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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HARRY MANSDORF, individually, and as Trustee, etc., Plaintiff and Respondent, v. MICHELE V. GIACOMAZZA et al., Defendants and Appellants.	B222759 (Los Angeles County Super. Ct. No. BC385946)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles F. Palmer, Judge. Affirmed.

Law Office of Gerald Philip Peters, and Gerald Peters for Defendants and Appellants.

John R. Mullen; Quinn, Emanuel, Urquhart & Sullivan, Daniel H. Bromberg and Timothy A. Butler, for Plaintiff and Respondent.

Since 1967, the Mansdorf Family Trust (Trust) has acquired substantial amounts of Southern California real estate. Its principal assets include approximately 1300 acres of undeveloped beachfront land near Malibu, and the Mansdorf family home in Beverly Hills. Before his death in 2003, Lee Mansdorf managed the Trust business on his own; after Lee died his elderly brother Harry took over. From the time Harry began to manage the Trust, he was hounded, intimidated, threatened and controlled by Michele Giacomazza, who claimed to have been Lee's general partner—and a 50 percent owner of most of the Trust's assets—since 1977. Giacomazza filed mechanic's liens for over $115 million, which clouded title to Trust properties and made it impossible for Harry to obtain the funds necessary for living expenses for himself or his elderly and disabled siblings who depended on him for support. By virtue of his undue influence, Giacomazza caused Harry to execute numerous deeds and an unlimited power of attorney, and enabled Giacomazza to obtain title to the Malibu and Beverly Hills properties without any consideration. By inserting himself into Harry's and the Trust's legal affairs, Giacomazza was also able to orchestrate Harry's actions and to cause him to adopt certain positions in several lawsuits and an administrative proceeding before the Internal Revenue Service (IRS).

Eventually, Giacomazza's ability to control Harry waned. In 2008, Harry filed this equitable action on his own behalf and on behalf of the Trust seeking, in essence, to quiet title. He prevailed.

At trial Giacomazza argued Harry was barred by the doctrine of judicial estoppel from asserting the property transfers were invalid or improper based on positions he had adopted in the earlier lawsuits and IRS proceeding. The trial court rejected this assertion, concluding Giacomazza had failed to establish the requisite elements to justify granting the extraordinary remedy of judicial estoppel. Giacomazza contends that ruling was an abuse of judicial discretion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Mansdorf brothers established the Trust in 1967.[1] It was funded initially with proceeds from the sale of stock in the family's aviation business. The Trust was managed by Lee Mansdorf, the eldest brother.

In 1978, the Trust began investing in the acquisition and sale of real property in Southern California. Through a series of purchases over the course of about 23 years, the Trust assembled approximately 1,300 contiguous acres of undeveloped beachfront land north of Malibu, in Ventura County (Malibu Properties). In addition to the Malibu Properties, the Trust acquired the Mansdorfs' family home on Alta Drive in Beverly Hills (Alta Property), approximately 1,000 acres in the San Fernando Valley and property in La Tuna Canyon. The Malibu and Alta Properties were the primary subjects of this litigation.

Lee died on June 27, 2003. Plaintiff and respondent Harry Mansdorf, who had never been involved in the Trust's business dealings, became the trustee. Another brother, Norman, also survived Lee, but Norman suffered from advanced Parkinson's Disease and was confined to his room. Mildred was almost 90 years old at the time of Lee's death. Harry lived alone at the Alta Property with his two remaining siblings, and was required to care for them and manage the Trust which had no employees.[2]

When Lee died, Harry was over 80 years old and in poor health. Due to injuries suffered during World War II, Harry lost one of his knees in 1945 and, since then, has been unable to walk unassisted. His vision was blurred by cataracts, rendering him unable to read without glasses; he had heart problems and other ailments.

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[1] There were five Mansdorf siblings, Lee, Fred, Norman, Harry and their sister Mildred. Fred died 15 or 20 years before this litigation began. We refer to the Mansdorfs by their first names for the sake of clarity, not out of disrespect.

[2] Lee had managed the Trust's business himself with minimal assistance from an accounting firm and a lawyer who handled "little lawsuits."

