2016 IL App (1st) 143751-U
No. 1-14-3751
March 1, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SUZAN TAMUZIAN, Plaintiff-Appellant, v. VONCH, LLC, an Illinois limited liability Company, POLEKATZ GENTLEMAN'S CLUB, LLC, an Illinois limited liability Company, STEPHEN DABROWSKI And ANTHONY QUARANTA, Defendants-Appellees.	)	Appeal from the Circuit Court Of Cook County. No. 13 CH 03189 The Honorable Peter Flynn, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court has discretion to decide whether to apply judicial estoppel when a party shows that the facts of the case meet all five prerequisites for estoppel. Where the circuit court, following precedent our supreme court later overruled, fails to exercise its discretion, we must reverse its judgment and remand for the circuit court to apply our supreme court's ruling.

¶ 2 In 2013, Suzan Tamuzian filed a complaint against the Polekatz Gentleman's Club and three other defendants. The defendants filed a motion to dismiss the complaint because, in bankruptcy proceedings, Tamuzian failed to list the claim against Polekatz as an asset before the bankruptcy court filed an order discharging Tamuzian's debts. The circuit court, following the binding precedent of *Berge v. Mader*, 2011 IL App (1st) 103778, granted the motion to dismiss, and Tamuzian appealed. Our supreme court subsequently held that the federal cases that formed the basis for *Berge* do not state Illinois law. *Seymour v. Collins*, 2015 IL 118432, ¶ 62. Following *Seymour*, we now reverse the circuit court's judgment and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 On October 18, 2011, Tamuzian filed a complaint against the defendants for an accounting and other relief. The defendants filed a motion to dismiss the complaint, arguing that the court should find her estopped because she failed to list the cause of action against Polekatz as an asset when she filed a petition for bankruptcy in August 2010. The bankruptcy court filed an order of discharge on December 28, 2010, relieving Tamuzian of her debts.

¶ 5 Tamuzian filed a motion for voluntary dismissal of her complaint against the defendants. The circuit court granted the motion on February 9, 2012. Tamuzian filed a motion to reopen the bankruptcy proceedings. The bankruptcy court reopened the case and permitted Tamuzian to amend her bankruptcy petition to add her interest in Polekatz and the lawsuit against the defendants as assets. The bankruptcy trustee conducted an investigation and filed a report finding nothing more to distribute to Tamuzian's creditors.

¶ 6 On February 1, 2013, Tamuzian filed a new complaint against the defendants, again seeking an accounting and other relief. The defendants again filed a motion to dismiss the complaint because Tamuzian failed to list the cause of action against Polekatz as an asset when she filed a petition for bankruptcy in August 2010. In opposition to the motion, Tamuzian filed an affidavit in which she swore that she disclosed her interest in Polekatz to the attorney she hired for the bankruptcy proceedings. Tamuzian, an unemployed waitress who did not graduate from college, signed 45 pages of bankruptcy schedules that her attorney prepared. She did not notice that the schedules did not include any reference to her interest in Polekatz. She presented to the circuit court the amended bankruptcy petition which included the interest in Polekatz as an asset.

¶ 7 The defendants argued that *Berge* required dismissal. Tamuzian argued that the circuit court should follow *Holland v. Schwan's Home Service, Inc.,* 2013 IL App (5th) 110560, instead. The court explained in detail its reasoning:

> "[In] *Hawkins v. Securitas Security Services*, 2011 U.S. District Lex[i]s 77397, a Northern District of Illinois case[, the court] squarely held that, 'Even if the plaintiff made an innocent mistake and did not realize that she had to list this lawsuit in her bankruptcy petition, she is bound by her representations to the Bankruptcy Court.'
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> ***
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> *Berge v. Mader,* 2011 Ill. App. [(1st)] 103778, is the same sort of decision as *Hawkins*. In *Berge* the plaintiff had filed bankruptcy. Subsequent to her bankruptcy filing, she had an auto accident. The bankruptcy was still pending at

the time she had the accident, however. She filed suit against defendant, Mader. She didn't disclose the suit in her bankruptcy proceedings, and the Court applied judicial estoppel.

The Court flat out rejected Ms. Berge's argument for a bad faith requirement, and the Court, our First District, by whose thinking I am, of course, bound, observed that the federal courts 'have not shown much forgiveness when a party fails to disclose assets in a bankruptcy case.'

And the *Berge* court added that this is true 'no matter what the party's excuse is or the nature of their intent, good or bad.'

* * *

Berge is not quite the end of the line. In 2013, as the parties have discussed here, *Holland v. Schwan's Home Service* declines to apply bankruptcy judicial estoppel to bar Mr. Holland's retaliatory discharge claim. ***

* * *

*** [T]he *Holland* court and the *Berge* court really disagree on what judicial estoppel in this particular context is all about.

* * *

The most recent case I know of on this score is *Seymour v. Collins*, 2014 Ill. App. (2nd) 140100 ***.

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*** This is paragraph 30 of the decision.

'Although plaintiffs contend that they were merely inadvertent in failing to do so, it was reasonable to infer that they understood the need to submit material financial information, as they had completed financial statements when they initiated the bankruptcy proceeding.'

If you think about that statement, that's pretty much absolute. That would apply to any debtor regardless of circumstances and would support the *Berge* form of a no excuses rule.

* * *

I am bound by *Berge*, and I will follow *Berge*. I think that the majority in *Seymour* *** correctly read *Berge* as an all but draconian rule.

* * *

*** 'Petitioning a Bankruptcy Court to re-open a closed case to disclose a previously omitted asset only after being faced with *** a motion to apply judicial estoppel, may demonstrate negligence, but it could just as easily be proof that plaintiff has been caught and feels a need to correct her failure to disclose before the bankruptcy court learns of her non-disclosure another way and plaintiff increases her risk of sanctions or referral of criminal charges by the bankruptcy court.'

