2017 IL App (3d) 150148-U

Order filed May 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

In re MARRIAGE OF	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
TAMMIE HANNIGAN,	)	Will County, Illinois.
	)	
Petitioner-Appellant,	)	Appeal No. 3-15-0148
	)	Circuit No. 08-D-1945
and	)	
	)	
BRIAN HANNIGAN,	)	Honorable
	)	Brian E. Barrett,
Respondent-Appellee.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court failed to exercise its discretion in determining that judicial estoppel barred plaintiff's claim, we must reverse the trial court's judgment dismissing plaintiff's claim and remand for the trial court to exercise its discretion in determining whether to apply judicial estoppel.

¶ 2 A judgment of dissolution of marriage was entered between the parties, Tammie and Brian Hannigan, containing monetary awards in favor of petitioner, Tammie, and against respondent, Brian. In a supplemental proceeding, Tammie filed a citation to discover assets in an

attempt to collect the monetary awards from the dissolution judgment from Brian. The trial court granted Brian's motion to dismiss Tammie's citation to discover assets because Tammie had failed to list her claim against Brian as an asset in her bankruptcy proceedings, which resulted in the discharge of her debts. We reverse the trial court's order granting Brian's motion to dismiss and remand for further proceedings in accordance with this order.

¶ 3 FACTS

¶ 4 On September 20, 1992, Tammie and Brian were married. On March 8, 2011, a judgment of dissolution of marriage was entered dissolving their marriage.

¶ 5 Prior to the trial, Tammie had filed a petition for contribution for Brian to pay a portion of her attorney fees that she owed to her attorneys, Panos & Associates. Tammie indicated that she had incurred $79,638.83 in total legal fees and costs since the inception of the case, with $59,461.66 remaining due and owing to Panos & Associates from Tammie.

¶ 6 As part of the judgment of dissolution of marriage, the trial court awarded Tammie $18,085 for her half of marital funds that had been dissipated by Brian, reimbursement of $1777.61 for banking fees and Brian's half of utilities, $132 as part of a property settlement involving an insurance refund check erroneously mailed to and cashed by Brian, and $3801 for Tammie's attorney fees resulting from Brian's contempt—totaling $23,795.61. The trial court also awarded Tammie $35,000 for contribution from Brian for her attorney fees, with Tammie responsible for the balance of the attorney fees incurred in the dissolution matter.

¶ 7 After the trial court denied Brian's motion to reconsider, Brian appealed. On appeal, this court affirmed the trial court's judgment. *In re Marriage of Hannigan*, 2012 IL App (3d) 110468-U (order filed September 26, 2012, and mandate issued December 5, 2012).

¶ 8 On June 29, 2012, during the pendency of the appeal, Tammie had filed for bankruptcy and was required to list her assets and liabilities. In so disclosing her assets, under a list of 35 descriptions of "personal property," Tammie indicated that she owned four categories of items—cash ($19), checking and savings accounts ($1000), household furnishings ($320), and clothing ($200). Tammie indicated that she did not have any of the remaining 31 types of personal property, which included her specifying, in part, that she had no: (1) interest in any insurance policies, annuities, retirement accounts, pension plans, tuition plans, stocks, bonds, businesses, joint ventures, negotiable and nonnegotiable instruments, or accounts receivable; (2) interest in "any alimony, maintenance, support, [or] property settlement to which [she] may be entitled"; (3) interest in any other liquidated debts owed to her including tax refunds; (4) interest in any "other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of [hers] and rights to setoff claims"; (5) vehicles; or (6) "other personal property of any kind not already listed." Tammie was also required to list her "creditors holding unsecured nonpriority claims," the date the claim was incurred, and "if [the] claim [was] subject to setoff." Tammie listed her divorce attorneys, Panos & Assoicates, as an unsecured creditor to whom she owed $135,000, with her "former husband responsible for $35,000 under court order." In her list of codebtors, she indicated Brian was her "codebtor" in regard to her Panos & Associates debt. On September 25, 2012, Tammie was granted a discharge of her debts in federal bankruptcy court.

