2014 IL App (1st) 131397-U

THIRD DIVISION
March 19, 2014

No. 1-13-1397

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF MARIE BRINKLEY,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County
	)	
and	)	No. 85 D 12964
	)	
LEONARD PRZYSUCHA,	)	Honorable
	)	Patrick W. O'Brien,
Respondent-Appellee.	)	Judge Presiding.
	)	
	)	

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court did not err in granting respondent's motion to dismiss on judicial estoppel grounds where petitioner did not disclose the judgment against respondent in a prior bankruptcy proceeding.

¶ 2 Petitioner-appellant Marie Brinkley (Marie) appeals from an order of the circuit court of Cook County dismissing post-decree proceedings she initiated against her former husband, Leonard Przysucha (Leonard), seeking to enforce a judgment for past-due child support. The dismissal was based on the circuit court's finding that Marie was judicially estopped to pursue

collection of the judgment by virtue of her failure to list the judgment as an asset in bankruptcy proceedings. For the reasons that follow, we affirm.

¶ 3 A judgment for dissolution of marriage was entered in this case on November 4, 1987. The parties had three children who at the time of the judgment were six, four and two years of age. Leonard was originally ordered to pay $850 per month in child support to Marie until December 31, 1987, and $720 per month thereafter. On May 20, 1992, Leonard's child support obligation was reduced to $200 per month.

¶ 4 Leonard failed to pay child support and on December 11, 1995, the State's Attorney, on Marie's behalf, pursued a rule to show cause. That proceeding resulted in a judgment against Leonard for past-due child support in the amount of $15,760 entered on January 25, 1996. As the arrears grew, that judgment was modified, ultimately totaling $17,300 by September 4, 1996. Marie asserts that after September 1996, Leonard continued to be delinquent in his child support payments for an additional 84 months leading to a total arrearage of $34,100. In the trial court, Marie claimed that after the last court date in September 1996, she "abandoned any hope of getting any child support" and failed to pursue the matter further.

¶ 5 Marie remarried. On March 29, 2007, she and her new husband filed a petition under chapter 13 of the United States Bankruptcy Code (11 U.S.C. §1301, *et seq.* (2005)).[1] By the time her bankruptcy petition was filed, Marie's children were 25, 23 and 22. In the schedule of assets filed with the petition, Marie did not list as an asset her judgment against Leonard. Further, one

[1] In the trial court, Marie represented that the bankruptcy filing was due to the fact that she lost her job. In her brief in this court, Marie represents that the petition was prompted by her husband's loss of employment.

of the questions Marie was required to answer under oath in connection with the filing of her bankruptcy petition sought information regarding "alimony, maintenance, support and property settlement to which the debtor is or may be entitled." Marie answered "None." The case was ultimately converted to a case under chapter 7 of the United States Bankruptcy Code (11 U.S.C. §701, *et seq.* (2005)). The bankruptcy court entered a no-asset discharge order on January 18, 2011.

¶ 6 On August 15, 2011, seven months after she received her discharge, Marie filed a petition for a rule to show cause as a post-decree proceeding against Leonard in an attempt to collect the judgment. Marie claims (without citation to any support in the record) that at some unspecified time, she learned that Leonard had inherited a home and other assets from his deceased father, thus prompting her renewed effort to collect the judgment. Marie also filed a non-wage garnishment against Guaranty Bank, where Leonard has an account, and later filed a petition for turnover of funds held in that account.

¶ 7 In March 2012 Marie did recover the sum of $8,860 from Leonard via an agreed judgment order, which she claims resolved the delinquency for past due child support for the period from September 25, 1996, through September 2003, when the youngest child reached majority. According to Marie, this payment did not satisfy the outstanding judgment against Leonard for past due amounts prior to September 1996. The trial court apparently agreed and the parties proceeded to litigate Leonard's liability for the 1996 judgment.

¶ 8 Leonard filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)). Leonard contended that the doctrine of

judicial estoppel barred Marie's renewed effort to collect the judgment based on her failure to disclose the judgment as an asset in her bankruptcy proceedings. In her response, Marie claimed that she failed to list the judgment because she did not believe it was an asset of her bankruptcy estate. This defense presumes, of course, that Marie recalled the judgment at the time her bankruptcy petition was filed and made a conscious decision not to disclose it.

¶ 9 On January 18, 2013, the trial court held a hearing on Leonard's motion. After the trial court indicated that it was inclined to find that Marie was judicially estopped to pursue her efforts to collect the judgment based on this court's decision in *Berge v. Mader*, 2011 IL App (1st) 103778, Marie requested and was granted a continuance in order to allow her to present evidence regarding her claim that her failure to list the judgment was inadvertent. On March 29, 2013, at the resumed hearing on the motion to dismiss, Marie testified. At the conclusion of the hearing, the court found that judicial estoppel applied and dismissed the non-wage garnishment petition. No transcript of this hearing is contained in the record on appeal.

¶ 10 ANALYSIS

¶ 11 At the outset, we note that Marie's brief fails to comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008) and 342 (eff. Jan. 1, 2005) in a number of important respects. The "Points of [*sic*] Authority" section of the brief does not contain citations to any cases or page references (Rule 341(h)(1)), many of the facts included in the brief are unsupported by citations to the record (Rule 341(h)(6)), and a copy of the order appealed from is not included in the appendix (Rule 342(a)). While we would be justified in striking Marie's brief for these shortcomings, Leonard has not requested such relief and we choose instead to address the sole issue raised on

appeal.