Again, that's the First District speaking, and it is not up to me to agree with it or not agree with it. It is my job to follow it. On the authority of *Berge*, I conclude that the Motion to Dismiss based on judicial estoppel must be granted."

¶ 8 Tamuzian filed a timely notice of appeal. Our supreme court, in *Seymour*, 2015 IL 118432, subsequently reversed one of the decisions the circuit court discussed. We asked for supplemental briefs concerning the effect of *Seymour* on Tamuzian's appeal. The parties have submitted the briefs we requested.

¶ 9 ANALYSIS

¶ 10 We find that *Seymour* controls our decision in this case. In *Seymour*, Seymour filed a bankruptcy petition in 2008. He suffered an injury in an automobile accident on June 3, 2010, and, in 2011, he filed a lawsuit against Collins, seeking to recover damages arising from the accident. He did not amend his bankruptcy petition to include the lawsuit as an asset before the bankruptcy court entered an order of discharge on July 17, 2012. *Seymour*, 2015 IL 118432, ¶ 8.

¶ 11 In July 2013, Collins filed a motion for summary judgment, arguing that the court should find Seymour judicially estopped from pursuing the lawsuit against him because Seymour failed to list the lawsuit as an asset in bankruptcy proceedings. Seymour submitted an affidavit in which he asserted that he did not intentionally fail to disclose the claim in the bankruptcy proceeding. *Seymour*, 2015 IL 118432, ¶ 10.

¶ 12 The trial court applied the "seemingly inflexible" (*Seymour*, 2015 IL 118432, ¶ 17) rule it derived from federal cases similar to the federal cases cited in *Berge*. Accordingly, the trial court granted Collins's motion for summary judgment. *Seymour*, 2015 IL 118432, ¶ 16. The appellate court affirmed. *Seymour v. Collins*, 2014 IL App (2nd) 140100, ¶ 50.

¶ 13 Our supreme court first established the proper procedure for the trial court to follow when a party asks the court to find another party judicially stopped:

> "First, the trial court must determine whether the prerequisites for application of judicial estoppel are met. In this respect, 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. [Citations.] We note, even if all factors are found, intent to deceive or mislead is not necessarily present, as inadvertence or mistake may account for positions taken and facts asserted. Second, if all prerequisites have been established, the trial court must determine whether to apply judicial estoppel—an action requiring the exercise of discretion. 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." *Seymour*, 2015 IL 118432, ¶ 47.

¶ 14 As support for its holding, our supreme court cited *Holland*, and not *Berge*. *Seymour*, 2015 IL 118432, ¶ 47. Our supreme court then held that when the trial court has exercised its discretion in the application of judicial estoppel, courts of review should disturb the trial court's ruling only if the trial court abused its discretion. *Seymour*, 2015 IL 118432, ¶ 48.

¶ 15 The *Seymour* court said:

> "In this case, our review is necessarily truncated by circumstances. When a court is required by law to exercise its discretion, the failure to do so may itself constitute an abuse of discretion, precluding deferential consideration on appeal.

[Citations.] We find that principle applicable in this case. *** [I]t does not *** appear from this record *** that the court exercised discretion in its application of the doctrine, finding, rather, that the presence of certain facts, *i.e.*, the mere failure to disclose the personal injury cause of action in the bankruptcy proceeding, *mandated* dismissal. Because no discretion was exercised *** no deferential review would be warranted." (Emphasis in original) *Seymour*, 2015 IL 118432, ¶ 50.

¶ 16 The court assumed for its analysis that Collins had established all five of the factors needed for the application of judicial estoppel. The court said:

"We are not willing, as appears to be the case in prevailing federal authority given these circumstances [citations], to *presume* that the debtors' failure to disclose was deliberate manipulation. We do not find that inference or presumption controlling in Illinois, much less given the facts of this case.

Where there is affirmative, uncontroverted evidence, that debtors did not deliberately change positions according to the exigencies of the moment, that they did not employ 'intentional self-contradiction *** as a means of obtaining unfair advantage,' we believe the purpose of the doctrine of judicial estoppel is not furthered by application of the doctrine ***. 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." *Seymour*, 2015 IL 118432, ¶¶ 62-63.

¶ 17 The supreme court reversed the judgments of the trial court and the appellate court and remanded for further proceedings.

¶ 18 Defendants here advance two arguments for distinguishing *Seymour* from this case. First, they claim that the circuit court actually rejected Tamuzian's affidavit as lacking credibility and exercised its discretion to find Tamuzian estopped. We find that the circuit court expressly reasoned that, under the binding precedent of *Berge*, and the *Berge* court's application of federal precedent, the court had no discretion once it found that Tamuzian failed to disclose the lawsuit prior to the discharge in bankruptcy. The circuit court found Tamuzian's affidavit irrelevant, not incredible.

¶ 19 Second, defendants claim that the record here proves that Tamuzian acted in bad faith and this court should reject Tamuzian's affidavit as lacking credibility. We find no evidence in this record that would provide a basis for this court to make the credibility determination defendants seek. See *Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 236 (1996); *Andersen v. Koss*, 173 Ill. App. 3d 872, 876 (1988).

¶ 20 We find no significant distinction between this case and *Seymour*. Because our supreme court has now clarified that the federal precedent followed in *Berge* does not state Illinois law, we must reverse the circuit court's judgment and remand for the circuit court to apply the correct standards and exercise its discretion with regard to defendants' request to hold Tamuzian judicially estopped from bringing her claims.

¶ 21 CONCLUSION

¶ 22 Because we find no significant distinction between this case and *Seymour*, we reverse the circuit court's judgment and remand for further proceedings in accord with this order.

¶ 23 Reversed and remanded.