¶ 9 Two years later, on October 16, 2014, Tammie filed a citation to discover assets against Brian as her judgment debtor. Tammie indicated the amount of the judgment entered in her favor and against Brian was $23,796 from the dissolution judgment of March 8, 2011, $220 filing and service costs, and $6959.60 of interest on the judgment to date—$30,975.60. Interestingly, the dissolution judgment amount sought in the citation to discover asset appear to

represent the total amount awarded to Tammie insurance check refund, Brian's dissipation of marital assets, and attorney fees for Brian's contempt and appears not have included the $35,000 for contribution to attorney fees.

¶ 10 Brian filed a motion to quash the citation and dismiss the citation proceedings pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), arguing Tammie was judicially estopped from asserting a claim for the money awarded in the dissolution judgment when she had taken a conflicting position in the bankruptcy proceedings by: (1) failing to list the awarded amounts as assets in the bankruptcy proceedings; and (2) having her attorney fees discharged in the bankruptcy proceedings when she was attempting to collect contribution from Brian for that same discharged debt. In response to Brian's motion to quash and dismiss, Tammie indicated that she had disclosed the fact that the dissolution judgment was pending on appeal. Tammie indicated, "she had no concept whether the appeal court would sustain the judgment or not at the time of filing her [bankruptcy] petition." She also argued that Brian did not have standing to raise judicial estoppel in regard to the bankruptcy determination and he "should not be allowed to benefit from an inadvertent action by [Tammie] in the U.S. Bankruptcy Court."

¶ 11 At the hearing on Brian's motion to quash and dismiss the citation to discover assets, Brian's attorney argued that Tammie filed for Chapter 7 bankruptcy protection in 2012 and the doctrine of judicial estoppel barred Tammie's citation to discover assets because she was attempting to collect on a claim that she did not disclose in her bankruptcy petition. Tammie's attorney argued that Tammie had disclosed the divorce case and indicated that the case was on appeal so that the bankruptcy trustee could have inquired further. He argued, alternatively, that if the disclosure was found to be insufficient then any such nondisclosure was inadvertent.

Brian's attorney argued that the bankruptcy disclosure asked for Tammie to list "other personal property of any kind not already listed," but Tammie failed to list any claim against Brian. He also argued that, through the bankruptcy proceedings, Tammie discharged the $135,000 of attorney fees that she had incurred in the dissolution case but Tammie was still pursuing the court-ordered contribution from Brian for those discharged attorney fees.

¶ 12 On January 26, 2015, the trial court entered its ruling. The trial court found that in the parties' divorce case was a judgment that had been entered against Brian "for a couple of different issues, dissipation, attorney's fees, other matters." The trial court further found that after dissolution judgment had been entered, Tammie filed for bankruptcy but failed to disclose that she was owed money from Brian. In determining whether judicial estoppel applied to Tammie's attempt to proceed with a citation to discover assets, the trial court stated:

> "I have reviewed the case law and the law in the matter and considered the arguments and reviewed the file. In this situation, there is *Ryan* [*Operations G.P. v. Santiam-Midwest Lumber, Co.*, 81 F.3d 355 (1996)]. No intentional self-contradiction to gaining an unfair advantage and, therefore, no judicial estoppel was found in that case based on a good faith filing of a bankruptcy petition; however, subsequent cases and cases have found that there is no excuse to the intent, good or bad, on a bankruptcy refiling requiring full disclosure of assets.
>
> My understanding and my research has shown me that once [Tammie] has filed for bankruptcy the assets become those of the [bankruptcy] trustee and only the trustee can claim anything else on those assets, claim any action on those assets. Once that debt is discharged, all the assets are now also discharged with it, and, therefore, based on the evidence in this case, the case law and the arguments,

the judicial estoppel does apply and the citation will be dismissed, quashed and dismissed."

¶ 13 The trial court found that judicial estoppel barred Tammie's claim against Brian and granted Brian's motion to quash and dismiss the citation to discover assets. Tammie appealed.

