

NOTICE
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2017 IL App (5th) 160263-U

NO. 5-16-0263

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SHERRY CAMPBELL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Franklin County.
)	
v.)	No. 11-SC-497
)	
KENNETH ATCHISON,)	Honorable
)	Thomas J. Dinn III,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Cates concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment affirmed but modified by applying judicial estoppel to reduce the plaintiff's damages award to an amount equal to that which the plaintiff represented to be the value of the claim.

- ¶ 2 In this small claims case, the defendant, Kenneth Atchison, appeals the May 9, 2016, judgment of the circuit court of Franklin County that ordered him to pay the plaintiff, Sherry Campbell, \$8,403.22 plus costs. For the following reasons, we affirm the judgment as modified to reflect a total award of \$2,000.

¶ 3

FACTS

¶ 4 On December 6, 2011, Sherry filed a small claims complaint against Kenneth. The complaint alleged that on January 23, 2010, the parties—who were in a relationship—entered into an oral contract involving the purchase of a pickup truck from a dealership. Pursuant to the oral contract, the parties would use Sherry's credit rating to obtain a loan for the truck, and Kenneth would make a down payment and take responsibility for all of the installments on the loan as well as any associated insurance premiums. The complaint further alleged that although Kenneth made the down payment, he only paid the insurance premiums "for a period of time" and made the monthly loan payments "for a period of just less than six months." Kenneth allegedly stopped making payments when the parties separated.

¶ 5 According to the complaint, in order to protect her credit rating, Sherry assumed responsibility for the payments in July 2010 while Kenneth maintained possession of the truck. Sherry requested that the circuit court award her damages in the amount of \$8,432.16 plus reasonable fees and costs, and to order Kenneth to resume making the loan payments on the truck.

¶ 6 On September 29, 2016, a stipulated bystander's report—pursuant to Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005)—was filed in the circuit court. According to the stipulated bystander's report, a bench trial was conducted on July 9, 2015. There, Sherry testified that on January 23, 2010, she and Kenneth entered into a contract with Scott Credit Union to finance the purchase of a 2009 Chevrolet Silverado pickup truck. The installment contract was admitted into evidence. Sherry testified that she agreed to

cosign the note so Kenneth could finance the truck. However, the retail installment contract in evidence, as well as the application for title, reveals that the parties were listed as co-borrowers on the application and co-owners on the title. The monthly payment at that time was \$563.76. Kenneth paid \$3,000 as a down payment and the parties agreed that Kenneth would pay the insurance, registration, and monthly payments, pursuant to the installment contract. Sherry testified that Kenneth made all of the agreed upon payments until August 2010.

¶ 7 Sherry indicated that she refinanced the truck on August 3, 2010, in her name only by entering into a new loan and security agreement with Scott Credit Union. The agreement was admitted into evidence. Sherry testified that Kenneth remained in possession of the truck, but did not make any payments after July 2010. Sherry testified that she regained possession of the truck in April 2012 by "self help." She reported that she made 21 payments on the truck at \$521.75 each, although the financing agreement indicates that the payment amounts were \$521.82. Sherry further testified that she paid insurance premiums totaling \$1,098 and paid registration in the amount of \$29.

¶ 8 Sherry testified that on February 18, 2014, she filed for Chapter 7 bankruptcy. In the bankruptcy proceedings, she disclosed in her schedule of assets a claim against Kenneth for conversion of the truck for \$2,000. No mention was made of a pending claim for breach of oral contract in which Sherry requested \$8,432.16 plus costs. Sherry reaffirmed the debt on the truck and the bankruptcy documents were admitted as evidence. The bankruptcy trustee abandoned the \$2,000 conversion claim.

¶ 9 On May 9, 2016, the circuit court entered a judgment ordering Kenneth to pay Sherry \$8,403.22 plus costs. Kenneth filed a timely notice of appeal.

¶ 10 ANALYSIS

¶ 11 Kenneth raises the following issues on appeal: (1) whether the circuit court erred by entering judgment against Kenneth on Sherry's claim for conversion of the truck, which Sherry possesses; (2) whether the circuit court erred by entering judgment against Kenneth for breaching an oral contract with Sherry; and (3) whether the circuit court erred by finding that judicial estoppel does not bar the instant case.

¶ 12 I. Conversion

¶ 13 The first issue on appeal is whether the circuit court erred by entering judgment against Kenneth on Sherry's claim for conversion of the truck. We decline to address this alleged issue, as no complaint, or judgment, for conversion exists in the record. The complaint Sherry filed is one of small claims alleging breach of an oral contract between the parties. The only mention of conversion anywhere in the record is the bankruptcy document which alleges the existence of a pending claim for conversion of the truck at issue in this case. Since no complaint or judgment for conversion exists, there is nothing to review regarding this alleged issue.

¶ 14 II. Breach of Contract

¶ 15 The second issue Kenneth raises on appeal is whether the circuit court erred by entering judgment against him for breaching an oral contract with Sherry. "The existence of an oral contract, its terms, and the intent of the parties are questions of fact, and the trial court's determinations on those questions will be disturbed only if they are against

the manifest weight of the evidence." *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009). " 'A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented.' " *Id.* (quoting *Best v. Best*, 223 Ill. 2d 342, 350 (2006)).

