

NOTICE

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2015 IL App (4th) 150225-U

NO. 4-15-0225

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 15, 2015

Carla Bender
4th District Appellate
Court, IL

REBECCA HERBST,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
TOYS "R" US-DELAWARE, INC. d/b/a TOYS "R")	No. 10L188
US,)	
Defendant-Appellee,)	
and)	
GEOFFREY, LLC., d/b/a TOYS "R" US, and)	Honorable
TOYS "R" US, d/b/a TOYS "R" US,)	Rebecca Simmons Foley,
Defendants.)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff was not judicially estopped from pursuing her personal injury cause of action against defendant despite the fact she failed to disclose this cause of action in her Chapter 13 bankruptcy prior to receiving a discharge.

¶ 2 Plaintiff, Rebecca Herbst, appeals from the circuit court's order granting summary judgment in favor of defendant Toys "R" Us-Delaware, Inc., d/b/a Toys "R" Us. The court granted summary judgment on the basis of judicial estoppel, finding plaintiff had failed to disclose her cause of action against defendant in her Chapter 13 bankruptcy prior to discharge. As a result of this nondisclosure, the court found plaintiff was judicially estopped from pursuing her personal injury claim. In this appeal, plaintiff argues the elements of judicial estoppel are not present and do not prevent her from proceeding with her damages claim. We reverse, finding

judicial estoppel should not bar plaintiff's claim because no evidence in the record suggests plaintiff tried to deceive or manipulate the bankruptcy court.

¶ 3

I. BACKGROUND

¶ 4

In October 2010, plaintiff filed this personal injury action in the circuit court of McLean County, alleging negligence and seeking money damages from defendants, Geoffrey, LLC, d/b/a Toys "R" Us; Toys "R" Us-Delaware, Inc., d/b/a Toys "R" Us; and Toys "R" Us, Inc., d/b/a Toys "R" Us. (In November 2013, the court dismissed two corporate entities from the case as defendants, leaving Toys "R" Us-Delaware, Inc., as the sole remaining defendant.) Plaintiff claimed she was injured at the retail store in Bloomington on "Black Friday" in November 2008 when she leaned on a lane-divider railing that gave way, causing her to fall and injure her back.

¶ 5

In July 2008, several months before plaintiff was injured at Toys "R" Us, she and her husband had filed a petition for relief under Chapter 13 of the Bankruptcy Code (11 U.S.C. §1301 (2006)) in the United States District Court for the Central District of Illinois. According to the record, plaintiff and her husband filed three plans in August 2008, the last of which was confirmed on November 17, 2008. The only filing in the bankruptcy case after plaintiff had filed her personal injury lawsuit was a May 2012 motion for hardship discharge. In that motion, plaintiff sought a discharge of her debts, alleging she was unable to make the remaining payments under her plan because she had been placed on medical restrictions after her spinal fusion surgery. Although she does not explain to the bankruptcy court why she had to undergo spinal fusion surgery, it is undisputed the surgery was a result of her fall at Toys "R" Us. Her motion for hardship discharge was denied in June 2012. In October 2013, plaintiff received a discharge after the successful completion of her plan.

¶ 6 In the meantime, discovery continued in the personal injury action until October 2014, when defendant filed a motion for summary judgment, arguing plaintiff should be judicially estopped from proceeding with her damages claim because she failed to disclose her personal injury action in the bankruptcy proceedings despite her continuing duty to do so. The court agreed with defendant and entered an order granting summary judgment in defendant's favor.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 A. Standard of Review

¶ 10 The framed issue in this appeal is whether the circuit court appropriately granted summary judgment in favor of defendant on the basis of judicial estoppel. However, our standard of review is abuse of discretion because the ultimate question is whether the circuit court properly applied, in its discretion, the doctrine of judicial estoppel, rather than whether, as a matter of law, summary judgment was appropriate. See *Seymour v. Collins*, 2015 IL 118432, ¶¶ 40-50 (discussion of the conflict between the appropriate standards of review when reviewing both the application of judicial estoppel and the entry of summary judgment). Because we find the circuit court abused its discretion in applying judicial estoppel in this case, our review of the appropriateness of summary judgment is "truncated by circumstances." *Seymour*, 2015 IL 118432, ¶ 50. In other words, given our decision on the judicial-estoppel issue, there is no need to address the standard for the entry of summary judgment.

