2019 IL App (1st) 181420-U

No. 1-18-1420

Order filed June 28, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WILLIAM HIGGINBOTHAM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 15 L 11075
DANIEL J. FINTEL, M.D.; KEITH H. BENZULY, M.D.;	)	
DANIEL SCHIMMEL, M.D.; NORTHWESTERN	)	
MEDICAL FACULTY FOUNDATION; and	)	
NORTHWESTERN MEMORIAL HOSPITAL,	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in granting defendants' motion for summary judgment based on the application of judicial estoppel where plaintiff received a benefit from his failure to disclose his medical malpractice lawsuit during bankruptcy proceedings and there was sufficient evidence the failure was intentional.

¶ 2 Plaintiff William Higginbotham filed for Chapter 13 bankruptcy (11 U.S.C. § 1301 (2012)). During the pendency of his bankruptcy proceedings, he sued defendants, Daniel J.

Fintel, M.D., Keith H. Benzuly, M.D., Daniel Schimmel, M.D., the Northwestern Medical Faculty Foundation and Northwestern Memorial Hospital, for medical malpractice, but failed to amend his bankruptcy petition to include the lawsuit as a potential asset. Defendants moved for summary judgment and argued that, because of plaintiff's failure to disclose the lawsuit in federal bankruptcy court, he should be judicially estopped from prosecuting it in state court. The circuit court agreed, applied judicial estoppel and granted the motion for summary judgment.

¶ 3 Plaintiff now appeals, contending that the circuit court erred in applying judicial estoppel because: (1) he did not receive a benefit from failing to disclose his medical malpractice lawsuit; (2) the court failed to exercise discretion in applying judicial estoppel when such an exercise was required; and (3) the court erred in finding that he intentionally failed to disclose the lawsuit. For the reasons that follow, we affirm the circuit court's application of judicial estoppel and grant of summary judgment in favor of defendants.

¶ 4 I. BACKGROUND

¶ 5 In July 2013, plaintiff, with the assistance of an attorney, filed a petition for Chapter 13 bankruptcy (11 U.S.C. § 1301 (2012)) in the United States District Court for the Northern District of Illinois. Included in the petition were multiple schedules that contained plaintiff's assets and liabilities, including a schedule dedicated to his personal property (Schedule B). In that schedule, plaintiff listed assets such as his vehicle, a pension plan through his employer, and savings accounts. Also in that schedule, plaintiff was asked to identify any "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." In response, plaintiff indicated that he had none. Another schedule (Schedule D) required plaintiff to list all of his creditors holding secured claims, and he listed multiple, including Bank of America, N.A., who was the holder of his mortgage. According to

the schedule, he owed Bank of America, N.A., $238,142. An additional schedule (Schedule F) required plaintiff to list all of his creditors holding unsecured non-priority claims. He listed several creditors, including Bank of America (a credit card), Chase (a credit card) and "Gecrb/Care" (a retail charge account). Together, plaintiff owed these three creditors $18,004.10. Plaintiff signed the petition under penalties of perjury and asserted that his statements contained therein were truthful.

¶ 6 In conjunction with his petition, plaintiff signed a "Rights and Responsibilities Agreement Between Chapter 13 Debtors and Their Attorneys," in which he agreed to contact his attorney "immediately" if he lost his job, had "a significant change in income" or "experience[d] any other significant change in financial situation (such as serious illness, marriage, divorce or separation, lottery winnings, or an inheritance)." Additionally, plaintiff agreed to "[n]otify" his attorney if he "wishe[d] to file a lawsuit." The bankruptcy court subsequently entered an order directing plaintiff's employer to deduct $1550 per month from his paychecks as part of his repayment plan.

¶ 7 In September 2013, plaintiff amended his petition to add an account at a credit union to his schedule of personal property (Schedule B). Plaintiff also filed a proposed repayment, which the bankruptcy court confirmed. One part of the plan required plaintiff to pay Bank of America, N.A., $1900 a month directly as part of continuing payments for his mortgage. The other part of the plan required plaintiff to pay $1550 a month to the trustee of his bankruptcy estate for 36 months and a total of $55,800 in payment, though the plan indicated that the payments could be modified in the future. The repayment plan had "Special Terms," which included that the trustee would "not pay any unsecured claim that [was] not timely filed."

