fide purchaser
22 for value and the trustee's deed is recorded, even if it be shown that
23 there were defects in the sale.

24 The parties cite a number of cases that have considered the effect
25 of alleged defects in a nonjudicial foreclosure sale. None of those
26 cases involved a completed sale to a bona fide purchaser for value in

1 which the trustee's deed had been recorded. Most of the cases that allow
2 a challenge to a foreclosure sale involve actions to stop the sale before
3 it occurs. See, e.g., James v. ReconTrust Co., 845 F.Supp.2d 1145 (D.
4 Or. 2012); Hooker v. Northwest Trustee Serv., Inc., 2011 WL 2119103 (D.
5 Or. 2011); Niday v. GMAC Mortgage, LLC, 353 Or. 648 (2013). Other cases
6 involve challenges to a foreclosure after the sale, but the sale was not
7 to a bona fide purchaser. E.g., U.S. Bank Nat'l Assoc. v. Wright, 253
8 Or. App. 207 (2012) (debtor could challenge foreclosure sale after it
9 occurred because the trustee's deed was prima facie evidence but not
10 conclusive for non-bona fide purchaser); Celestino v. Reconstrust Co.,
11 N.A., 2012 WL 1805495 (D. Or. 2012); Option One Mortg. Corp. v. Wall, 159
12 Or. App. 354 (1999); Domingo v. Anderson, 138 Or. App. 521 (1996), aff'd
13 in part, rev'd in part 325 Or. 385 (1997).

14 In a recent decision from the Oregon District Court, Judge Panner
15 considered and rejected the plaintiff's argument that a nonjudicial
16 foreclosure sale was invalid because there were unrecorded transfers of
17 the trust deed. Mikityuk v. Northwest Trustee Serv., Inc., 2013 WL
18 3388536 (D. Or. 2013). In that case, as in this one, the plaintiff had
19 waited until after the foreclosure sale had occurred and the trustee's
20 deed had been recorded to challenge the sale. Judge Panner considered
21 the OTDA, including its purposes, and concluded that, after the sale and
22 recording of a trustee's deed, the need for finality and certainty
23 prevails over the need to protect homeowners from wrongful foreclosures.⁹

24
25 ⁹ It is not clear from the opinion whether the purchaser at the
26 foreclosure sale was a bona fide purchaser for value. Judge Panner
(continued...)

1 I agree. The OTDA provides "a well-coordinated statutory scheme to
2 protect grantors from the unauthorized foreclosure and wrongful sale of
3 property, while at the same time providing creditors with a quick and
4 efficient remedy against a defaulting grantor." Staffordshire
5 Investments, 209 Or. App. at 542. That scheme's protections for debtors
6 are extensive, including a detailed notice of the sale at least 120 days
7 before the scheduled sale date, explaining the right to reinstate and
8 avoid the sale, ORS 86.740(1); 86.745, and the right to cure the default
9 and avoid the sale up to five days before the scheduled sale. ORS
10 86.753. These protections give borrowers ample time and opportunity to
11 cure the default and avoid the sale, or to challenge the sale if it has
12 been commenced improperly or without authority. At some point, however,
13 foreclosure sales to bona fide purchasers for value must become final, in
14 order to provide stability and certainty in the real estate market.
15 Given the legislature's direction that a trustee's sale forecloses any
16 interest in the property of a person to whom notice was given and that
17 the recitations in a recorded trustee's deed are conclusive as to a bona
18 fide purchaser for value, I conclude that, upon recording of a trustee's
19 deed to a bona fide purchaser for value, the foreclosed party can no
20 longer challenge the sale on the basis of lack of recorded assignments of
21 the trust deed. Accord Mikityuk, 2013 WL 3388536.

22 Debtor does not allege nor argue that Everett had notice of any
23

24 _____
25 ⁹(...continued)

26 relied primarily on ORS 86.770, which provides that the trustee's sale
forecloses and terminates the interest of any person with notice of the
sale. That statute does not refer to bona fide purchasers.

1 defenses to the sale and is not a bona fide purchaser for value.¹⁰

2 Therefore, the sale is final, and debtor cannot have the sale set aside.

3 I now turn to each of the claims alleged in the complaint to
4 determine which, if any, survive in light of my conclusion that debtor is
5 estopped from bringing prepetition claims and that the sale cannot be set
6 aside.