¶ 12 As noted, Marie has failed to include in the record on appeal a transcript of the hearing or bystander's report concerning her testimony that her failure to disclose the judgment against Leonard was inadvertent. See Ill. S. Ct. R. 323(a), (c) (eff. Dec. 13, 2005) (providing that the report of proceedings shall include all evidence pertinent to the issues on appeal and, if no verbatim transcript of the evidence of proceedings is obtainable, an appellant may prepare a bystander's report). It is the appellant's burden to provide this court with a complete record necessary to resolve the issues on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Cambridge Engineering v. Mercury Partners,* 378 Ill. App. 3d 437, 445 (2007). "An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding." *Corral*, 217 Ill. 2d at 156. In the absence of an adequate record, we will assume that the trial court's ruling was properly based on the evidence presented at the hearing. *Id.* at 157; *Cambridge Engineering,* 378 Ill. App. 3d at 445-46.

¶ 13 Tellingly, Marie's brief also does not mention, much less distinguish the primary Illinois authority relied upon by Leonard and the trial court in dismissing her petition: *Berge v. Mader*, 2011 IL App (1st) 103778. Indeed, all of the authorities cited by Marie, with the exception of an 1857 case from Tennessee, are federal. We believe Marie's failure to cite or discuss relevant Illinois authority of which she was undoubtedly aware is sanctionable pursuant to Illinois Supreme Court Rule 375(b)(eff. Feb. 1, 1994). Rule 375 provides: "An appeal or other action will be deemed frivolous when it is not reasonably well grounded in fact and not warranted by

existing law or a good-faith argument for the extension, modification, or reversal of existing law." *Id*. We will address the consequences of that failure at the end of this decision.

¶ 14 Marie contends that the applicable standard of review on appeal is abuse of discretion, claiming that the relevant issue is whether the trial court abused its discretion in denying her motion for a turnover of funds held in Leonard's bank account. As Leonard points out, the issue on appeal is whether the trial court erred in granting his section 2-619 motion to dismiss, an issue as to which *de novo* review applies. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). But since Leonard's motion was based on the doctrine of judicial estoppel and the application of the doctrine is within the discretion of the trial court (see *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996)), we will nevertheless consider whether the trial court abused its discretion in basing the dismissal on judicial estoppel.

¶ 15 In *Berge,* the plaintiff filed a Chapter 13 bankruptcy petition in April 2006. 2011 IL App (1st) 103778, ¶ 3. Shortly after the filing of the petition, she was involved in an auto accident and in November 2007 sued the defendants in state court. *Id*. In May 2009, plaintiff converted her chapter 13 to a chapter 7 petition and received a no asset discharge in October 2009. *Id*. In the three years her bankruptcy petition was pending, plaintiff never disclosed her state court claim against defendants. *Id*. After defendants learned independently of the bankruptcy case, they moved for summary judgment based on the doctrine of judicial estoppel. *Id*.

¶ 16 The *Berge* court noted that there are five elements of judicial estoppel as applied by Illinois courts:

> " '(1) the two positions must be taken by the same party; (2) the positions

> must be taken in judicial proceedings; (3) the position must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be "totally inconsistent." ' " *Id.* ¶ 13 (quoting *Ceres Terminals, Inc. v. Chicago City Land & Trust Co.*, 259 Ill. App. 3d 836, 851 (1994)).

Like Marie, the plaintiff in *Berge* claimed she was not guilty of "bad faith" in failing to disclose the pending lawsuit. This court noted that of the five elements necessary to invoke the doctrine of judicial estoppel, "bad faith" is not one of them. *Id.* ¶ 6. But even if a showing of bad faith were necessary, the *Berge* court concluded that such finding would be warranted: "[plaintiff's] concealment of this state court case, which had the potential for her to realize financial gains, coupled with her statutory duty [to disclose claims in bankruptcy] are sufficient for any trial court to infer 'bad faith' " *Id.* The court found that under the circumstances, all of the elements of judicial estoppel were satisfied and that plaintiff was therefore precluded from proceeding with her personal injury claim against defendants. *Id.* ¶ 21.

¶ 17 The reasoning of *Berge* mandates the same result here. At the time she filed her chapter 13 petition, Marie was clearly aware that she held a judgment against Leonard. Her emphasis on the age of the judgment (10 years) and her claimed "abandonment" of efforts to collect it is countered by her original defense to the motion to dismiss in which she argued that she deliberately failed to disclose the judgment against Leonard based on her belief that the judgment was not an asset of her bankruptcy estate. The trial court was not required to indulge such factually inconsistent positions. Because Marie originally asserted that she knew of the judgment

and made a conscious decision not to disclose it, she cannot now claim that the non-disclosure was inadvertent because she "forgot" about the judgment.

¶ 18 The record also does not contain any evidence about the timing of any efforts Marie made to enforce the judgment and when she claims she abandoned those efforts. Given the absence of any transcript, we must assume that the trial court did not believe her assertions, repeated on appeal, that her failure to list the judgment as an asset was inadvertent because she believed she would never be able to collect on it.

¶ 19 It is significant that although Marie claims she held out no hope of recovering on the judgment in the four years her bankruptcy case was pending, she commenced these proceedings shortly after receiving a no asset discharge. To paraphrase the *Berge* court, "[Marie] benefitted by having her debts discharged in bankruptcy without giving her creditors any knowledge of her potential to recover [on the judgment against Leonard]. In other words, [Marie's] failure to disclose left her with the ability to permanently avoid her debts after recovering [on the outstanding judgment]." *Id.* ¶ 14. As her claimed inadvertence is the only basis upon which Marie contests the application of judicial estoppel, we find that the trial court acted within its discretion in applying the doctrine under the circumstances presented in this case and, therefore, properly granted Leonard's motion to dismiss.

¶ 20 As we have noted, Marie's failure to cite or discuss relevant controlling authority in her brief calls into question her good faith in pursuing this appeal. Within 14 days of the date of this order, we direct Marie and her counsel to show cause why sanctions pursuant to Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) should not be imposed.

¶ 21 For the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.