



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
Cynthia Pandora Stafford

Debtor(s).

Chapter: 11
Case No: 2:16-13355-NB

**MEMORANDUM DECISION GRANTING
APPLICATION OF EPPS & COULSON, LLP
FOR RELEASE OF SALE PROCEEDS**

Hearing:
Date: September 12, 2017
Time: 2:00 p.m.
Place: 255 E. Temple St. Rm. 1545
Los Angeles, CA 90012

At the above-captioned hearing this court orally granted the “Application of Epps & Coulson, LLP [‘E&C’] for Release of Sale Proceeds to Epps & Coulson, LLP” (dkt. 118) over the objection of creditor Steven Roth. A written order memorializing that ruling has been entered on the docket (dkt. 134), which states that relief is granted for the reasons stated on the record, “to be further explained in a forthcoming memorandum decision.” This Memorandum Decision supplements and confirms those reasons.¹

¹ For brevity, documents are referred to by docket number and/or trial exhibit number rather than their full title (e.g., “adv. dkt. ___” for documents filed in an adversary proceeding, or “dkt. ___” for documents filed in

1 This court previously held that Mr. Roth had waived his own claim against the
2 estate, and alternatively that he was equitably and judicially estopped to assert his
3 claim, all subject to one potential exception. If he could assert some legitimate grounds
4 to reduce the dollar amount of E&C's claim below the net proceeds from the sale of the
5 debtor's house (the "Sale Proceeds"), then he could assert his claim against the
6 balance of the Sale Proceeds after whatever was paid to E&C.

7 At the above captioned hearing, however, this court was persuaded that not only
8 was Mr. Roth estopped to assert his own claim, but he was also estopped to reduce
9 E&C's claim. Specifically, based on the arguments and evidence at that hearing, this
10 court was persuaded that Mr. Roth had been present at a hearing on May 17, 2016 (the
11 "5/17/16 Hearing") when the debtor had promised through her counsel that there were
12 no other unsecured creditors so E&C would be solely entitled to any Sale Proceeds.
13 But despite hearing the representations made on the record, Mr. Roth failed to disclose
14 his claim.

15 Alternatively, this court was persuaded that even if Mr. Roth had left the 5/17/16
16 Hearing before the debtor made it explicit that only E&C would be entitled to any
17 proceeds, he had been present when this court had expressed grave concerns about
18 whether there might be other claims that would reduce the proceeds available to pay
19 E&C. In other words, Mr. Roth was well aware that this court was relying on the
20 absence of other creditors, such as himself, in making its rulings.

21 If this court had known of Mr. Roth's claim then this court would not have
22 authorized a distribution of \$75,000 to the debtor and dismissal of this case. Rather,
23 this court would have taken steps to assure that, in light of the newly discovered
24 misrepresentations by the debtor that concealed Mr. Roth's claim, E&C would have had

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26
27 the bankruptcy case itself). Unless the context suggests otherwise, references to a "chapter" or "section"
28 ("§") refer to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"), a
"Rule" means one of the Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, or
other federal or local rule, and other terms have the meanings provided in the
Bankruptcy Code, the Rules, and the parties' filed papers.

1 the opportunity to seek to surcharge the debtor's homestead exemption, or to pursue
2 other sanctions or remedies.

3 For these reasons, Mr. Roth is judicially estopped to seek any reduction in E&C's
4 claim. These issues are further explained below.

5 **I. LEGAL STANDARDS**

6 The elements of judicial estoppel are "(1) whether a party's later position is
7 'clearly inconsistent' with its original position; (2) whether the party has successfully
8 persuaded the court of the earlier position; and (3) whether allowing the inconsistent
9 position would allow the party to 'derive an unfair advantage or impose an unfair
10 detriment on the opposing party.'" *Wilcox v. Parker*, 471 B.R. 570, 576 (9th Cir. BAP
11 2012) (quoting *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008); *Cheng v.*
12 *K&S Diversified Invs., Inc.*, 308 B.R. 448, 452-3 (9th Cir. BAP 2004)).

13 Courts invoke judicial estoppel "not only to prevent a party from gaining an
14 advantage by taking inconsistent positions, but also because of 'general considerations
15 of the orderly administration of justice and regard for the dignity of judicial proceedings,'
16 and to 'protect against a litigant playing fast and loose with the courts.'" *Hamilton v.*
17 *State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (quoting *Russell v. Rolfs*,
18 893 F.2d 1033, 1037 (9th Cir. 1990)). Estoppel applies both (a) to affirmative
19 representations or conduct and (b) to silence that induces reliance. See, e.g., *In re*
20 *Marriage of Recknor*, 138 Cal.App.3d 539, 546-47 (1982); *In re Raanan*, 181 B.R. 480,
21 485 (C.D. Cal. 1995).