7 2. Claims

8 A. Claim #1 - Declaratory Judgment (against all defendants)

9 Debtor seeks a declaration that the foreclosure actions were
10 unlawful and the sale void because of the unrecorded assignments of the
11 trust deed, as well as that certain charges assessed or collected over
12 the life of the loan were unlawful. The determination that the
13 foreclosure sale is not void and cannot be set aside disposes of the
14 portions of this claim seeking declarations relating to wrongful
15 foreclosure.

16 When an action for declaratory relief merely duplicates the relief
17 sought under another cause of action, it is proper to dismiss the
18 declaratory judgment claim. Swartz v. KPMG LLP, 476 F.3d 756, 766 (9th
19 Cir. 2007); Dental v. City of Salem, 196 Or. App. 574, 580 (2004). To
20 the extent the finality of the sale does not dispose of all of this
21 claim, the other declarations that debtor seeks are merely duplicative of
22 other relief he seeks based on the same facts. Therefore, defendants'

23
24 ¹⁰ Defendants argued in their briefs that Everett was a bona fide
25 purchaser, so the foreclosure sale was final and could not be challenged.
26 Debtor's response did not deny that Everett was a bona fide purchaser for
value; his response was that the trustee did not have the authority to
conduct the foreclosure sale.

1 motion for judgment on the pleadings will be granted and debtor's motion
2 for partial summary judgment will be denied on this claim.

3 B. Claim #2 - Quiet title (against all defendants)

4 This claim is based on the wrongful foreclosure theory. Defendants'
5 motion will be granted as to this claim.

6 C. Claim #3 - Unlawful foreclosure (against Wells Fargo, AHMSI,
7 Fidelity)

8 Defendants' motion for judgment on the pleadings will be granted and
9 debtor's motion for partial summary judgement will be denied, because the
10 foreclosure sale is final and cannot be set aside.

11 D. Claim #4 - Violation of the stay, relief from stay order, and
12 confirmation order (against AHMSI and Wells Fargo)

13 Debtor alleges that defendants violated the automatic stay, the
14 order granting relief from stay, and the confirmation order in various
15 ways. These include assessing undisclosed, unauthorized, or unreasonable
16 charges to debtor's account both pre- and postpetition; misapplying
17 payments made by the chapter 13 trustee; misapplying postpetition
18 payments to prepetition arrearages, to a suspense account, to undisclosed
19 and unauthorized charges, to interest on prepetition arrearages, and to
20 prepetition escrow balances; improperly increasing debtor's payment
21 amount; assessing and charging debtor an inconsistent payment amount; and
22 applying payments from debtor and the chapter 13 trustee in violation of
23 the order required by the note, trust deed, and modification. All of
24 this, he alleges, resulted in a miscalculation of the amounts debtor owed
25 and caused a deficiency in his postpetition balance.

26 As to allegations of prepetition misconduct, that alleged conduct

1 was not subject to the automatic stay, the order granting relief from
2 stay, or the confirmation order, all of which apply or were entered after
3 the bankruptcy petition was filed. Therefore, the prepetition conduct
4 could not have violated either the automatic stay or the orders granting
5 relief from stay or confirming the plan.

6 As to the allegations of postpetition misconduct, it is not possible
7 to tell from the complaint which conduct is alleged to have violated
8 which order or the automatic stay. Therefore, by necessity this
9 discussion will deal with generalities.

10 a. Violation of the automatic stay

11 Debtor alleges that defendants' conduct in assessing improper
12 charges and misapplying payments postpetition, among other things,
13 violated the automatic stay.

14 Section 362(k) provides that an individual injured by a willful stay
15 violation shall recover actual damages. Here, even assuming that some of
16 defendants' conduct violated the automatic stay, debtor has not alleged
17 any actual damage that could support an award of sanctions.