A few days after Lee's death, Harry was approached by appellant Michele Giacomazza. Harry had never before met Giacomazza, nor had Lee—who had always consulted his siblings on all major decisions concerning the Trust—ever spoken of him. Giacomazza told Harry that Lee had been a friend of his and that he owed him $7 million in connection with a loan Giacomazza had secured with some unspecified property. Giacomazza claimed Lee had agreed to transfer the Malibu and Alta Properties to Giacomazza in satisfaction of that debt. Giacomazza had some documents with him at the time supposedly verifying his claim, but refused to give them to Harry, then or ever. Mistrustful of Giacomazza's claim, Harry asked the Trust's long time lawyer to investigate the claim. After receiving the attorney's report, Harry told Giacomazza to "get lost."

About a week after Harry sent him away, Giacomazza appeared at the Alta Property. Giacomazza threatened to make Norman "look like Lee" if Harry did not pay him the $7 million, a threat Giacomazza repeated often thereafter. In the ensuing months and years, Giacomazza also repeatedly threatened Harry's life and the lives of his sister and, after Harry married in 2007, his wife. Giacomazza is 20 years younger than Harry, and is described in excerpts from his 2007 medical records as "well-built" and "'mildly psychotic.'" Giacomazza's threats of physical harm made Harry fear for his own and his siblings' safety. Harry's fears were heightened over time because Giacomazza was purportedly able to enter the Mansdorf home at will, and because Giacomazza was alone with Norman when he died in 2004, and also alone with Mildred when she died in 2007.

Giacomazza also imposed significant economic and psychological pressures on Harry. In November 2003, Giacomazza threatened to foreclose on the Alta Property, claiming he was owed $7.5 million for expenses incurred and work performed on the Malibu Properties. In April 2004, Giacomazza recorded a $600,000 mechanic's lien against the Malibu and Alta Properties. In October and again in December 2004 Giacomazza recorded two more mechanic's liens against the Malibu Properties, for $20

million and $95 million, respectively.[3] The liens were invalid; Giacomazza conceded at trial he had no license to support them. Nevertheless, the liens clouded title to the Malibu Properties which could not be sold to generate cash the Mansdorfs needed for living expenses. The Trust's cash holdings were depleted by, among other things, estate taxes. As a result, Harry was forced to support himself and his siblings on his military pension and social security income. Giacomazza, who intruded on an almost daily basis on Harry's life, also attempted to isolate and manipulate him. Giacomazza's behavior was erratic. At times Giacomazza was solicitous of and friendly to Harry; the next minute he demeaned Harry and ordered him around.

Giacomazza also inserted himself into the legal affairs of Harry and the Trust. In 2004, Lee's ex-wife, Marylin Mansdorf, sued Harry, Mildred and an attorney, claiming Lee had made an oral gift to her of 50 percent of his interest in the Trust estate.[4] At the inception of that action Giacomazza—who attended several law schools but was never admitted to the bar—purported to act as Harry's attorney. After Harry learned Giacomazza was not an attorney, he retained Alfred Keep, an attorney to whom Giacomazza referred him. Even after Harry retained Keep, Giacomazza remained actively involved in the *Rhoades* litigation; he went with Harry to meetings with Keep, provided information to Keep, reviewed documents prepared by Keep, and filed court documents (for which Harry paid Giacomazza $250 each time he went to court).

Purportedly in connection with court filings, Giacomazza frequently brought documents to Harry late in the afternoon and demanded that he sign them immediately. Harry was unable to read the documents without his glasses, which he left upstairs in his office. Harry asked Giacomazza for copies. Giacomazza claimed he did not have time and would provide Harry a copy later after the document was filed, but never did.

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[3] Giacomazza filed the liens as president of appellant United American Engineering & Development, an unlicensed entity Giacomazza testified is "basically" him.

[4] *Marylin Mansdorf v. Rufus Rhoades*, (L.A.S.C. No. BC316011 (*Rhoades*).

Giacomazza also sometimes took Harry—without his glasses—to notaries in order to sign documents for use in litigation.