¶ 8 On October 30, 2013, plaintiff went to the emergency room of Northwestern Memorial Hospital complaining of chest pain. Plaintiff was diagnosed with a heart attack and underwent surgery. After staying at the hospital multiple days, plaintiff was discharged and began cardiac rehabilitation. In late February 2014, while plaintiff was at a cardiac rehabilitation appointment, he again experienced chest pain and went back to Northwestern Memorial Hospital, where he was diagnosed with another heart attack and underwent triple bypass surgery. Approximately two weeks later, plaintiff was discharged from the hospital. At some point around this period of time, plaintiff began keeping a medical diary on his computer, where he detailed various events concerning his health and conversations he had with his doctors about his treatment. Plaintiff created the diary at the suggestion of an attorney, but not the one who ultimately represented him in the instant medical malpractice lawsuit.

¶ 9 On October 30, 2015, plaintiff filed a three-count complaint sounding in medical malpractice against multiple doctors, a nurse and the hospital, stemming from his treatment from late October 2013 through February 2014. Plaintiff claimed his damages were equal to an amount in excess of the jurisdictional floor to bring the action in the law division of the circuit court of Cook County. During discovery, defendants propounded interrogatories on plaintiff, one of which asked if he had "ever been a party in any legal proceeding, including but not limited to civil, criminal, workers' compensation claims, or bankruptcy filings?" In June 2016, plaintiff responded: "Bankruptcy case filed 2016."

¶ 10 The next month, plaintiff amended his complaint to allege one count of medical malpractice against Daniel J. Fintel, M.D., Keith H. Benzuly, M.D., Daniel Schimmel, M.D., the Northwestern Medical Faculty Foundation and Northwestern Memorial Hospital, again stemming from his October 2013 admission to the hospital and his subsequent treatment.

Plaintiff once again claimed his damages were equal to an amount in excess of the jurisdictional floor to bring the action in the law division of the circuit court of Cook County.

¶ 11 In April 2017, while plaintiff's medical malpractice case continued in the circuit court, he filed a motion to vacate the bankruptcy court's payroll control order, which had required his employer to deduct $1550 per month from his paychecks, because the "instant case [was] nearing completion." Later in the month, the bankruptcy court granted plaintiff's motion and vacated the payroll control order. Plaintiff's bankruptcy case was completed in May 2017.

¶ 12 In August 2017, the trustee of plaintiff's bankruptcy estate submitted her "Final Report and Account" to the bankruptcy court. The trustee stated that plaintiff had paid $61,517.61 in total to his secured and unsecured creditors, and declared that $18,004.10 in unsecured claims were discharged without payment. According to the trustee's "Scheduled Creditors" list, every creditor, secured and unsecured, who asserted a claim against plaintiff's bankruptcy estate was paid in full. According to the list, the trustee had scheduled $18,004.10 in total payments to Bank of America, Chase and Gecrb/Care, all unsecured creditors, but they apparently did not assert claims against the estate. The individual amounts scheduled to each of the three creditors corresponded to the debts owed to them by plaintiff as documented on his Schedule F.

¶ 13 In December 2017, defendants moved for summary judgment and contended that, because plaintiff did not disclose his lawsuit against them in his bankruptcy proceedings, judicial estoppel barred his medical malpractice cause of action. Defendants argued that all of the prerequisites necessary to establish judicial estoppel had been met, including that plaintiff succeeded in his bankruptcy proceedings and received some benefit from his nondisclosure because he was discharged from his debts at the expense of his creditors.

¶ 14 In response, plaintiff agreed that most of the prerequisites necessary to establish judicial estoppel had been met, but asserted he received no benefit from his inadvertent failure to disclosure his medical malpractice lawsuit in the bankruptcy proceedings. Plaintiff posited that all of his creditors who "perfected" their claims were paid in full and while he had $18,004.10 in unsecured debt discharged, it was discharged only because those creditors failed to "perfect" their claims. Plaintiff attached an affidavit, wherein he averred that he "harbored no intent to deceive any of [his] creditors" and at all times, he relied on the advice of his bankruptcy attorney. Plaintiff further stated that he "never knew" and was never "advised" that his "lawsuit had to be disclosed." He asserted that he had asked his bankruptcy attorney to re-open his bankruptcy case so he could file an amended schedule to disclose the lawsuit.