18 The \$106,000 that he seeks for violation of the automatic stay is
19 presumably made up of the \$55,000 he alleges was lost equity and \$51,000
20 that he alleges was unlawful charges. See FAC ¶ 79. Any such loss was
21 the result of the foreclosure, which in turn was caused by debtor's
22 default. Debtor has not alleged that he could have cured the default and
23 avoided the foreclosure sale had defendants not violated the automatic
24 stay, the confirmation order, or the order granting relief from stay.
25 Although he alleges that defendants' conduct "resulted in miscalculation
26 of the amounts owed by Plaintiff and caused a deficiency in Plaintiff's

1 post-petition balance," FAC ¶ 61, he does not allege that he would not
2 have defaulted postpetition if not for defendants' improper assessment of
3 fees and charges, or that he could have cured any default and avoided
4 foreclosure had those fees and charges not been assessed or had the
5 trustee's and debtor's post-confirmation payments been applied correctly.
6 See FAC ¶ 31 (alleging that amount of default stated in motion for relief
7 from stay was incorrect, but does not allege that there was no
8 postpetition default). Therefore, any loss of equity was caused by the
9 foreclosure sale, not by any violations of the automatic stay.

10 For the same reason, the alleged improper assessment of fees and
11 charges does not support an award of damages for violations of the
12 Bankruptcy Code after the foreclosure sale is final. There is no
13 deficiency judgment in a nonjudicial foreclosure. ORS 86.770(2).
14 Because defendants were entitled to foreclose based on debtor's default,
15 they cannot seek a judgment against debtor for any fees or charges that
16 were not recovered through the foreclosure, and debtor does not allege
17 that his default was caused by any improperly assessed charges or fees,
18 he has not alleged damage that he could recover for violation of the
19 stay.¹¹

20 b. Violation of the order granting relief from stay

21 The order granting relief from stay allowed defendants to foreclose

22
23 ¹¹ Debtor also alleges that he is entitled to \$300,000 under
24 § 105(a) or Fed. R. Bankr. P. 9011, for the violations of the automatic
25 stay, the order granting relief from stay, and the order confirming plan.
26 Violation of the automatic stay is governed by § 362(k), and I have
explained that debtor is not entitled to damages under that provision;
§ 105(a) and Rule 9011 cannot be used to award different sanctions for
conduct covered by § 362(k).

1 "to the extent permitted by applicable nonbankruptcy law." FAC, Exh. 18.
2 As I have explained, debtor waited too long to challenge the foreclosure
3 sale. Therefore claims for violation of the relief from stay order based
4 on wrongful foreclosure come too late.

5 c. Violation of the confirmation order

6 Debtor alleges, without pointing to precisely what conduct did so,
7 that defendants' conduct violated the order confirming debtor's chapter
8 13 plan. The chapter 13 plan did not make any adjustments to the note or
9 trust deed; debtor's and defendants' rights continued to be governed by
10 those documents. Debtor does not explain how any of defendants' conduct
11 violated the order confirming the plan.

12 Defendants' motion for judgment on the pleadings will be granted and
13 debtor's motion for partial summary judgment will be denied as to Claim
14 #4.

15 E. Claim #5 - Breach of Contract (against AHMSI, Wells Fargo,
16 Fidelity)

17 Debtor alleges that defendants breached the note, trust deed, and
18 loan modification by improperly assessing and collecting excessive
19 charges and interest; misapplying payments; offering the loan
20 modification; and unlawfully foreclosing, causing debtor to lose the
21 equity in his house.

22 It is not clear from the pleadings what alleged breaches occurred
23 prepetition. As I have said, debtor is estopped from bringing any
24 prepetition claims. Therefore, debtor cannot pursue damages for any
25 prepetition alleged improper assessment or collection of excessive
26 charges and interest, misapplication of payments, or issues relating to

1 the execution of the loan modification agreement.

2 To the extent some of the alleged breaches occurred postpetition,
3 defendants argue that debtor cannot claim a breach of contract because he
4 was in breach himself. See Slover v. Or. State Bd. of Clinical Soc.
5 Workers, 144 Or. App. 565, 570 (1996) (to allege breach of contract,
6 plaintiff must allege that plaintiff has fully performed).

7 Debtor admits that he defaulted on the loan, but responds that this
8 claim is for breach of the duty of good faith and fair dealing, in that
9 defendants failed to correctly and legally pursue their remedies under
10 the contracts (including wrongfully foreclosing), failed to cooperate
11 with debtor in performance of the contract, and assessed and collected
12 improper fees.