After Lee's ex-wife sued Harry, Giacomazza told Harry that, to act as his attorney, Giacomazza needed a power of attorney. Harry executed a document, purportedly prepared by Giacomazza, entitled "General Un-Limited Power of Attorney." The document does not authorize Giacomazza to act as Harry's attorney. Rather, it gives Giacomazza authority over all the Trust property other than the Alta Property, including the power to mortgage and sell those properties.

Between May 2004 and April 2007, five deeds were executed purportedly transferring title of the Malibu Properties from the Trust to appellant Malibu Hills Ranch Corporation, a Nevada Corporation, appellant Malibu Hills Ranch, Inc., a Nevada Corporation, or appellant Joint Venture Corp., a Nevada Corporation.[5] One deed was executed by Giacomazza on Harry's behalf, under the power of attorney. The other four were purportedly signed by Harry, although he denied knowingly signing or authorizing the signing of any deed. One deed stated the properties listed therein were being transferred in exchange for $50,000, and another for $25,000. Giacomazza never made any payment to Harry or the Trust. [6]

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[5] At trial, Giacomazza testified that, at all relevant times, he has owned and controlled each defendant entity (as well as Joint Venture LLC), and each entity is "basically" him. None of these entities has ever had any assets, conducted any corporate meetings or created any official corporate documents.

[6] According to Keep and the unpublished appellate decision in that case, the *Rhoades* action focused on the credibility of Marylin Mansdorf's claim to an interest in the Trust, which was ultimately rejected. (*Mansdorf v. Mansdorf* (March 15, 2007, B186672, B190316 [nonpub. opn.]), 2007 WL 765745 at *3-4, 8, 9 [rejecting a challenge to the statement of decision and noting the plaintiff's acknowledgement that "the statement of decision rejected her claim that Lee made an oral gift of one half of his share of the trust estate…"].) In a deposition in that case, Harry testified Giacomazza, not the Trust, owned the Alta Property and that Giacomazza had a 50 percent interest in the Malibu Properties. Harry also testified he had found a 1986 quitclaim deed in a safe used

In August 2006, title to the Mansdorfs' Beverly Hills home was transferred to Giacomazza's daughter, appellant Kathryn Gatto, who then applied for a $2.5 million loan, secured by the property. Gatto is a massage therapist. Previously, she worked for 25 years at a Savon drugstore. In her loan application, Gatto represented that she had worked for 24 years as a real estate investor for two of her father's companies, and earned $82,000 per month. After the loan was approved, Gatto directed that the funds be sent to an account controlled by her father, and conveyed title to the Alta Property to herself and Giacomazza as joint tenants.

In March 2006, the IRS found the estates of Lee and Norman Mansdorf deficient because they undervalued the properties in the Trust. Harry, accompanied by Giacomazza, met with the Trust's tax counsel, David Roth. At that meeting, Giacomazza explained to Roth that he owned the Malibu Properties because Lee had taken out a loan secured by property owned by Giacomazza and, more generally, because Lee and Giacomazza were partners. To bolster this claim, Giacomazza provided Roth the 1986 deed supposedly recovered from Lee's safe, and the Altered Judgment in the *Rhoades*

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by Lee. At trial here, Harry testified he said what Giacomazza told him to say in the *Rhoades* action out of fear.

At the conclusion of the *Rhoades* action, Keep drafted a proposed judgment. Giacomazza took that document to be filed. On September 29, 2005, an altered version of the proposed judgment was filed and signed (Altered Judgment). (*Mansdorf v. Mansdorf*, *supra*, B186672, B190316, 2007 WL 765745 at *4.) The Altered Judgment added findings that the Malibu Properties were "currently owned by Defendant [] Michele Giacomazza since 1986" and that Giacomazza and his entities "shall recover all properties [g]ranted to, and deeded to," them "from the late Lee Mansdorf, Lee Mansdorf Family Trust and by the successor to the Mansdorf family trust Harry Mansdorf." When Keep discovered the alterations he moved successfully to have the Altered Judgment amended, removing any reference to Giacomazza's ownership of the Malibu Properties. An amended judgment was filed on March 21, 2006. (*Ibid.*) Giacomazza claimed Harry had made the alterations.

action.[7] Relying on this information, Roth asserted in a letter to the IRS sent in October 2006 that the Trust did not own the Malibu Properties. The IRS was not persuaded. It found the Altered Judgment unpersuasive because Harry had not contested Giacomazza's ownership, and it distrusted the purported 1986 quitclaim deed. On Roth's advice, Harry abandoned his protest and settled the IRS claims.