¶ 15 Following briefing, the circuit court granted defendants' motion for summary judgment, finding all of the prerequisites of judicial estoppel satisfied. In particular, the court concluded that plaintiff received a benefit from the nondisclosure because some of his debts were discharged without his creditors' knowledge of his potential to recover a monetary judgment from the lawsuit. The court further observed plaintiff's assertions that the nondisclosure was inadvertent and he relied on his bankruptcy attorney at all times. But the court rejected them, finding that plaintiff had "a motive for concealment," as a potential monetary judgment could be hidden from his creditors, and he never provided an affidavit from his bankruptcy attorney. Lastly, the court highlighted plaintiff's offer to re-open his bankruptcy case to file an amended schedule, but noted that allowing him to do so would defeat the purpose of judicial estoppel and encourage concealment of assets in bankruptcy.

¶ 16 Plaintiff filed a motion to reconsider, maintaining that he did not benefit from the nondisclosure and the nondisclosure was inadvertent. Plaintiff attached an affidavit from his

litigation attorney, wherein the attorney averred that he contacted plaintiff's bankruptcy attorney, but that attorney "refused to sign an affidavit." The circuit court denied the motion to reconsider, and plaintiff appealed.

¶ 17 II. ANALYSIS

¶ 18 Before addressing plaintiff's contentions on appeal, we note that, when he filed his petition for Chapter 13 bankruptcy (11 U.S.C. § 1301 (2012)) in July 2013 and amended his petition in September 2013, the events that led to him filing the instant medical malpractice lawsuit had not yet occurred. Those occurred in late October 2013, and plaintiff filed his lawsuit based on them in October 2015. An individual seeking bankruptcy protection has a statutory duty to disclose all of his assets, actual or potential, to the bankruptcy court when filing his petition. *Seymour v. Collins*, 2015 IL 118432, ¶ 52 (citing *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010)). However, that duty does not end with the filing of the petition, but rather continues throughout the bankruptcy proceedings. *Id.* (citing *Robinson*, 595 F.3d at 1274). If that individual's financial circumstances change, he must amend his financial disclosures. *Id.* (citing *Robinson*, 595 F.3d at 1274). Pursuant to these principles, "chapter 13 debtors are obligated to disclose postpetition causes of action." *Id.*

¶ 19 Based on the foregoing, plaintiff readily acknowledges that he should have amended his bankruptcy petition to disclose the medical malpractice cause of action. However, he contends for various reasons that, despite his failure, the circuit court erred in applying judicial estoppel and granting defendants' motion for summary judgment.

¶ 20 The doctrine of judicial estoppel is an equitable one to be invoked by the circuit court at its discretion. *Id.* ¶ 36. Its purpose is to protect the integrity of the judicial system by preventing "parties from 'deliberately changing positions' according to the exigencies of the moment." *Id.*

(quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)). Judicial estoppel is an "extraordinary" remedy that should be applied cautiously. *Construction Systems, Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶ 38. Determining whether to apply judicial estoppel requires two steps. *Seymour*, 2015 IL 118432, ¶ 47. First, the circuit court must determine whether the party to be estopped has (1) taken two positions (2) that are inconsistent factually (3) in separate judicial proceedings, or quasi-judicial administrative proceedings, (4) which are intended to be accepted as true by the trier of fact, and (5) the party must have been successful in the first proceeding and received some benefit from it. *Id.* These prerequisites must be proven by clear and convincing evidence. *Id.* ¶ 39.