13 Defendants' motion for judgment on the pleadings will be granted.
14 Debtor seeks damages for the lost equity in his house. However, debtor
15 has not alleged that he could have cured the default and avoided the
16 foreclosure sale had defendants not breached the contract or improperly
17 exercised their remedies for default. Therefore, any loss of equity was
18 caused by the foreclosure sale, a remedy that defendants were entitled to
19 exercise in the face of debtor's default.

20 Nor can debtor show that he is entitled to damages for improperly
21 assessed fees and charges. There is no deficiency judgment in a
22 nonjudicial foreclosure. ORS 86.770(2). Because defendants were
23 entitled to foreclose based on debtor's default, they cannot seek a
24 judgment against debtor for any fees or charges that were not recovered
25 through the foreclosure. Debtor does not allege that his default was
26 caused by any improperly assessed charges or fees, therefore he has not

1 alleged damage that he could recover for breach of contract.

2 F. Claims #6 and 7 - Fair Debt Collection Practices Act ("FDCPA")
3 (against Wells Fargo, AHMSI, Fidelity)

4 Defendants move for judgment on the pleadings on debtor's claims
5 under the state and federal FDCPAs. Debtor alleges that defendants
6 violated the debt collection laws by wrongfully foreclosing and by making
7 false representations about the amount of the debt, the amount of the
8 payments, application of the payments, and assessment and collection of
9 improper fees and charges. He moves for partial summary judgment on
10 these claims to the extent they are based on wrongful foreclosure.

11 The FDCPA forbids a debt collector from taking certain actions in
12 connection with the collection of a debt. 15 U.S.C. § 1692; ORS 646.639.
13 As I have already explained, it is too late for debtor to complain about
14 the foreclosure. Therefore, to the extent these claims are based on
15 wrongful foreclosure, defendants' motion for judgment on the pleadings
16 will be granted. Debtor's motion for partial summary judgment will be
17 denied.

18 However, to the extent the claims are based on other conduct, such
19 as misrepresentations about the amount of debt or payments or
20 misapplication of payments and collection of improper fees and charges,
21 defendants have not argued that the complaint does not state a claim.
22 Therefore, I will not dismiss the portions of the claim alleging
23 misconduct other than wrongful foreclosure. However, debtor may only
24 rely on postpetition conduct. Further, he is not entitled to the
25 economic damages of \$106,000 that he claims, because those damages arose
26 from the foreclosure brought on by his default, not by the alleged

1 unlawful debt collections practices.

2 Debtor also claims \$96,000 as compensation for defendants' wrongful
3 conduct, based on \$1,000 per known instance. To the extent those
4 instances occurred postpetition, debtor will need to replead facts to
5 support his allegation of multiple instances. Defendant's motion for
6 judgment on the pleadings will be granted except to the extent the claim
7 alleges statutory damages; debtor's motion for partial summary judgment
8 will be denied. Debtor shall replead to limit his FDCPA claims to
9 postpetition conduct, and to plead facts to support his allegation of
10 damages for multiple known instances of wrongful conduct.

11 G. Claim #8 - Oregon Unlawful Trade Practices Act ("UTPA")
12 (against Wells Fargo, AHMSI, Fidelity)

13 Defendants move for judgment on the pleadings and debtor moves for
14 partial summary judgment on Claim #8, which asserts violation of Oregon's
15 UTPA. Debtor alleges a number of unlawful trade practices, essentially
16 repeating the allegations contained in the previous claims, relating to
17 defendants' conduct in servicing the loan, in conducting the three
18 foreclosure proceedings, in its actions during the bankruptcy case, and
19 in imposing what debtor alleges was an unconscionable loan modification,
20 which he says caused him damages.

21 Defendants argue that this claim fails for the same reasons the
22 other claims based on these allegations fail. In addition, they argue
23 that debtor's alleged damages were not caused by any alleged unfair trade
24 practice.