In February 2007, Giacomazza was sued, in an action entitled *Lee Mansdorf v. Giacomazza* (L.A.S.C. No. BC366206, filed February 13, 2007 (*Mansdorf*)). The action was ostensibly filed by Harry and his siblings for fraud, elder abuse and other claims. Giacomazza asked Keep to represent Harry again. In that action, Harry executed a declaration asserting that Giacomazza had been his "business partner for several years and was a business partner to [his] brother Lee Mansdorf for many years before that." Harry said he and Giacomazza had "a relationship of trust and confidence." The *Mansdorf* action was dismissed on the grounds that Harry had not authorized the lawsuit, and his siblings were deceased.

Also in 2007, in an action in Ventura County entitled, *New Cingular Wireless v. Pacific Coast Leasing* (*New Cingular Wireless*), Giacomazza was purportedly sued by an individual claiming Lee had orally promised him $5 million upon transfer of the Malibu Properties. At trial here, Harry admitted that, in his deposition in the *New Cingular Wireless* action, he testified he was present when Lee signed a quitclaim deed in 1986 transferring an interest in the Malibu Properties to Giacomazza.

In February 2008, Harry filed this action against Giacomazza, his entities and his daughter.[8] The operative third amended complaint asserted causes of action against

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[7] Giacomazza gave Roth the Altered Judgment several months after the amended judgment had been filed.

[8] Harry concedes this action is being underwritten by Jaime Gonzalez, the attorney behind the *Mansdorf* action ostensibly filed on behalf of Harry and his siblings. Gonzalez has promised to pay Harry $45 million for the Malibu Properties if title to them can be "cleaned up" and promised to protect him from Giacomazza. In addition, Gonzalez supplied the necessary funds to finance this action to recover the properties.

Giacomazza, Gatto and Giacomazza's entities for elder abuse; fraud; intentional misrepresentation; negligent misrepresentation; quiet title; rescission based on fraud; rescission based on failure of consideration; to set aside fraudulent conveyance; unfair business practices; the imposition of a constructive trust; conspiracy; and a "cause of action" for declaratory relief.[9]

A bench trial was conducted between April 28 and May 29, 2009 on the equitable causes of action. At trial, Giacomazza testified about his efforts on behalf of his 30-year partnership with Lee, and the work he performed for which he claimed he held a 50 percent interest in the properties held by the Trust. The Court found there was no partnership agreement between Lee and Giacomazza by which Lee had granted Giacomazza 50 percent or any interest in any Trust asset. That finding was largely based on the court's determination that Giacomazza was "not . . . a credible witness," in light of: its observation of Giacomazza during trial; Giacomazza's inability to recall key details or to provide any evidence of any real value or significant benefit added to advance the interest of the purported partnership by virtue of his efforts on its behalf over 30 years; his inability to provide a credible explanation as to why no property was transferred to him prior to Lee's death; a paucity of evidence that Giacomazza had any expertise, skills or background which might explain Lee's willingness to grant him half interest in the Malibu and Alta Properties for no financial consideration; abundant internal inconsistencies in Giacomazza's testimony; and inconsistencies between Giacomazza's testimony and that of credible witnesses.[10] The court specifically "found Harry to be a more credible witness than [Giacomazza]."

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[9] Chevy Chase Bank was also a defendant to the claims for quiet title, fraud, rescission based on failure of consideration and declaratory relief. The claims against the bank were severed and it is not a party to this appeal.

[10] The trial also revealed significant problems with two key documents, the 1977 "Irrevokable [sic] Joint Venture, General Partnership" agreement between Lee and Giacomazza, and the 1986 quitclaim deed. Giacomazza refused to authenticate the 1977 agreement. That agreement bears the seal of a notary whose commission expired in

At the conclusion of trial, the court found in favor of Harry individually and on behalf of the Trust on the equitable claims for quiet title, rescission based on fraud; rescission based on failure of consideration; to set aside fraudulent conveyance; unfair business practices; and the imposition of a constructive trust. At Harry's request, the court dismissed the remaining claims and entered judgment. Giacomazza and his codefendants (collectively, Giacomazza) appeal.