¶ 21 Second, if the circuit court finds the five prerequisites have been satisfied, the court must utilize its discretion and determine whether the circumstances warrant the application of judicial estoppel. *Id.* ¶ 47. An exercise of discretion is mandatory because, although all five prerequisites may be satisfied, there may not be an "intent to deceive or mislead" because "inadvertence or mistake may account for positions taken and facts asserted." *Id.* The court may entertain multiple factors in making this determination, including "the significance or impact of the party's action in the first proceeding" and "whether there was an intent to deceive or mislead, as opposed to the prior position having been the result of inadvertence or mistake." *Id.* The latter factor is "critical" in making this determination. *Id.* ¶ 54. When "there is affirmative, uncontroverted evidence" that a debtor "did not deliberately change positions according to the exigencies of the moment," the purpose of judicial estoppel is not furthered and the doctrine should not be applied. *Id.* ¶ 63.

¶ 22 Generally, because the decision to apply judicial estoppel is within the discretion of the circuit court, we review its application for an abuse of discretion. *Id.* ¶ 48. An abuse of discretion occurs only when the court's decision was unreasonable, arbitrary or where no reasonable person

would adopt the same view taken by the court. *Id.* ¶ 41. "However, where the exercise of that discretion results in the termination of the litigation, and that result is brought about via the procedural mechanism of a motion for summary judgment, it follows, as well, that we review that ruling *de novo*." *Id.* ¶ 49. Disposing of litigation on a motion for "[s]ummary judgment is a drastic means," and such a motion "should be granted only when the movant's right to judgment is clear and free from doubt." *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 45. Specifically, the circuit court should only grant summary judgment where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. A genuine issue of material fact exists where the material facts are disputed or reasonable people could draw different inferences from the undisputed facts. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. As such, when judicial estoppel is applied through a motion for summary judgment, "[w]here there are no disputed issues of material fact related to the application of judicial estoppel, we then decide whether the trial court abused its discretion in applying the doctrine." *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 21.

¶ 23 A. Benefit From Nondisclosure

¶ 24 We now turn to plaintiff's specific contentions on appeal, beginning with his argument that the circuit court erred when it determined that he derived a benefit from the nondisclosure of his lawsuit in the bankruptcy proceedings.

¶ 25 The parties agree, as do we, that the first four prerequisites of judicial estoppel have been met. It is clear that plaintiff took two factually inconsistent positions in separate judicial proceedings where, in the circuit court, he prosecuted his medical malpractice lawsuit against

defendants, but in the bankruptcy court, he failed to amend his petition to disclose the lawsuit, which in essence amounted to him ignoring the lawsuit's existence. See *Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 39 (finding that it was "clear that [the] plaintiffs took two factually inconsistent positions by not disclosing the possibility of their personal injury claim as an asset in their federal bankruptcy proceedings, which essentially amounted to ignoring the claim's existence and then subsequently bringing this personal injury action in circuit court"). Additionally, plaintiff undoubtedly intended the two positions to be accepted as true by the trier of fact. In the bankruptcy court, he signed his petition, which included the property schedules, under penalties of perjury and asserted that his statements contained therein were truthful. And in the circuit court, plaintiff filed a complaint sounding in medical malpractice. See *Barnes*, 2017 IL App (3d) 150157, ¶ 22 (finding that the plaintiff intended the circuit court to accept the truth of the facts alleged in her personal injury lawsuit by virtue of filing the lawsuit therein and she intended the bankruptcy court to accept the truth of the facts alleged in her petition by filing the petition therein).

¶ 26 Regarding the fifth prerequisite, although plaintiff tacitly concedes that he was successful in his bankruptcy case by being discharged of debt, the parties disagree about whether he received some benefit from the factually inconsistent positions. Defendants argue that plaintiff benefited from the inconsistent positions because he obtained a discharge of $18,004.10 in unsecured debt and a termination of his bankruptcy case without the Chapter 13 trustee, his creditors or the bankruptcy court having any knowledge of, or access to, his medical malpractice lawsuit. Generally, in such circumstances, this court has found that the party derived a benefit from the nondisclosure. See *id.* (finding the plaintiff "received a benefit" from failing to disclose a personal injury claim "by having more than $92,000 of her unsecured debt discharged in

bankruptcy without having to increase her payments to her creditors in light of the claim"); *Shoup v. Gore*, 2014 IL App (4th) 130911, ¶ 13 (finding "the plaintiff received a benefit by having her debts discharged without the creditors knowing of her potential recovery in state court").