¶ 14 ANALYSIS

¶ 15 On appeal, Tammie argues the trial court erred by dismissing her petition for citation to discover assets as being barred by the doctrine of judicial estoppel because the elements of judicial estoppel have not been met in this case. She also contends that nondisclosure of the specific amounts she had been awarded in dissolution judgment, if such a disclosure was required, was inadvertent so that the application of judicial estoppel would not be appropriate in this case. Brian argues that judicial estoppel should be applied to bar Tammie from attempting to collect on a judgment that she had failed to disclose as an asset in her bankruptcy proceedings. We find the trial court erred in its application of judicial estoppel.

¶ 16 In this case, Brian's motion to dismiss was based on subsection (a)(9) of section 2-619 of the Code of Civil Procedure (Code), which permits dismissal where "the claim asserted * * * is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014). We review a dismissal under section 2–619 of the Code *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶ 42.

¶ 17 Here, in granting the dismissal of Tammie's citation to discover assets, the trial court found that judicial estoppel barred Tammie's attempt to collect on the awarded granted to her in dissolution judgment. Judicial estoppel is an equitable doctrine invoked by the court at its discretion. *Id.* ¶ 36. The purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process by prohibiting a party from deliberately changing positions according to the

exigencies of the moment. *Id.* Judicial estoppel applies when a litigant takes a position, benefits from that position, and then seeks to take a contrary position in a subsequent legal proceeding. *Id.* The doctrine of judicial estoppel will not be applied where its application would result in an injustice. *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 113.

¶ 18 To invoke the doctrine of judicial estoppel, the party to be stopped must have: (1) taken two positions; (2) that are factually inconsistent; (3) in separate judicial or quasi-judicial administrative proceedings; (4) intending for the trier of fact to accept the truth of the facts alleged; and (5) succeeded in the first proceeding and received some benefit from it. *Seymour*, 2015 IL 118432, ¶¶ 37, 47. The "core concern" is that a party takes factually inconsistent positions in separate proceedings having intended that the trier of fact accept the truth of facts alleged. *Id.* ¶ 38. Judical estoppel, like all estoppels, must be proven by clear and convincing evidence. *Id.* ¶ 39.

¶ 19 Where the five prerequisites of judicial estoppel have been established by clear and convincing evidence, the trial court must exercise its discretion in determining whether to apply judicial estoppel. *Id.* ¶¶ 39, 47. The trial court may consider many factors in deciding whether to apply judicial estoppel, including whether there was intent to deceive or mislead as opposed to taking the prior position inadvertently or by mistake. *Id.* ¶ 47 (citing *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001) (acknowledging that it may be more appropriate to refrain from applying judicial estoppel when a party's prior position was based upon inadvertence or mistake); *Holland*, 2013 IL App (5th) 110560, ¶ 120 (noting that courts have been reluctant to apply judicial estoppel in the bankruptcy context when a party's prior position was based on inadvertence or mistake)). A trial court's application of the judicial estoppel doctrine is reviewed for an abuse of discretion. *Seymour*, 2015 IL 118432 ¶ 48.

¶ 20 In this case, the trial court found that judicial estoppel barred Tammie's attempt to collect the money awarded to her from Brian because those assets had become those of the bankruptcy trustee and only the trustee could claim an action on those assets, so that once Tammie's debts were discharged "all the assets [were] also discharged with it." Initially, we note the Bankruptcy Code defines the property of a bankruptcy estate as including, among other things, (1) "all legal or equitable interests of the debtor in property as of the commencement of the case" (with certain exceptions not applicable in this case); and (2) "[a]ny interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date…as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree." 11 U.S.C. § 541(a)(1), (a)(5)(B). Neither party argues that the amounts awarded in the dissolution judgment were not to be considered property of the bankruptcy estate.

¶ 21 Rather, Tammie contends that she clearly disclosed the pending appeal of the parties' dissolution judgment in her bankruptcy statement of financial affairs, so that she did not make two conflicting positions in separate judicial proceedings to support the application of judicial estoppel. Brian argues that regardless of whether Tammie's failure to list her claims against Brian as an asset was intentional or inadvertent, she should be judicially estopped from attempting to collect on any judgment not properly listed in her bankruptcy proceedings.