DISCUSSION

Giacomazza maintains the trial court abused its discretion when it refused to bar Harry from contesting Giacomazza's claim of ownership of the Malibu Properties based on the doctrine of judicial estoppel, in light of contradictory representations Harry made in prior administrative and judicial proceedings. Giacomazza also contends the trial court abused its discretion in refusing to grant his motion for relief from deemed admissions. We find no merit in Giacomazza's first contention and, given that dispositive conclusion, need not address the latter assertion of error.

1991, and who therefore could not have actually notarized the document in 1977. (See Gov. Code, § 8204 [notarial commissions are issued in four-year increments].) In addition, the document was signed by a notary who did not acquire the name under which she signed until after her marriage in 1985. At trial Giacomazza denied that the original agreement was ever notarized, or that he had ever seen a notarized copy before one was presented to him by his attorney in the *Rhoades* action. Giacomazza also claimed that his attorney in that case had added the notarial seal. The 1977 agreement also refers to the Malibu Properties as constituting approximately 1300 acres of land; much of the acreage that constitutes the Malibu Properties acreage acquired by the Trust was acquired after 1977.

Two versions of the 1986 deed were identified. One, purportedly signed by both Harry and Lee in December 1986, lacks the attachments to which it refers. Giacomazza claimed they had been stolen. The other, which bears only the purported signature of Lee, includes some attachments, but the parcel numbers to which they refer (all of which begin with 2000) do not refer to any of the Malibu Properties. (Each parcel number of the Malibu Properties begins with 7000). Both bear the stamp of a notary whose commission expired in 1969.

1. Standard of review

The initial determination as to whether judicial estoppel applies is a question of law. (*Kitty-Anne Music Co. v. Swan* (2003) 112 Cal.App.4th 30, 35–36.) If the issue on appeal is a challenge to the evidence supporting a trial court's factual determination, substantial evidence review is appropriate. (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 354; *In re Marriage of Dekker* (1993) 17 Cal.App.4th 842, 850.) However, where, as here, the challenge is to the court's exercise of discretion based on undisputed facts, abuse of discretion review applies. (*Hartford Casualty Ins. Co. v. Travelers Indemnity Co*. (2003) 110 Cal.App.4th 710, 724.)

2. The trial court did not abuse its discretion by refusing to bar Harry's claims based on the doctrine of judicial estoppel

Judicial estoppel prevents a party from asserting a position in a legal proceeding contrary to a position the party previously adopted in that or another earlier proceeding. It is an extraordinary remedy invoked only when a party's inconsistent behavior would otherwise result in a miscarriage of justice, and only after a very high threshold is cleared. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130–131; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.)

"'"The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. [Citation.] 'The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings."' [Citation.] Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts."' [Citation.] Because it is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion. . . . Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior

one. [Citations.]"' [Citation.]" (*International Engine Parts, Inc. v. Feddersen & Co.*, *supra*, 64 Cal.App.4th at p. 350.)

Typically, five factors are considered to determine whether to apply judicial estoppel. The doctrine is most appropriately applied when "'(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987; *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.) There are no inflexible prerequisites nor is there an exhaustive formula for determining the applicability of judicial estoppel. (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 132.) It is an equitable doctrine and "'its application, even when all of the necessary elements are present, is discretionary.'" (*Ibid.*) Thus, for example, when, in a dissolution action, a wife claimed her husband was judicially estopped based on a declaration he filed in another case, judicial estoppel was properly denied because the wife had actively assisted the husband to prepare the key declaration. (*In re Marriage of Dekker*, *supra*, 17 Cal.App.4th at p. 850.)