¶ 27 Plaintiff responds that his nondisclosure had no effect on his bankruptcy case because, even if he had disclosed the lawsuit, his repayment plan would not have changed and none of his creditors would have received any additional money. Plaintiff observes that he had $18,004.10 in unsecured debt discharged, but notes that the three unsecured creditors whom he owed this amount to, and who were listed on his bankruptcy petition's Schedule F, failed to "perfect[]" their claims. Under bankruptcy law, an unsecured Chapter 13 creditor must file a proof of claim in order to have the claim allowed by the bankruptcy trustee. See *In re Barker*, 839 F.3d 1189, 1193 (9th Cir. 2016). Although plaintiff uses the phrase "failed to perfect," he means that his unsecured creditors failed to file their proof of claims. Thus, while his bankruptcy estate's trustee scheduled $18,004.10 in debt to these three creditors, their claims were not asserted. Given these three creditors' failure to file proof of claims, plaintiff argues that the discharge of $18,004.10 in unsecured debt had nothing to do with his failure to disclose the medical malpractice lawsuit. Or, in other words, even if he disclosed the lawsuit, $18,004.10 in unsecured debt would have still been discharged.

¶ 28 Despite plaintiff's no-harm, no-foul argument, this court in *Johnson*, 2017 IL App (1st) 162130, rejected a similar argument. There, a man suffered a work-place injury and filed a workers' compensation claim based on it. *Id.* ¶ 3. A year and a half later, he and his wife filed for bankruptcy, and included in one of their schedules the workers' compensation case. *Id.* ¶ 5. Four months later, the plaintiffs received a discharge of debt in bankruptcy court and their case was

closed. *Id.* ¶ 6. Two months after the discharge, they filed a personal injury lawsuit against various defendants based on the work-place injury. *Id.* ¶ 4. During discovery, it came to light that the plaintiffs failed to disclose their potential personal injury lawsuit in the bankruptcy court, and two of the defendants filed a motion to dismiss based on judicial estoppel. *Id.* ¶¶ 8-9. The plaintiffs subsequently filed a motion in the bankruptcy court to re-open their bankruptcy case so that they could amend their schedules to disclose their personal injury lawsuit. *Id.* ¶ 10. They asserted that their failure to do so earlier was inadvertent as the actual lawsuit was never filed during the pendency of their bankruptcy case, and they did disclose the workers' compensation claim. *Id*. The bankruptcy court allowed the plaintiffs to re-open their case, and the circuit court case was stayed. *Id.* ¶¶ 10-11. During a bankruptcy court appearance, the trustee of their estate informed the court that he would be abandoning the asset as part of the bankruptcy estate. *Id.* ¶ 12. Eventually, the stay was lifted in the circuit court, the defendants filed a renewed motion to dismiss based on judicial estoppel, and the circuit court granted the motion in part based on judicial estoppel. *Id.* ¶¶ 13-14, 18.

¶ 29 The plaintiffs appealed and argued in part that not all of the prerequisites of judicial estoppel had been satisfied. *Id.* ¶ 31. Initially, this court observed that the plaintiffs succeeded in their bankruptcy case by receiving a discharge of debt and they derived a benefit when they avoided "the addition of their personal injury claim to their assets prior to discharge of their debts." *Id.* ¶ 42. But the plaintiffs argued that the abandonment of the personal injury lawsuit as an asset by their bankruptcy estate's trustee "negate[d]" any benefit derived from their nondisclosure. *Id.* In rejecting this argument, this court determined that the benefit was not "the discharge alone, but rather the discharge of their original bankruptcy petition having been granted with the trustee, the creditors, and the court being unaware of plaintiffs' personal injury

claim." *Id.* And based on the unawareness of the trustee, creditors, and bankruptcy court, there was "enough evidence to clearly and convincingly establish a benefit," despite the trustee's abandonment of the personal injury lawsuit as an asset of the bankruptcy estate. *Id.*

¶ 30 Following the reasoning of *Johnson*, plaintiff here has clearly and convincingly received a benefit from his nondisclosure, namely his ability to proceed in the bankruptcy case without the bankruptcy court, his trustee and his creditors being aware of this potential asset. The fact that plaintiff's nondisclosure did not impact his creditors' ultimate recovery does not negate this benefit. See *id.* Our focus is on the benefit received by plaintiff not the lack of harm felt by his creditors. And notably, when the circuit court found plaintiff had received a benefit from his nondisclosure, it also relied on *Johnson*. Consequently, the circuit court did not err in finding that plaintiff derived a benefit from his failure to disclose the lawsuit in his bankruptcy proceedings and did not err in finding all five prerequisites of judicial estoppel satisfied.