22 **II. BACKGROUND**

23 **A. The debtor's lies**

24 The debtor repeatedly lied. Her lies have harmed her creditors, including E&C
25 and Mr. Roth.

26 But the debtor claims to have no funds (see dkt. 58, p. 2:14) – or at least it is far
27 easier for E&C and/or Mr. Roth to collect from the remaining proceeds from the sale of
28 her house (the "Sale Proceeds") than to try to collect from the debtor. See Order (dkt.

1 93) (approving stipulation to hold remaining Sale Proceeds). So the question is who is
2 entitled to share in the remaining Sale Proceeds.

3 Before turning to that issue it is helpful to review the debtor's lies. First, she
4 executed a written verification (dkt. 17 at PDF pp. 35-36) that her list of creditors was
5 complete. Her counsel reiterated at a hearing on May 3, 2016 that there were no
6 general unsecured creditors. Audio recording (5/3/16) at 2:29:40 p.m. – 2:33:46 p.m.

7 On the basis of those representations this court approved the sale of her house
8 without notice to any unsecured creditors. See Notice (dkt. 31), Debtor Decl. (*id.*
9 p. 13:15), *and* Order (dkt. 66, the "Sale Order"). In fact, the debtor had omitted E&C,
10 which had obtained a default judgment against her less than a year before (dkt. 118,
11 p. 2:10-19) and had belatedly been included on the creditor matrix in the debtor's prior
12 bankruptcy case (case no. 2:16-bk-10164-SK, dkt. 10).

13 Second, the debtor lied again after E&C discovered this bankruptcy case. E&C
14 applied both orally and in writing to modify the Sale Order to pay E&C out of the
15 proceeds. See Order (dkt. 74) *and* Application (dkt. 76). The debtor then assured this
16 court that, whatever oversight or other cause might have led her to omit E&C, she had
17 no other creditors. She did so both at the 5/17/16 Hearing on E&C's motion, through
18 her counsel (audio recording, 5/17/16, at 4:28 p.m. - 4:29 p.m.), and later through her
19 signed declaration (dkt. 84, ¶ 8).

20 In fact, the debtor had another creditor. As she now fully admits, she owed Mr.
21 Roth's fees under his contract with her. See Roth & Stafford Decls. (dkt. 122 at PDF
22 pp. 12-22) and Ex. A & B thereto (dkt. 122 at PDF pp. 24-28).

23 Nevertheless, she executed a stipulation with E&C (dkt. 88) that the remaining
24 funds in her bankruptcy estate would be used to satisfy E&C's judgment, if any, after
25 conclusion of her litigation in State Court to be relieved from the default judgment
26 against her. Specifically, the stipulation provides that, after payment of secured claims
27 and administrative expenses, "The balance of the funds [*i.e.*, the Sale Proceeds] will be
28 held in trust [by her attorneys] and shall be distributed to E&C, subject to [a requirement

1 that no further distribution would be made absent further order of this court], to pay for
2 the money judgment against the Debtor, if any, resulting from a final adjudication in
3 favor of E&C and against the Debtor in the State Court [litigation].” Dkt. 83, p. 5:20-24
4 (emphasis added).

5 On the basis of the debtor’s assurances that she had no other creditors, this
6 court approved the Stipulation, thereby authorizing a \$75,000 distribution to the debtor.
7 See Order (dkt. 93, the “Distribution Order”). That distribution has occurred, leaving a
8 remainder of only about \$59,000. See dkt. 118, p. 6:9-10 (estimating \$59,000 balance).

9 **B. Mr. Roth’s motion for reconsideration, and litigation on that motion**

10 Several months after this court approved the sale of the debtor’s house and
11 distribution of \$75,000 to her, Mr. Roth mailed a letter to this court (dkt. 96, the
12 “Reconsideration Motion”) that this court interpreted as a motion for reconsideration of
13 the Distribution Order. See dkt. 115 at PDF p. 4 (describing procedural history of the
14 Reconsideration Motion). After a hearing on April 25, 2017 this court issued orders (dkt.
15 113, 115) denying Mr. Roth’s Reconsideration Motion, except for requiring E&C to file
16 an application for distribution.