25 "[A]ny person who suffers any ascertainable loss of money or
26 property, real or personal, as a result of willful" use of an unlawful

1 trade practice may bring an action for damages. ORS 646.638(1). To
2 prevail on an UTPA claim, the plaintiff must show "(1) the existence of
3 an unfair trade practice; (2) causation; and (3) damages." Feitler v.
4 Animation Celection, Inc., 170 Or. App. 702, 708 (2000).

5 Much of the conduct about which debtor complains occurred
6 prepetition, and claims based on that conduct are barred by judicial
7 estoppel.

8 As to the postpetition conduct, and assuming that defendants'
9 conduct constituted unlawful trade practices, as I have already
10 explained, any economic damages debtor suffered were as a result of the
11 foreclosure, which was due to his default on the loan and failure to cure
12 the default before the foreclosure. See Gemignani v. Pete, 187 Or. App.
13 584, 591 (2003) (misrepresentation that property was free and clear of
14 liens was not cause of loss of home to undisclosed lienholder; loss was a
15 result of the existence of the prior lien). Debtor does not allege that
16 the foreclosure would not have occurred but for the alleged unlawful
17 trade practices. Nor does he allege that, but for the conduct that he
18 alleges to be unlawful trade practices, he would have been able to cure
19 the default.¹² Therefore, he cannot show that his damages were caused by
20 an unlawful trade practice.

21 Further, to the extent he seeks damages for emotional distress based
22 on the alleged unlawful trade practices, those damages are not

24 ¹² He alleges that defendants' conduct rendered him unable to cure
25 any default and left him with no option other than to accept the
26 prepetition loan modification. FAC at ¶ 90. This allegation relates to
the prepetition modification; debtor is estopped from challenging that
modification.

1 "ascertainable loss of money or property" that the statute provides may
2 be recovered. An "ascertainable loss" is one that "is 'capable of being
3 discovered, observed, or established.'" Scott v. Western Int. Surplus
4 Sales, Inc., 267 Or. 512, 515 (1973). Actual damages are intended to
5 provide "restitution for economic loss suffered by a consumer as the
6 result of a deceptive trade practice." Gross-Haentjens v. Leckenby, 38
7 Or. App. 313, 317 (1979). Although "any loss will satisfy" the
8 requirement of ascertainable loss, Feitler v. Animation Celection, Inc.,
9 170 Or. App. 702, 712 (2000), that loss must be of "money or property."
10 ORS 646.638(1). Emotional distress damages are neither ascertainable nor
11 are they loss of money or property.

12 Defendants' motion for judgment on the pleadings will be granted on
13 this claim; debtor's motion for partial summary judgment will be denied.

14 H. Claim # 9 - Elder Abuse (against Wells Fargo, AHMSI, Fidelity)

15 Defendants move for judgment on the pleadings and debtor moves for
16 partial summary judgment on Claim #9 for Elder Abuse.

17 A claim for elder abuse under ORS 124.100(2) based on financial
18 abuse has four elements:

19 (1) a taking or appropriation (2) of money or property (3) that
20 belongs to an elderly or incapacitated person, and (4) the taking
must be wrongful.

21 Church v. Woods, 190 Or. App. 112, 117 (2003).

22 Debtor's claim for elder abuse is based on his allegations that the
23 nonjudicial foreclosure of his property was wrongful. As I have
24 explained, the foreclosure sale is final and debtor is precluded from
25 challenging it. Further, the loss of the property was a result of
26 debtor's default and defendants' exercise of their remedies on default,

1 not of the allegedly improper foreclosure. Defendants are entitled to
2 judgment on the pleadings on this claim; debtor's motion for partial
3 summary judgment will be denied.

4 I. Claim #10 - Wrongful Eviction; Everett's Counterclaim for
5 Ejectment

6 Everett moves for judgment on the pleadings on debtor's claim for
7 wrongful eviction and its counterclaim for ejectment. I have concluded
8 that debtor cannot challenge the foreclosure sale. This case came to
9 bankruptcy court by removal from state court. Everett's motion will be
10 granted with regard to the wrongful eviction claims. I will remand the
11 counterclaim for ejectment to state court to allow the ejectment action
12 to proceed in that court, which is best suited for determining a right to
13 ejectment.