¶ 31 B. Failure to Exercise Discretion

¶ 32 Plaintiff next contends that the circuit court failed to exercise its discretion when it determined that he should be judicially estopped from pursuing his medical malpractice lawsuit. Plaintiff argues that the failure to exercise discretion when required can itself constitute reversible error.

¶ 33 In *Seymour*, 2015 IL 118432, ¶ 50, our supreme court stated that "[w]hen a court is required by law to exercise its discretion, the failure to do so may itself constitute an abuse of discretion." In that case, the circuit court found that the plaintiffs' failure to disclose their personal injury cause of action during their bankruptcy proceedings mandated dismissal of their lawsuit based on judicial estoppel. *Id.* ¶¶ 18-19. Or, in other words, because of the plaintiffs' nondisclosure, the court had no choice but to dismiss their lawsuit regardless of whether they

failed to disclose it intentionally. *Id.* ¶ 50. As such, our supreme court found that the circuit court improperly failed to exercise its discretion in applying judicial estoppel. *Id.*

¶ 34 In this case, in the circuit court's written order that granted defendants' motion for summary judgment, it initially noted that judicial estoppel was an equitable doctrine to be invoked at the court's discretion. After listing the prerequisites of the doctrine and finding them satisfied, the court addressed whether plaintiff's nondisclosure was inadvertent. And in doing so, it discussed multiple facts related to the circumstances of the nondisclosure and ultimately why it would apply judicial estoppel against plaintiff. Unlike in *Seymour*, the court here clearly understood it had discretion in determining whether to judicially estop plaintiff and exercised that discretion in ultimately judicially estopping him from pursuing his litigation. Consequently, the circuit court properly exercised its discretion in applying judicial estoppel against plaintiff.

¶ 35 C. Inadvertence

¶ 36 Plaintiff next contends that, even if the prerequisites of judicial estoppel were satisfied, the circuit court erred in finding that his nondisclosure was intentional.

¶ 37 However, the evidence in this case, even when viewing the evidence strictly against defendants and liberally in favor of plaintiff, does not show affirmative and uncontroverted evidence that his failure to disclose his medical malpractice lawsuit in bankruptcy was accidental. Here, there are multiple undisputed facts showing otherwise. Primarily, when plaintiff filed for bankruptcy, he signed a document titled "Rights and Responsibilities Agreement Between Chapter 13 Debtors and Their Attorneys," in which he agreed to "[n]otify" his attorney if he "wishe[d] to file a lawsuit." Plaintiff's signing of this document clearly put him on notice that he needed to disclose the medical malpractice lawsuit to at the very least his attorney. Despite signing this document, in plaintiff's affidavit attached to his response to

defendants' motion for summary judgment, he averred that he "never knew" and was never "advised" that his "lawsuit had to be disclosed." And in his argument on appeal, plaintiff relies heavily on this averment from his affidavit. Yet all of this is plainly contradicted by the very document he signed, which required him to notify his attorney if he wanted to file a lawsuit.