Turning to Giacomazza's arguments regarding judicial estoppel, we conclude the trial court did not abuse its discretion by rejecting application of the doctrine here. Giacomazza contends Harry should be judicially estopped from asserting ownership to the Malibu Properties because he has, in one administrative proceeding and in three prior lawsuits, "repeatedly claimed that the Trust previously conveyed the Malibu Properties to Giacomazza."[11]

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[11] Giacomazza fails to dispute the trial court's findings refuting his claim of ownership of the Alta Property, and canceling the three mechanic's liens he placed on the Malibu Properties. Accordingly, we deem him to have forfeited any claim of error as to these or any other unbriefed contention of error. (*Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn.* (1994) 27 Cal.App.4th 503, 507–508, fn. 5; *Arthur*

Giacomazza argues first that, in the administrative proceeding, Harry protested the IRS's proposed adjustments to estate taxes on Lee's and Norman's estates by asserting that the Malibu Properties were owned by Giacomazza, not the Trust. The trial court refused to apply the doctrine of judicial estoppel based on this assertion because the IRS rejected Harry's claim and remained unpersuaded that Giacomazza owned the Malibu Properties.

Second, as for the *Rhoades* litigation, we find Harry presented no evidence to contradict his position here.[12] Giacomazza asserts that, in the *Rhoades* litigation, Harry claimed "that, pursuant to recorded deeds, title to the Malibu Properties resided in Giacomazza." Not quite. Keep, Harry's attorney in the *Rhoades* litigation, testified in the trial of this case that Harry and Giacomazza brought him some deeds during the *Rhoades* trial which stated that Giacomazza's entities held title to the properties. But Keep never presented that evidence in the *Rhoades* trial because it was not relevant to the matters at issue in the *Rhoades* action and, if anything, helped the opposition. Far from relying on this evidence, Keep testified he "chew[ed Harry and Giacomazza] out about doing things during the trial that [were] not helpful," and could only serve to "snatch defeat from the jaws of victory." Keep noted his opposing counsel may have introduced the evidence. In any event, Keep testified that the trial court in *Rhoades* never addressed the deeds. It rejected Lee's ex-wife's claims based on its finding that Lee never gifted or

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v. Department of Motor Vehicles (2010) 184 Cal.App.4th 1199, 1209 [issue not raised in opening brief is deemed abandoned].)

[12] The Statement of Decision does not address the *Rhoades* action, and Giacomazza does not take issue with its failure to do so. We nevertheless address this argument because Giacomazza raised his contention regarding the purportedly inconsistent position taken by Harry in *Rhoades* at trial, in his closing brief and in objections to the court's tentative statement of decision.

assigned half his interest in the Trust. Thus, according to Keep, title to the Malibu Properties was simply not at issue in *Rhoades*.[13]

In the third case, (*Mansdorf*), Giacomazza relies on a declaration Harry submitted in support of a motion to dismiss that action. But Harry's declaration does not address ownership of the Malibu Properties. Rather, it merely states Harry did "not wish to pursue a lawsuit against . . . Giacomazza. . . inasmuch as he [was . . . his] business partner for several years" and had been his brother's partner for years before that. The trial court correctly observed that Harry's attestation was not "totally inconsistent" with his position in this action and does not provide a basis for judicial estoppel. (See *Aguilar*, *supra*, 32 Cal.4th at p. 987; *Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.)

Finally, Giacomazza points to Harry's deposition testimony in the *New Cingular Wireless* action. But, as the court pointed out, Giacomazza presented insufficient evidence to show Harry was successful in asserting any position in that Ventura lawsuit, or even to demonstrate what was at issue in that case. In addition, Giacomazza presented no evidence the New Cingular Wireless litigation was complete or that the trial court in that action had rendered a final ruling, let alone that it had adopted Harry's position or accepted it as true.

Under these circumstances, judicial estoppel will not operate against Harry. The doctrine should be applied only when the person against whom it is asserted "was

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[13] Giacomazza also relies on Harry's deposition testimony in *Rhoades* in which he testified Giacomazza had a 50 percent interest in the Malibu Properties, and that he had found the 1986 quitclaim deed in favor of Giacomazza in Lee's safe. We cannot credit those statements given the trial court's findings that actions Harry took and positions he adopted with respect to the properties and while under the grip of Giacomazza's power, were the result of "undue influence exerted upon [him] by [Giacomazza] through threats, misrepresentations, intimidation, bullying, and fraud . . . ." In any event, as with the IRS, Harry was apparently unsuccessful in persuading the court in *Rhoades* to adopt the position that the Malibu Properties had been conveyed to Giacomazza. The court rejected Marylin Mansdorf's claims on an independent basis, rendering the title issue moot.

successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true)." (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 183.)