¶ 16 Here, Kenneth alleges in his brief that he attempted to pay the monthly installment to the credit union in August 2010, but the credit union informed him that the installment contract had been terminated and the entire balance had been paid when Sherry refinanced the truck. However, these facts are not substantiated by the record. The stipulated bystander's report contains no evidence to support the allegation that he attempted to make the monthly payment or that the credit union ever refused a payment from him. Kenneth further argues that Sherry's refinancing the underlying loan constituted a modification of the original oral contract whereby Kenneth agreed to make payments on the truck. Kenneth further argues that this modification bars any claim Sherry had for damages she incurred in making payments while Kenneth maintained possession of the truck because the modification was not supported by adequate consideration. We disagree.

¶ 17 There is nothing in the record to support Kenneth's assertion. The fact that Sherry refinanced the loan for a lower payment while the truck remained in Kenneth's possession in no way indicates that Sherry did not sustain damages as a result of Kenneth's breach of their oral agreement. In fact, when Sherry refinanced the loan in response to Kenneth's breach, the payments were actually lowered, thereby benefitting Kenneth by lowering the amount of damages that were subsequently entered against him. See *Pokora v.*

Warehouse Direct, Inc., 322 Ill. App. 3d 870, 880 (2001) (party injured by breach of contract is required to use reasonable means to mitigate damages). We find that Sherry's refinancing the loan constituted mitigation of damages rather than a modification of her oral contract with Kenneth that would require consideration. Accordingly, the circuit court's judgment in this regard was not against the manifest weight of the evidence.

¶ 18

III. Judicial Estoppel

¶ 19 The final issue on appeal is whether the circuit court erred by finding that judicial estoppel does not bar the instant case. The standard of review regarding the circuit court's application of the doctrine of judicial estoppel is abuse of discretion. *Berge v. Mader*, 2011 IL App (1st) 103778, ¶ 9. "The law of judicial estoppel prevents a party who makes a representation in one case from taking a contrary position in another case." *Id.* ¶ 12. "The clear intent and evolution of the law of judicial estoppel has been to preserve and protect the integrity of our system of justice." *Id.*

¶ 20 The Illinois Supreme Court "has identified five prerequisites as 'generally required' before a court may invoke the doctrine of judicial estoppel." *Seymour v. Collins*, 2015 IL 118432, ¶ 37. "The party to be estopped 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) have succeeded in the first proceeding and received some benefit from it." *Id.* "[I]f all prerequisites have been established, the trial court must determine whether to apply judicial estoppel ***." *Id.* ¶ 47. "Multiple factors may inform the court's decision, among them the significance or impact of the party's action in the first proceeding and, as

noted, whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.*

¶ 21 Applying these principles to the case at bar, we find the circuit court abused its discretion by finding that judicial estoppel does not apply. Regarding the five prerequisites, the record is absolutely clear that Sherry: (1) took two positions; (2) in separate judicial proceedings; (3) that were factually inconsistent. *Id.* ¶ 37. Namely, she filed her complaint on December 6, 2011, as a small claims action for a breach of contract, and sought damages in the amount of \$8,432.16 plus costs. The record is also absolutely clear that in the February 2014 bankruptcy proceedings, Sherry disclosed in her schedule of assets a claim against Kenneth for conversion of the truck for \$2,000. No mention was made of the pending small claims case in which she alleged a breach of contract and sought \$8,432.16 plus costs. No reasonable judge could find that Sherry did not intend for the trier of fact to accept the truth of the facts alleged by listing as an asset in the bankruptcy court a claim of \$2,000 for conversion. See *id.* Further, no reasonable judge could conclude that Sherry did not receive a benefit when the bankruptcy trustee considered the asset's value at \$2,000 rather than \$8,432.16 plus costs, and abandoned the \$2,000 conversion claim. See *id.*

¶ 22 We note that Sherry cites *Knott v. Woodstock Farm & Fleet, Inc.*, 2017 IL App (2d) 160329, ¶ 31, where the court held that judicial estoppel did not apply where the plaintiff's failure to disclose to the bankruptcy court the details of a possible personal injury claim did not, in and of itself, establish an intent on the part of the plaintiff to deceive or manipulate the bankruptcy court. This case is distinguished because in *Knott*,

the plaintiff filed a personal injury complaint *after* discharge from bankruptcy, and informed the bankruptcy court that he had a "possible claim" of personal bodily injury. *Id.* ¶ 27. Here, Sherry's attorney represented her in both the bankruptcy proceeding and the instant proceeding after the bankruptcy proceeding concluded. This was not an inadvertent omission, as was the case in *Knott*, but rather an affirmative misrepresentation to the bankruptcy court regarding the nature of the case and the amount of damages incurred. By accepting Sherry's characterization of the claim at its represented value of \$2,000, Sherry was allowed to keep the claim when the bankruptcy trustee accepted her representations and abandoned it.

¶ 23 Because the requisite elements of judicial estoppel were fulfilled in this case, we find the circuit court abused its discretion by failing to apply it. Sherry valued the lawsuit involving the truck as \$2,000 in the bankruptcy court. We find that judicial estoppel applies to limit Sherry to the position she took in the bankruptcy court regarding the value of the lawsuit as an asset. Accordingly, we modify the total judgment to \$2,000, pursuant to her representation to the bankruptcy court as to the value of her claim.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the May 9, 2016, judgment of the circuit court of Franklin County that found in favor of Sherry and against Kenneth, but modify the total award to \$2,000.

¶ 26 Affirmed as modified.