¶ 38 Additionally, though plaintiff claimed in his affidavit that he relied on the advice of his bankruptcy attorney at all times, absent any indication that he informed his attorney of the prospect of the lawsuit or the actual initiation of the lawsuit, plaintiff's excuse is meritless. See *Barnes*, 2017 IL App (3d) 150157, ¶ 25 (finding the plaintiff "cannot claim that she acted in reliance on any advice from the trustee or from her [bankruptcy] counsel" where there was no evidence in the record that she informed either of them about her personal injury claim). What's more, in the instant medical malpractice lawsuit when plaintiff responded to one of defendants' interrogatories about whether he had been a party to any prior legal proceedings, including bankruptcy filings, he responded: "Bankruptcy case filed 2016." But that is not true. Plaintiff clearly initiated his bankruptcy case in July 2013. None of the foregoing facts are in dispute, and given the undeniable fact that plaintiff knew of the need to disclose to his bankruptcy attorney that he wanted to file the instant malpractice lawsuit and failed to, no reasonable inference can be made that it was an innocent mistake or that he did not know it needed to be disclosed. And together, the foregoing facts established a reasonable basis for the circuit court to find plaintiff's failure to disclose his lawsuit in bankruptcy court was intentional rather than inadvertent. See *id.* ¶¶ 24-26 (where the record contained ample undisputed evidence that the plaintiff's failure to disclose her personal injury claim during her bankruptcy was intentional, the circuit court did not abuse its discretion in applying the doctrine of judicial estoppel).

¶ 39 Plaintiff maintains that he had no motive to conceal his medical malpractice lawsuit during bankruptcy because it had no practical effect on his bankruptcy repayment plan. Plaintiff is correct that the significance of the nondisclosure is a factor the circuit court may consider in determining whether to apply judicial estoppel. See *Seymour*, 2015 IL 118432, ¶ 47. But as noted by our supreme court, "a cause of action is an asset that is not easily valued, insofar as, prior to judgment, a cause of action's value is unliquidated and contingent." *Id.* ¶ 52 n. 9. So while the value of that asset to the bankruptcy estate is certainly relevant, the "primary focus" in determining whether to apply judicial estoppel is "on the knowledge and intent of the debtors." *Id.* And focusing on these factors, plaintiff did have a motive to conceal the asset, as it allowed him the benefit of proceeding through and concluding his bankruptcy case without his creditors, bankruptcy trustee and the bankruptcy court having knowledge of his lawsuit.

¶ 40 Additionally, in his argument on appeal, plaintiff describes himself as "a blundering layman," who did not know he needed to disclose the lawsuit in bankruptcy court. But in same breath, he also argues he could not have had a motive to conceal the lawsuit because the disclosure of it would not have affected his repayment plan. This argument is a microcosm of what the doctrine of judicial estoppel is intended to prevent: changing positions according to the exigencies of the moment. Under the former argument, we would have to believe that plaintiff could not understand much of the bankruptcy proceedings absent his attorney's assistance. But under the latter argument, we would have to believe that plaintiff had more than an elementary understanding of the bankruptcy proceedings in order for him to sufficiently grasp that the nondisclosure of his medical malpractice lawsuit would have no impact on his repayment plan. Under the circumstances, given these undisputed material facts, even when viewing them strictly

against defendants and liberally in favor of plaintiff, the circuit court could have reasonably found that plaintiff's failure to disclose the lawsuit during bankruptcy was deliberate.

¶ 41 We further reject plaintiff's argument that the circuit court misapplied the law on judicial estoppel. He argues that the court improperly relied on *Seymour v. Collins*, 2014 IL App (2d) 140100 and *Berge v. Mader*, 2011 IL App (1st) 103778, cases in which plaintiffs failed to disclose personal injury lawsuits in their bankruptcy proceedings and the circuit court granted defendants' motions for summary judgment based on judicial estoppel in light of their failures. The circuit court in this case did cite both cases in its order granting defendants' motion for summary judgment and both cases have been overruled to various extents by *Seymour*, 2015 IL 118432, namely our supreme court's pronouncement that circuit courts *must* engage in a two-step process of (1) determining whether all five prerequisites of judicial estoppel have been established and (2) exercising discretion in determining whether the doctrine should be applied.

¶ 42 However, the circuit court in this case did not rely on the reasoning of either case but merely cited them for general principles of law. And, as already discussed, the court properly followed the requisite two-step process in determining whether to apply judicial estoppel. Consequently, the circuit court did not misapply the law on judicial estoppel or improperly rely on *Seymour*, 2014 IL App (2d) 140100 or *Berge*, 2011 IL App (1st) 103778. Accordingly, the circuit court did not abuse its discretion when it applied judicial estoppel against plaintiff and granted summary judgment for the defendants.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.