¶ 22 Subsequent to the trial court's ruling in this case, our supreme court decided *Seymour v. Collins*, 2015 IL 118432. In *Seymour*, the Illinois Supreme Court held when the trial court has exercised its discretion in applying judicial estoppel a reviewing court should not disturb the ruling unless there was an abuse of discretion and the trial court's failure to exercise its

discretion when applying judicial estoppel may be an abuse of discretion. *Id.* ¶¶ 48, 50. The *Seymour* court found that the trial court in that case failed to exercise its discretion in applying the doctrine of judicial estoppel and, instead, had found that the presence of certain facts—the plaintiff's failure to disclose the personal injury action in the bankruptcy proceedings—mandated the dismissal of the plaintiff's subsequent personal injury suit. *Id.* ¶ 50. The *Seymour* court held that while a person has a legal duty to disclose an asset in a bankruptcy proceeding, the failure to do so does not create the presumption of intent to deceive or manipulate the bankruptcy court to support the *per se* application of judicial estoppel. *Id.* ¶ 64. The *Seymour* court reasoned that such a rigid application of judicial estoppel would diminish its purpose and would fail to allow courts to consider the specific circumstances of each case. *Id.*

¶ 23 In reviewing the record in this case, it does not appear that the trial court exercised its discretion in applying the doctrine of judicial estoppel, as is now clearly required under *Seymour*. Instead, the trial court found that Tammie's discharge in the bankruptcy proceedings mandated the dismissal of her attempt to collect on her claim against Brian. Because the trial court believed that the application of judicial estoppel was mandated, the trial court did not exercise its discretion and judicial estoppel was inequitably applied. See *id.* ¶ 50 (when a court is required by law to exercise its discretion, the failure to do so may itself constitute an abuse of discretion).

¶ 24 Furthermore, we cannot be completely and absolutely sure from the record whether any portion of the $23,796 judgment referenced in Tammie's citation to discover assets included any portion of the $35,000 awarded to Tammie for contribution to her attorney fees discharged in the bankruptcy proceedings. It appears from the citation to discover assets that the $35,000 for contribution to attorney fees was not being sought after by Tammie. In the bankruptcy proceedings, Tammie had disclosed her attorney, Panos & Associates, as an unsecured creditor

to whom she owed $135,000 and disclosed that Brian was ordered to pay $35,000 of those attorney fees. If Tammie were attempting to recover any portion of the $35,000 awarded to her for contribution to attorney fees—fees that had been discharged in the bankruptcy proceedings—then perhaps the application of judicial estoppel might be appropriate to bar an attempt to collect for contribution awarded when the debt was discharged in the bankruptcy proceedings.

¶ 25 Certainly, the trial court could, within its discretion, determine that judicial estoppel should not bar Tammie's attempt to collect from Brian any of the other awards in the dissolution judgment despite Tammie's failure to specifically disclose those claims as assets in the bankruptcy proceedings. The amounts awarded to Tammie in the dissolution judgment, other than the $35,000 for contribution to her attorney fees, were a property settlement award stemming from an insurance refund check, an award for Brian's dissipation of marital assets, and attorney fees stemming from Brian's contempt of court. Arguably, it could create an injustice to allow Brian to escape payment of those awards if there was no indication that Tammie had attempted to deceive or mislead the bankruptcy court.

¶ 26 In sum, it does not appear from this record that the trial court exercised its discretion in applying the doctrine of judicial estoppel. Instead, it appears the trial court found that the prior bankruptcy discharge mandated the dismissal of Tammie's attempt to collect from Brian the awards granted to her in the dissolution judgment. Because no discretion was exercised, we cannot perform a deferential review of the trial court's application of judicial estoppel in this matter. See *id.* Thus, we remand this cause for a proper determination of whether judicial estoppel should be applied under the circumstances of this case. Therefore, we reverse the trial court's order granting Brian's motion to quash and dismiss Tammie's citation to discover assets and remand for the trial court to exercise its discretion in determining whether judicial estoppel

should bar Tammie's attempt to collect on her claim of $23,796, plus interest, against Brian, in accordance with this order.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is reversed and this cause is remanded with directions.

¶ 29 Reversed and remanded with directions.