

2013 IL App (2d) 121058-U  
No. 2-12-1058  
Order filed June 25, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CHARLES C. HAPP,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-265
	)	
	)	
CHERYL ADOLPH,	)	Honorable
	)	Christopher C. Starck,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly invoked judicial estoppel against plaintiff and granted defendant summary judgment: having obtained a judgment in a prior suit on the ground that plaintiff had made a loan to an individual, he could not now sue defendant on the ground that he had made the loan to the corporation.

¶ 2 Plaintiff, Charles C. Happ, appeals from the ruling of the circuit court of Lake County granting defendant Cheryl Adolph's motion for reconsideration and entering summary judgment in her favor based on the doctrine of judicial estoppel. Because the trial court did not abuse its

discretion in applying the doctrine of judicial estoppel and properly granted summary judgment as to all of plaintiff's claims, we affirm.

¶ 3

### I. BACKGROUND

¶ 4 The following facts are taken from the pleadings and other matters of record in this case. Plaintiff, in a prior lawsuit against defendant's husband, Braden J. Adolph (Braden), filed a verified complaint in which he alleged that he loaned Braden \$200,000, that Braden failed to repay the loan upon demand, and that Braden was indebted to plaintiff for the \$200,000. The verified complaint sought "judgment against [Braden]."

¶ 5 During the course of that lawsuit, plaintiff obtained a default judgment against Braden in the amount of \$235,064.44. Braden filed a motion to vacate the default judgment, in which he argued that the \$200,000 loan was made to his company, Eclectic Products and Resources, Inc. (Eclectic), as opposed to him personally. In his response to Braden's motion, plaintiff stated that Braden did not have a meritorious defense because plaintiff never entered into an agreement to purchase Eclectic stock, there never was any "transfer of corporate shares," Braden considered the \$200,000 as a loan to himself, and plaintiff "[did] not have an ownership interest in [Braden's] company." The motion to vacate the default judgment was ultimately denied.

¶ 6 After Braden filed bankruptcy, plaintiff brought suit against defendant in this case. In his four-count, amended complaint, he alleged as to all counts that he "loaned Eclectic" \$200,000 and that defendant, "as an officer of Eclectic," used "corporate assets of Eclectic to pay [her] personal expenses, debts, and obligations." He further alleged in count I that defendant breached a fiduciary duty owed to plaintiff by using "corporate funds" to pay for various personal expenses and debts. Plaintiff alleged in count II that defendant was unjustly enriched through her "misappropriation of

Eclectic funds” to pay her expenses and debts. In count III, a shareholder derivative action, plaintiff alleged that he owned 25% of the “stock of Eclectic,” that defendant used “corporate assets of Eclectic to pay personal expenses, debts, and obligations,” and that she breached a fiduciary duty owed to plaintiff when she “utilized corporate funds of Eclectic” to pay various personal expenses and debts. Count IV, another shareholder derivative action, alleged that defendant misappropriated Eclectic funds to pay her personal expenses and debts and was thus unjustly enriched to plaintiff’s detriment.

¶ 7 Defendant filed a motion for summary judgment directed at plaintiff’s original complaint. The trial court entered an order denying the motion for summary judgment and granting plaintiff leave to file the previously-described amended complaint. Defendant, in turn, filed a motion to reconsider the order denying her motion for summary judgment. In the motion to reconsider, defendant, for the first time, raised the issue of judicial estoppel as a basis for summary judgment. Specifically, she argued that, because in his prior lawsuit against Braden plaintiff had alleged that he made the loan to Braden personally and denied being a shareholder of Eclectic, he should not be allowed in this case to inconsistently assert that the loan was made to Eclectic and that he was in fact an Eclectic shareholder.

¶ 8 After the trial court set a briefing schedule on defendant’s motion to reconsider, defendant filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), in which she also asserted judicial estoppel. On June 13, 2010, the trial court granted the motion to reconsider and entered summary judgment for defendant on the amended complaint. After the trial court denied plaintiff’s motion to reconsider the June 13 order, plaintiff filed this timely appeal.

¶ 9

## II. ANALYSIS

¶ 10 On appeal, plaintiff contends that the trial court erred in applying judicial estoppel to the claims in his amended complaint, for the following reasons: (1) that there was a question of material fact as to whether he took inconsistent positions regarding his stock ownership of Eclectic in his lawsuits against Braden and defendant; (2) that even if he did take an inconsistent position in the Braden lawsuit it did not result in his success in that lawsuit; and (3) judicial estoppel does not preclude his claim of unjust enrichment in count II because it is immaterial to that claim whether he was a shareholder of Eclectic or a creditor of Braden.

¶ 11 The threshold issue we must resolve is what is the proper standard of review. In deciding that question, we begin by noting that the parties are not entirely clear as to the applicable standard of review. Plaintiff states that both the decision to apply the judicial estoppel doctrine and the “dismissal” of the amended complaint are “questions of law which are reviewed by [this court] *De Novo*.” Defendant asserts that the entry of summary judgment is reviewed *de novo* and that the underlying basis for summary judgment, judicial estoppel, is a matter of discretion. Defendant further maintains that the trial court should be affirmed under “either standard.”

¶ 12 Our research reveals that the applicable standard of review, when considering a trial court’s decision to apply judicial estoppel to bar the use of certain factual assertions or evidence, is abuse of discretion. See *Berge v. Mader*, 2011 IL App (1st) 103778, ¶ 9; *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996); see also *People v. Runge*, 234 Ill. 2d 68, 132 (2009) (judicial estoppel is equitable doctrine invoked as matter of discretion); *People v. Caballero*, 206 Ill. 2d 65, 80 (2002) (same) (citing *Bidani*, 285 Ill. App. 3d at 550). However, once the doctrine of judicial estoppel has been invoked to bar factual assertions or evidence, the related decision of whether to grant summary

judgment as a result of the barred factual assertions or evidence is reviewed *de novo*. *Semeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 22; *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 459 (2003). Put another way, the initial decision by the trial court to apply judicial estoppel and bar evidence or factual assertions because they are inconsistent with those made by a party in a prior case is reviewed for abuse of discretion. Once the particular evidence or factual assertions are barred from the case, the subsequent decision to grant summary judgment because of the absence of such assertions or evidence is reviewed *de novo*.