17 This court found that Mr. Roth had waived his claim against the bankruptcy
18 estate (dkt. 115 at PDF pp. 5-7, part “(2)” “(a)” of analysis) – at least in any contest
19 between him and E&C (as distinguished from any contest between him and the debtor).
20 Alternatively, this court found that Mr. Roth was equitably estopped to assert a claim
21 against the bankruptcy estate (dkt. 115 at PDF p. 7, part “(2)” “(b)” of analysis).
22 Alternatively, this court found that Mr. Roth was judicially estopped to assert a claim
23 against the bankruptcy estate (dkt. 115 at PDF pp. 7-8, part “(2)” “(c)” of analysis).

24 None of the foregoing prevented Mr. Roth from objecting to E&C’s claim, if he
25 could do so on any other grounds. In fact, prior to the hearing on April 25, 2017 this
26 court’s tentative ruling directed the parties to address “Mr. Steven Roth’s statement (dkt.
27 103, pp. 9:8-10:6) that he objects, or at least contemplates objecting, to the claim of
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1 Epps & Coulson, LLP against the debtor, which it has been pursuing in State Court.”
2 Dkt. 115 at PDF p. 3.

3 This court could not know in advance what possible grounds Mr. Roth might have
4 to object to E&C’s claim, so this court left open the possibility that there might be some
5 legitimate ground to do so. This court recognized that *res judicata* or similar doctrines
6 would prevent the debtor herself from objecting to any judgment obtained by E&C, and
7 might or might not bar any objection by other parties in interest such as Mr. Roth. But it
8 was premature to determine any such issues, so at the hearing on April 25, 2017, this
9 court was persuaded that E&C would not receive an automatic distribution but instead it
10 would be required to apply for a release of the Settlement Proceeds. That would give
11 Mr. Roth an opportunity to object if he had any legitimate grounds to do so.

12 Pursuant to these procedures, on July 18, 2017 E&C filed its application (dkt.
13 118) for a release of the Sale Proceeds. That was shortly after it obtained a final State
14 Court judgment against the debtor for \$231,260.66. See dkt. 118, p. 4:6-10, and dkt.
15 122, Ex. 2. On August 1, 2017 Mr. Roth filed his objection (dkt. 122) to E&C’s
16 requested distribution.

17 Mr. Roth argued that *res judicata* and similar doctrines do not apply (dkt. 122,
18 p. 6:1-12), because he was not a party to the State Court litigation between E&C and
19 the debtor. He also argued that E&C’s claim against the debtor was “unconscionable,”
20 or at least unreasonable, and should be reduced or denied. E&C’s reply brief (dkt. 123)
21 did not address *res judicata* or similar doctrines and instead argued that its claim was
22 reasonable. The parties also filed various other documents, including objections to
23 each others’ declarations. The matter came on for hearing on September 12, 2017. At
24 that hearing this court was persuaded that judicial estoppel not only prevented Mr. Roth
25 from asserting his own claim but also prevented him from seeking to reduce E&C’s
26 claim. The key issue was the extent to which Mr. Roth was present when the issues
27 regarding E&C’s claim and distribution of the Sale Proceeds were addressed. Mr. Roth

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1 asserted that, although he could not specifically recall, he did not believe he was
2 present for whatever was the critical portion of the hearing.

3 **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

4 **A. Mr. Roth was present for the entirety of the 5/17/16 Hearing, and in any**
5 **event, he does not dispute that he was present for the critical portion of that**
6 **hearing**

7 For each of the following alternative reasons this court finds by a preponderance
8 of the evidence that Mr. Roth was present for the entirety of the 5/17/16 Hearing.

9 **1. Mr. Roth's letter**

10 Mr. Roth's own letter (dkt. 96-1, pp. 1-2, carryover paragraph) states that he was
11 present at the hearing. It does not say that he was present for only part of the hearing.

12 **2. Mr. Cohen's uncontested offer of proof**

13 The attorney for E&C, Jeffrey Aaron Cohen, Esq., stated at the hearing on
14 September 12, 2017 that he personally recalls that Mr. Roth was present for the entire
15 hearing. Mr. Roth stated that he does not recall being present. Mr. Cohen's affirmative
16 recollection outweighs Mr. Roth's lack of recollection.

17 In making this finding this court recognizes that there was no testimony by Mr.
18 Cohen or Mr. Roth under oath. But this court takes Mr. Cohen's assertion in open court
19 as an offer of proof, and Mr. Roth did not object to this court's reliance on Mr. Cohen's
20 assertion, or ask to cross-examine Mr. Cohen.