¶ 11 B. Application of Judicial Estoppel

¶ 12 In its motion for summary judgment, defendant argued plaintiff's failure to disclose her personal injury claim as a potential asset in her bankruptcy case judicially estopped

her from seeking a monetary judgment as a result of her injury. In support of its argument, defendant relied on the Second District's opinion in the factually similar case of *Seymour v. Collins*, 2014 IL App (2d) 140100.

¶ 13 In *Seymour*, one of the plaintiffs was injured in an automobile accident in June 2010. *Seymour*, 2014 IL App (2d) 140100, ¶ 3. Prior to this accident, in April 2008, the plaintiffs had filed a Chapter 13 bankruptcy petition. *Seymour*, 2014 IL App (2d) 140100, ¶ 4. The bankruptcy plan was confirmed in September 2008, with three modifications taking place, the final modification in March 2010. *Seymour*, 2014 IL App (2d) 140100, ¶¶ 4-5. The plaintiffs filed a personal injury complaint as a result of the June 2010 accident in May 2011 but never disclosed the lawsuit to the bankruptcy court before the entry of the discharge in July 2012. *Seymour*, 2014 IL App (2d) 140100, ¶¶ 7-8. The trial court granted the defendant's motion for summary judgment in the personal injury action, finding the plaintiffs' failure to disclose the existence of the lawsuit in the bankruptcy court justified the application of judicial estoppel. *Seymour*, 2014 IL App (2d) 140100, ¶ 14.

¶ 14 The Second District, noting the purpose of the doctrine was to promote the truth and protect the integrity of the judicial system, found each element satisfied and affirmed the trial court's application of the doctrine. *Seymour*, 2014 IL App (2d) 140100, ¶ 47. Relying on the plaintiffs' ongoing duty to disclose the personal injury lawsuit in the bankruptcy court proceedings, the appellate court found the plaintiffs' failure to disclose clearly demonstrated "their intent [for] the bankruptcy court [to] accept the fact that no such claim existed." *Seymour*, 2014 IL App (2d) 140100, ¶ 32. The court noted the plaintiffs "knowingly took inconsistent positions in the bankruptcy court and the trial court regarding the existence of their personal injury claims. They did so in a way that benefitted them in each of those courts. That is a classic

situation to which the doctrine of judicial estoppels applies." *Seymour*, 2014 IL App (2d) 140100, ¶ 47.

¶ 15 However, a dissenting justice found the circumstances of the case did not support the application of judicial estoppel. *Seymour*, 2014 IL App (2d) 140100, ¶ 63 (Schostok, J., dissenting). In the dissent's opinion, the plaintiffs' failure to disclose was unintentional, as no evidence demonstrated they intended to play " 'fast and loose' with the court." *Seymour*, 2014 IL App (2d) 140100, ¶ 52 (Schostok, J., dissenting) (quoting *People v. Runge*, 234 Ill. 2d 68, 133 (2009)). In the absence of evidence demonstrating the plaintiff's intent to deceive the bankruptcy court, the application of judicial estoppel under the particular circumstances presented would have caused a "grave injustice." *Seymour*, 2014 IL App (2d) 140100, ¶ 63 (Schostok, J., dissenting). The dissent opined each case should be judged on the particular circumstances presented, rather than having the doctrine applied pursuant to "a rigid formula." *Seymour*, 2014 IL App (2d) 140100, ¶ 62 (Schostok, J., dissenting).

¶ 16 After the parties filed their respective briefs in this appeal, our supreme court issued its opinion in *Seymour*. See *Seymour*, 2015 IL 118432, ¶ 64. Agreeing with the dissent, the supreme court found the plaintiffs' failure to disclose their personal injury action alone was insufficient to justify the application of judicial estoppel, even if the elements of the doctrine had been satisfied. *Seymour*, 2015 IL 118432, ¶¶ 50, 53. Rather, the court considered the particular circumstances of the case to determine whether there was evidence the debtors had sought to obtain an unfair advantage by deliberately changing positions in two different judicial proceedings. *Seymour*, 2015 IL 118432, ¶ 63. If the particular circumstances were not considered, the application of the doctrine would have become more of a " 'rigid formula,' " instead of an equitable principle that would remain flexible as it was intended. *Seymour*, 2015 IL

118432, ¶ 64. The supreme court found, even though the litigants had failed to disclose their personal injury action to the bankruptcy court, in light of their continuing duty to disclose such an action, no evidence suggested they intended to deceive or manipulate the bankruptcy court. *Seymour*, 2015 IL 118432, ¶ 64.