¶ 13 We therefore first address whether the trial court in our case abused its discretion in applying the doctrine of judicial estoppel to bar the factual assertions or evidence that plaintiff loaned the \$200,000 to Eclectic and that he was a shareholder of Eclectic. The doctrine of judicial estoppel provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 59 (2009). The purpose of the doctrine is to promote the truth and to protect the integrity of the court system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Gambino*, 398 Ill. App. 3d at 59-60. The five elements necessary for the application of judicial estoppel require that the party to be estopped: (1) 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) has succeeded in the first proceeding and received some benefit from the prior factual position. *Gambino*, 398 Ill. App. 3d at 60.

¶ 14 Here, plaintiff alleged in his verified complaint in his prior suit that he loaned the \$200,000 to Braden. He further alleged that he demanded that Braden repay the debt. He also alleged that

Braden failed to do so and thus was indebted to him for the \$200,000. He sought “judgment against [Braden]” in the amount of at least \$200,000. Additionally, in his response to Braden’s motion to vacate the default judgment, plaintiff denied any ownership interest in Eclectic.

¶ 15 In the present case, plaintiff alleged as to all four counts that he loaned the \$200,000 to Eclectic and that he had a 25% stock ownership in Eclectic. He further alleged that defendant misused “corporate assets” and “Eclectic funds” for her own personal expenses and debts.

¶ 16 The current factual assertions regarding the \$200,000 loan are entirely inconsistent with the allegations in plaintiff’s suit against Braden. Plaintiff loaned the \$200,000 either to Braden or to Eclectic. He cannot have it both ways. Likewise, either he had an ownership interest in Eclectic or he did not. The assertions in this case, that he loaned the \$200,000 to Eclectic and acquired an ownership interest in Eclectic, are diametrically opposed to what he asserted in the prior case.

¶ 17 Based on the foregoing, defendant has shown that plaintiff took factual positions in this case that are inconsistent with his factual assertions in a prior judicial proceeding, intending the trier of fact in each case to accept the truth of the respective factual positions. Thus, four of the five elements necessary for application of judicial estoppel have been satisfied.

¶ 18 That leaves the question of whether plaintiff succeeded in the first proceeding and, in doing so, received “some benefit” from his prior inconsistent factual assertions. Plaintiff contends that his prior position that he was not an owner of Eclectic did not result in his obtaining a default judgment against Braden. He argues, therefore, that he did not receive some benefit from that factual assertion in his case against Braden.

¶ 19 Although plaintiff might be correct that he did not receive some benefit from his prior assertion of not being an owner of Eclectic, such contention does not undermine the trial court’s

application of judicial estoppel. All of plaintiff's claims in his amended complaint, including the two based on plaintiff's being a shareholder, rely on the factual assertion that plaintiff loaned the \$200,000 to Eclectic as opposed to Braden. Thus, irrespective of whether he had an ownership interest in Eclectic, judicial estoppel applies if plaintiff received some benefit from his assertion in the prior suit that the loan was to Braden.

¶ 20 That factual assertion clearly resulted in plaintiff's receiving some benefit in the Braden case. This is so because, absent that factual assertion, plaintiff never would have obtained a default judgment against Braden. He was required to prove his entitlement to damages notwithstanding Braden's default, and his assertion that Braden owed him \$200,000 was essential to proving damages as to each of his claims. Therefore, we conclude that plaintiff, in obtaining a default judgment, received some benefit in the Braden case from the inconsistent assertion regarding the loan. Accordingly, defendant satisfied all five elements of judicial estoppel as to the factual assertion in this case that plaintiff loaned the \$200,000 to Eclectic. Thus, the trial court did not abuse its discretion in applying judicial estoppel and barring plaintiff from asserting that position.

¶ 21 Having said that, we must now decide whether, absent that factual assertion, defendant was entitled to judgment as a matter of law. See 735 ILCS 5/2-1005(c) (West 2010). Count I, a claim for breach of fiduciary duty, depended on the allegation that defendant misused Eclectic funds, part of which consisted of the alleged \$200,000 loan. Absent the fact of the \$200,000 loan to Eclectic, plaintiff could not recover under count I, and defendant was entitled to judgment as a matter of law on that claim. The same can be said for counts III and IV, as both depended on the fact that plaintiff loaned Eclectic \$200,000 and that defendant, in turn, misappropriated those funds to pay her personal expenses and debts. Therefore, summary judgment also was proper as to these claims.

¶ 22 That leaves the claim of unjust enrichment in count II. As to that claim, plaintiff contends that it is “irrelevant whether or not [he] was a shareholder of Eclectic or a creditor of [Braden] for determining whether or not he has a valid cause of action in unjust enrichment against [defendant].” We disagree. As with the other claims, plaintiff, in count II, alleged that he loaned the \$200,000 to Eclectic. It is essential to plaintiff’s unjust enrichment claim that the \$200,000 went to Eclectic as opposed to Braden personally. Absent that fact, plaintiff had no basis to claim that defendant was unjustly enriched to his detriment by her alleged improper use of the Eclectic funds. Accordingly, the trial court properly granted summary judgment as to count II as well.

### III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court’s grant of summary judgment on all claims in plaintiff’s amended complaint.

¶ 24 Affirmed.