21 **3. Ambiguities in Mr. Roth's letter cut against his latest position, not**
22 **for it**

23 Mr. Roth has pointed out that his letter (dkt. 96-1) could be read to imply that he
24 was not present for the entirety of the 5/17/16 Hearing. But this court actually finds that
25 the letter cuts the other way. The letter states:

26 I am a creditor I submitted a creditor's claim in [the debtor's] prior
27 bankruptcy [case]. ...

28 [After learning of this latest bankruptcy case] I e-mailed a copy of an updated
creditor's claim to [the debtor] Ms. Stafford's new attorney. ...

1 To my surprise, [the debtor's attorney] informed me that [the debtor] did not list
2 me as a creditor in [this case]. He and [the debtor] proceeded to inform me
3 that they were trying to get the bankruptcy [case] dismissed and that I would
4 be paid from the sale of her residence and that if the bankruptcy [case]
remained open, all remaining funds would be consumed in attorney's and
trustee fees. I was not paid.

5 [Earlier, on] May 17, 2016[,] a hearing was held [in this case]. I attended that
6 hearing. During the hearing, Ms. Stafford's counsel knowingly falsely
7 represented that there were no other creditors aside from Epps & Coulson, a
law firm who filed a creditor's claim. This was false and known to be false
[because of Mr. Roth's claim].

8 I have also been informed that [the debtor] made a deal as a condition of
9 dismissal of [this bankruptcy case] with respect to the funds remaining in her
10 counsel's trust account being held in the event that Epps & Coulson prevails
11 on their claim against [the debtor]. This is not something I approved of or was
party to negotiating. As a result, [the debtor] and her counsel deprived me of
my rights.

12 [Dkt. 96-1, pp. 1-2 (carryover paragraph, emphasis altered)]

13 At the hearing on September 12, 2017, Mr. Roth pointed to the portion his letter
14 stating that he had been "informed" that the Sale Proceeds would go to E&P, which
15 could be read to imply that he learned this information (from some undisclosed
16 communication with somebody) after the hearing. But this court finds that the very fact
17 that the letter does not explain when and how he learned this information suggests that
18 he had been "informed" for some time – in fact, that he had been "informed" at the
19 5/17/16 Hearing.

20 One would expect that anyone who learned after the fact that another creditor
21 (E&C) was to receive a priority distribution would have been outraged as soon as they
22 learned that fact, and would have spoken up immediately, with a precise description of
23 when and how they first learned of that priority. But the letter fails to include any such
24 precise description. The opening paragraphs of the letter suggest a more likely
25 scenario: Mr. Roth was aware that E&C would be paid from the Sale Proceeds held by
26 the debtor's attorneys but that did not concern him because he thought he would be
27 paid by the debtor herself out of her homestead exemption. When it turned out, after
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1 several months, that she failed to pay him, he sent his letter to the court seeking
2 reconsideration of the arrangements for E&C.

3 **4. Alternatively, Mr. Roth does not dispute that he was present for**
4 **the critical portion of the 5/17/16 Hearing**

5 Even supposing, for the sake of discussion, that Mr. Roth was not present for the
6 entirety of the 5/17/16 Hearing, at most he claims to have left during a recess in that
7 hearing. Prior to that recess he had more than sufficient notice that E&C might be paid
8 in full before he would receive any distribution.

9 First, the debtor's attorney argued that E&C was attempting to be paid before
10 other unsecured creditors. Audio recording, 5/17/16, at 2:29:21 p.m. to 2:29:37 p.m.
11 Second, and alternatively, this court made it clear that it was relying on the absence of
12 other creditors in determining how to protect the asserted interests of E&C. Audio
13 recording, 5/16/17, at 2:57:10 p.m. to 2:57:32 ("[this court has] a real concern that the
14 debtor and counsel may have omitted creditors and if there are persons who have
15 claims and, even if those claims are disputed, they haven't gotten notice").

16 In other words, Mr. Roth had sufficient information to know that E&C might be
17 paid in full before other creditors such as himself, because this court was relying on the
18 absence of other creditors in determining what should be distributed to E&C. This court
19 did in fact rely on the absence of claims like Mr. Roth's belatedly asserted claim in
20 approving the stipulation to pay E&C in full. Dkt. 83, p. 5:20-24. Mr. Roth could have
21 spoken up and informed the court that he was an undisclosed creditor, but he elected
22 not to do so.