¶ 17 Applying the supreme court's reasoning to the facts of this case, we come to the same conclusion. There is no evidence before us that plaintiff deliberately did not disclose the existence of the lawsuit in order to gain an advantage in her bankruptcy proceedings. As the supreme court did in *Seymour*, we also assume plaintiff had a continuing duty to disclose her personal injury cause of action during the pendency of her Chapter 13 bankruptcy proceeding. See *Seymour*, 2015 IL 118432, ¶ 52. It is undisputed plaintiff failed to do so. Further, we assume, as did the court in *Seymour*, that the five elements required for the application of the doctrine of judicial estoppel have been met. See *Seymour*, 2015 IL 118432, ¶ 53. Generally, judicial estoppel applies if (1) the party has taken two positions, (2) that are factually inconsistent, (3) in separate judicial proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have received a benefit from the first position taken. See *Seymour*, 2015 IL 118432, ¶ 53.

¶ 18 In this case, the only pleading filed in the bankruptcy court after the October 2010 filing of the personal injury lawsuit was plaintiff's May 2012 motion for hardship discharge. In that motion, plaintiff alleged she would be unable to complete the payments as required under the plan because she had spinal fusion surgery and had been placed on medical restrictions. She alleged her paid medical leave ended in April 2010 and her employment ended in August 2010. Although she did not disclose the reason for her surgery, it was undisputed it was a result of her November 2008 fall on defendant's premises, the subject of the personal injury lawsuit.

Plaintiff's motion for hardship discharge was denied in June 2012. In October 2013, plaintiff's bankruptcy was discharged upon the successful completion of the plan.

¶ 19 "The filing of the motion to modify does not evince knowledge on the part of the plaintiffs, of the need to disclose their personal injury claim in the bankruptcy proceeding." *Seymour*, 2015 IL 118432, ¶ 58. The fact plaintiff mentioned the injury in her bankruptcy pleading suggests she had no intent to hide the circumstances of her injury from the bankruptcy court. See *Seymour*, 2015 IL 118432, ¶ 59. Further, although it does not appear in a supporting affidavit, according to plaintiff's response to defendant's motion for summary judgment, she had, in fact, advised her bankruptcy attorney about the personal injury lawsuit. In response, her attorney explained no modification of the bankruptcy documents was necessary.

¶ 20 Given the circumstances of this case, which are strikingly similar to those presented in *Seymour*, we will not presume plaintiff's failure to disclose the personal injury lawsuit was "deliberate manipulation." *Seymour*, 2015 IL 118432, ¶ 62. In so holding, we are guided by our supreme court's statements as follows:

"We are not so ready, as the federal courts appear to be, to penalize, via presumption, the truly inadvertent omissions of good-faith debtors in order to protect the dubious, practical interests of bankruptcy creditors. [Citations.] In this case, given these uncontested facts, we find the failure to disclose the personal injury action insufficient, in itself, to warrant the application of judicial estoppel." *Seymour*, 2015 IL 118432, ¶ 63.

¶ 21 There is no doubt plaintiff had a legal duty to disclose her personal injury lawsuit to the bankruptcy court during her bankruptcy proceedings. She failed to do so. However, her

failure to do so does not demonstrate she failed to do so *in bad faith*, with an intent to deceive the court. We find no evidence to suggest she intended to play "fast and loose" with the court. *Runge*, 234 Ill. 2d at 133. Although the elements of judicial estoppel may have been established, we decline to apply the equitable doctrine to this case because if we were to do so, we would not be complying with the true equitable purpose of the doctrine, given the lack of evidence demonstrating an intent to deceive on plaintiff's part.

¶ 22

III. CONCLUSION

¶ 23

For the reasons stated, we reverse the circuit court's judgment and remand for further proceedings.

¶ 24

Reversed and remanded.