Giacomazza invites us to ignore this well-established law, and instead apply the principles articulated in *Thomas v. Gordon* (2000) 85 Cal.App.4th 113 (*Thomas*). We decline to do so. In *Thomas*, the Court of Appeal observed some courts do not limit application of judicial estoppel to situations where the litigant was successful in asserting the contradictory position. In *Thomas*, the appellant admitted transferring her interest in two corporations to an entity owned solely by her friend in order to keep it out of her creditors' hands, and then filed for bankruptcy, expecting to reclaim her funds after her debts were discharged. (*Id.* at p. 119.) She signed documents in the bankruptcy court claiming to list all of her assets but said nothing about those interests. (*Ibid.*) She later sued her accountant for negligence and fraud, claiming he failed to keep her apprised of the financial affairs of both corporations. (*Id.* at p. 115.) The accountant successfully moved for summary judgment in part on the ground the appellant should be judicially estopped from claiming any legal or equitable interest in the corporations sufficient to require the accountant to keep her apprised of their affairs. (*Id.* at pp. 117, 120.) Finding this to be the "rare situation" where the litigant made an egregious attempt to manipulate the legal system, the court agreed the circumstances warranted application of judicial estoppel even in the absence of appellant's success in the earlier litigation. (*Id.* at p. 119 [agreeing with the trial court that "'this is as egregious as it gets'"].) In reaching this conclusion, the court observed that because of the nature of bankruptcy law, the appellant obtained a legal benefit from her prior statements as soon as they were made, because they resulted in an automatic stay preventing creditors from taking any action against her for a period of time. (*Ibid.*)

The circumstances here are distinguishable from those in *Thomas*. Harry's position in the IRS and other actions, which the trial court found were undertaken as a result of Giacomazza's undue influence, threats and intimidation, were not adopted by those tribunals. If judicial estoppel were applied here, Giacomazza would be permitted to profit from his own egregious misconduct. Such a result would be antithetical to

application of the equitable doctrine. (See *In re Marriage of Dekker*, *supra*, 17 Cal.App.4th at p. 850 [refusing to apply judicial estoppel in favor of one party based on a declaration filed by another in another action where the first party had actively assisted the party she sought to estop in preparing the key declaration].) "'[A] court of equity seeks to do justice, not injustice,'" and "'will not do inequity in the name of equity.'" (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 184; see also Civ. Code, § 3517 ["No one can take advantage of his own wrong."].) Moreover, as we have observed before, *Thomas* was decided before the Supreme Court emphasized the importance of the success factor in considering whether to apply the extraordinary doctrine of judicial estoppel in *New Hampshire v. Maine* (2001) 532 U.S. 742, 749–751, and *Zedner v. U.S.* (2006) 547 U.S. 489, 503–506. (*Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 147.)

In addition, unlike *Thomas*, we cannot conclude that Harry purposefully gained an advantage here by virtue of his inconsistent positions in earlier matters. The mere assertion of an inconsistent position does not warrant imposition of judicial estoppel. Rather, the inconsistent position "must be attributable to intentional wrongdoing." (*Ryan Operations G.P. v. Santiam-Midwest Lumber Co.* (3d Cir. 1996) 81 F.3d 355, 362; *Thomas*, *supra*, 85 Cal.App.4th at p. 119.) Inconsistent positions forced on a party by coercion do not reflect intentional wrongdoing, particularly where, as here, the party seeking to invoke the equitable doctrine coerced the party he now seeks to estop into adopting the positions in the first place.[14]

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[14] Giacomazza also argues the trial court abused its discretion when it denied his motion to vacate an order deeming requests for admissions to which Giacomazza had failed to respond admitted. The trial court did not refer to or rely on these admissions in its Statement of Decision. Moreover, the issue is moot given our conclusion as to judicial estoppel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.