23 **B. Mr. Roth is judicially estopped from seeking to reduce E&C's claim**

24 **1. Mr. Roth's later position is "clearly inconsistent" with his original**
25 **position**

26 Mr. Roth clearly asserted inconsistent positions. As discussed above, he was
27 present during the critical portion of the 5/17/16 Hearing but failed to disclose that he
28 was a creditor of the debtor's estate and would seek to reduce any distribution to E&C.

1 Then, months later (presumably after the debtor failed to pay him from the proceeds of
2 her homestead exemption), Mr. Roth asserted that he was in fact a creditor and
3 objected to E&C receiving the stipulated distribution on its claim.

4 **2. Mr. Roth successfully persuaded this court to adopt his earlier**
5 **position**

6 In reliance on the understanding that there were no other undisclosed claims
7 against the debtor's estate, and that E&C was the only general unsecured creditor, this
8 court approved the debtor's requests for approval of the sale of her house, dismissal of
9 this bankruptcy case, and distribution of all of the remaining funds to E&C. This court
10 made it clear on the record at the 5/17/16 Hearing that it was relying on the absence of
11 other creditors in determining how to protect the asserted interests of E&C. If this court
12 had known of Mr. Roth's claim, then it would not have authorized a distribution of
13 \$75,000 to the debtor and dismissal of this case and instead would have taken steps to
14 assure that E&C (or any other potentially undisclosed creditors) would have the
15 opportunity to pursue sanctions or other remedies.

16 Therefore, the fact that Mr. Roth was present during the critical portion of the
17 hearing, was well aware that this court was relying on the absence of other creditors,
18 such as himself, in making its rulings, and intentionally chose not to disclose his status
19 as a creditor provides sufficient grounds to now find that he is estopped from seeking to
20 reduce E&C's claim so that he could receive some of its distribution. From the record
21 before it, this court is sufficiently persuaded that Mr. Roth acted intentionally and that his
22 conduct was not the result of any mistaken understanding or inadvertence on his part.
23 He was fully aware that this court was relying on the absence of creditors like him.

24 **3. Allowing Mr. Roth to assert his inconsistent position would allow**
25 **him to derive an unfair advantage and impose an unfair detriment on this court**
26 **and E&C**

27 Finally, allowing Mr. Roth's inconsistent positions would allow him a second bite
28 at the apple and impose an unfair detriment on this court and E&C. Mr. Roth was well

1 aware that, pursuant to the stipulation, E&C was to be paid from the Sale Proceeds.
2 Rather than speaking up immediately and asserting his purported claim against the
3 debtor's estate, Mr. Roth elected not to raise any issues with E&C's entitlement to the
4 Sale Proceeds.

5 Had Mr. Roth disclosed his asserted claim against the debtor during the hearing,
6 this Court would have taken other steps to protect not only E&C's rights, but also the
7 rights of any other potentially undisclosed creditors. Now, the property has been sold,
8 the case has been dismissed, and the debtor claims to have no funds (see dkt. 58, p.
9 2:14). Moreover, even if E&C could collect from the debtor, it likely would incur
10 substantial additional costs to do so.


11 Furthermore, invocation of judicial estoppel is also appropriate to protect the
12 integrity of the bankruptcy process and to prevent creditors, such as Mr. Roth, from
13 making side deals with the debtor and then later seeking redress from the bankruptcy
14 court when those deals have gone sour.

15 **IV. CONCLUSION**

16 For the foregoing reasons, Mr. Roth's objection to the distribution of the Sale
17 Proceeds to E&C has been overruled by separate order (dkt. 134).

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24 Date: December 27, 2017


Neil W. Bason
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, the below-named deputy clerk of the United States Bankruptcy Court, certify that I placed a true and correct copy of the attached document in a sealed envelope for collection and mailing, no later than the next business day that is not a court-observed holiday, in the United States mail, first class, postage prepaid, and addressed as follows:

Steven Roth
5737 Kanan Road, #732
Agoura Hills, CA 91301

Epps & Coulson, L.L.P.
Attn: Dawn M. Coulson, Esq.
Attn: Jeffrey A. Cohen, Esq.
707 Wilshire Blvd., Suite 3000
Los Angeles, CA 90017

Levene, Neal, Bender, Yoo & Brill L.L.P.
Attn: David B. Golubchik, Esq.
Attn: John-Patrick M. Fritz, Esq.
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Service information continued on attached page

Date: 12/27/2017 Signature: /s/ Sharon Sumlin
Deputy Clerk [*printed name*]: Sharon Sumlin