14 J. Claim #11 - Intentional Infliction of Emotional Distress
15 (against Wells Fargo, AHMSI, Fidelity)

16 Defendants move for judgment on the pleadings on debtor's claim for
17 intentional infliction of emotional distress.

18 In order to state a claim for intentional infliction of emotional
19 distress, the plaintiff must allege that

20 (1) the defendant intended to inflict severe emotional distress on
21 the plaintiff, (2) the defendant's acts were the cause of the
22 plaintiff's severe emotional distress, and (3) the defendant's acts
constituted an extraordinary transgression of the bounds of socially
tolerable conduct.

23 McGanty v. Staudenraus, 321 Or. 532, 543 (1995) (quoting Sheets v.
24 Knight, 308 Or. 220, 236 (1989), overruled on other grounds in McGanty,
25 321 Or. at 549-40). "Whether conduct constitutes an extraordinary
26 transgression of the bounds of socially tolerable conduct is a question

1 of law." Harris v. Pameco Corp., 170 Or. App. 164, 171 (2000).

2 "Liability has been found only where the conduct has been so outrageous
3 in character, and so extreme in degree, as to go beyond all possible
4 bounds of decency, and to be regarded as atrocious, and utterly
5 intolerable in a civilized community." House v. Hicks, 218 Or. App. 348,
6 357 (2008) (quoting Restatement (Second) of Torts § 46 comment d).

7 "Conduct that is 'rude, boorish, tyrannical, churlish and mean' does not
8 support liability for IIED." Schoen v. Freightliner, LLC, 224 Or. App.
9 613, 627 (2008).

10 Debtor alleges that defendants' conduct in connection with his loan,
11 including among other things inadequate servicing, filing false
12 documents, bullying him to enter into the modification agreement, and
13 misleading statements, which led to the foreclosure, caused him emotional
14 distress, and that defendants knew or should have known that their
15 conduct would cause that distress.

16 Much of the conduct complained of occurred prepetition; debtor is
17 estopped from pursuing a claim based on that conduct. To the extent the
18 alleged conduct occurred postpetition, the allegations do not rise to the
19 level of conduct that is atrocious or utterly intolerable in a civilized
20 society. Although defendants' conduct no doubt caused debtor distress,¹³
21 it is not the type of conduct that is an extraordinary transgression of
22 the bounds of socially tolerable conduct. Defendants are entitled to
23 judgment on the pleadings on this claim.

24 ¹³ Although debtor alleges that he experienced difficulty making
25 his mortgage payments after contracting cancer in 2006, FAC ¶ 20, he does
26 not allege that defendants were aware of his illness at the time they
took any of the actions that he alleges were outrageous.

1 CONCLUSION

2 Debtor alleges that defendants engaged in extensive misconduct in
3 relation to the servicing and collection of his mortgage loan. The
4 problem with his complaint is that he simply waited too long to obtain
5 relief for most of the alleged misconduct. He failed to disclose his
6 claims during his bankruptcy case, leading to application of judicial
7 estoppel against him for any prepetition claims. As for the foreclosure,
8 which occurred postpetition, had debtor challenged the foreclosure sale
9 or sued for damages before the sale was completed, his allegations might
10 have supported one or more claims for relief. However, having waited
11 until after the foreclosure sale to a bona fide purchaser was completed
12 and became final, he cannot now challenge that sale or obtain damages
13 relating to the sale.

14 For the reasons outlined in my discussion above, defendants' motion
15 for judgment on the pleadings will be granted on Claims #1, 2, 3, 4, 5,
16 8, 9, 10, and 11. Their motion will be granted in part on Claims #6 & 7;
17 debtor may replead to limit his claims to postpetition conduct and
18 statutory damages. Defendants' motion for judgment on the pleadings on
19 Everett's counterclaim for ejectment will be denied and the matter
20 remanded to state court. Debtor's motion for partial summary judgment
21 will be denied.

22 Debtor seeks leave to replead. This is the fourth amended
23 complaint. Most of the allegations relate either to prepetition claims,
24 which debtor is estopped from pursuing, or to wrongful foreclosure, which
25 claims fail as a matter of law. The complaint will be dismissed with
26 leave to replead only the postpetition claims under the FDCPA as outlined

1 above.

2 Counsel for defendants should submit the order.

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