

STATE OF MICHIGAN
COURT OF APPEALS

GIL MAINS, JR., d/b/a THE M COMPANIES,

Plaintiff/Counter-Defendant-
Appellant,

v

FRED DERY,

Defendant/Counter-Plaintiff/Cross-
Defendant-Appellee,

and

CENTURY AUCTION AND APPRAISAL
SERVICE INC.,

Defendant/Cross-Plaintiff-Appellee.

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff/counter-defendant (“plaintiff”) appeals as of right an order granting summary disposition to defendant/counter-plaintiff/cross-defendant, Fred Dery (“Dery”) and defendant/cross-plaintiff, Century Auction and Appraisal Service Inc. (“Century Auction”), and an order of dismissal. We affirm.

This case arises out of a dispute over payment for environmental cleaning services that plaintiff provided to New Boston Coke Company (“NBC”). Plaintiff¹ averred that after NBC filed its Chapter 11 bankruptcy petition, 11 USC 1101 *et seq.*, Dery, who is the president of NBC, assured him that NBC currently had sufficient assets to render payment and, in assurance of such payment, NBC transferred real estate and construction equipment (including two front-end loaders) to plaintiff. Plaintiff further averred that Dery and Century Auction induced plaintiff to permit the sale of the two front-end loaders at auction – the proceeds from which

¹ The individual plaintiff is the sole member of The M Companies.

Dery and Century Auction later retained contrary to their promise that plaintiff would receive such proceeds. Dery and Century Auction denied these allegations. Plaintiff subsequently entered into a settlement agreement in the bankruptcy court whereby he accepted \$85,000 in lieu of \$830,770.13 in fees he had previously requested. The bankruptcy court entered an order reflecting this settlement, and plaintiff filed suit in Oakland Circuit Court against both Dery and Century Auction alleging fraudulent misrepresentation and conversion.

On appeal, plaintiff first argues that the trial court erred in applying judicial estoppel. We disagree. The Court reviews de novo an appeal from an order granting summary disposition pursuant to MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when the moving party is entitled to judgment as a matter of law because there is no genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If the nonmoving party would bear the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).²

Judicial estoppel prevents a party from asserting a position at a later proceeding that is wholly inconsistent with the position the party successfully asserted under oath at a prior proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). “Under the ‘prior success’ model [of judicial estoppel], the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true.” *Id.*

Judicial estoppel bars plaintiff’s claims against Dery and Century Auction. First, plaintiff’s position in this matter is inconsistent with its position in the bankruptcy proceeding. “Fees in a bankruptcy proceeding are governed by federal, not state, law.” *Dery v Cumberland*

² Century Auction filed its summary disposition motion under MCR 2.116(C)(7), (8), and (10). MCR 2.116(C)(7) permits summary disposition where “the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” MCR 2.116(C)(8) permits summary disposition for failure to state a claim on which relief may be granted. However, we need only review this issue under MCR 2.116(C)(10). Regarding 2.116(C)(7), Century Auction not only failed to make any specific arguments under that rule, but Century Auction also adopted plaintiff’s proposed standard of review exclusively under MCR 2.116(C)(10). Further, review under MCR 2.116(C)(8) is inappropriate given that the trial court reviewed matters outside the pleadings in rendering its decision. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

Cas & Surety Co, (In re 5900 Assocs, Inc), 468 F3d 326, 329 (CA 6, 2006).³ Under 11 USC 330, “[a]fter notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a . . . professional person employed under section 327 . . . reasonable compensation for actual, necessary services rendered by the . . . professional person.” 11 USC § 330(a)(1).⁴ “In order to receive payment under § 330, [a professional person] must comply with Federal Rule of Bankruptcy Procedure 2016, which requires professional service providers to submit to the court a detailed statement of services rendered and expenses incurred [i.e., a fee application].” *Dery, supra* at 330. Federal Rule of Bankruptcy Procedure 2016(a) also requires the fee application to disclose any payments that have been made or promised for services rendered or to be rendered and the source of such promised compensation.

In addition, Federal Rule of Bankruptcy Procedure 2014(a), which governs the employment of professionals, requires that an application for the employment of a professional under § 327 “be accompanied by a verified statement [i.e., an affidavit of disinterestedness] of the person to be employed setting forth the person’s connections with the debtor, creditors, [and] any other party in interest.”

Nowhere in plaintiff’s fee application or affidavit of disinterestedness did plaintiff disclose any basis of compensation for its environmental services to NBC other than NBC’s estate. Also, plaintiff made no mention of any promise from Dery or Century Auction regarding payment for services, transfer of construction equipment, or proceeds from the auction of the front-end loaders. On the contrary, plaintiff averred in his fee application that “the source of compensation is [NBC’s] estate and there are no promises or agreements for sharing any of the compensation paid or to be paid.” Similarly, plaintiff’s affidavit of disinterestedness indicated that plaintiff had no interest in the bankruptcy action other than its employment as environmental site coordinator and denied that plaintiff had any connection with NBC or any other party in interest.

Supplying the information required by 11 USC 330 “establishes the exclusive means of allowing a claim for professional fees in a bankruptcy proceeding.” *Dery, supra* at 328. Therefore, even if Dery and Century Auction made the assurances plaintiff alleges, plaintiff was required by law to disclose such assurances in his affidavit of disinterestedness and fee application. “Indeed, the disclosure requirements imposed under Rule 2014 and 11 USC § 327 require *complete disclosure* by the professional seeking employment of all facts impacting upon

³ Federal precedents, although not binding, may be persuasive. *Penden v Detroit*, 470 Mich 195, 219; 680 NW2d 857 (2004).

⁴ Section 327(a) provides in relevant part: “the trustee, with the court’s approval, may employ one or more . . . professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee’s duties under this title [11 USC §§ 101 *et seq.*].” Although the employment order nunc pro tunc does not expressly reference § 327, the language of the order clearly reflects the requirements of § 327 in authorizing plaintiff’s employment.

his eligibility for appointment.” *In re Lee Way Holding Co*, 100 BR 950, 960 (SD Ohio, 1989) (emphasis supplied).⁵

Moreover, in requiring plaintiff to submit the affidavit of disinterestedness and fee application *before* entering the employment order nunc pro tunc and fee order, the bankruptcy court clearly relied upon plaintiff’s position and accepted it as true. Thus, to now assert that additional sources that were not parties to the bankruptcy action are responsible for remitting payment for the services rendered to NBC is wholly inconsistent with plaintiff’s position in the prior proceeding that its only source of compensation was NBC’s estate.⁶

Plaintiff contends that his position is not inconsistent because he seeks to recover under theories of fraud arising from Dery’s and Century Auction’s personal guarantee and the conversion of construction equipment allegedly transferred to him. However, plaintiff admitted that the alleged misrepresentations regarding NBC’s ability to pay and the transfer of construction equipment induced him to continue providing services because he believed he would be “paid in full.” In other words, plaintiff’s state law allegations pertain directly to the recovery of payment for his services, i.e., fees. However, as noted above, plaintiff was required to disclose such information during the bankruptcy proceeding. Moreover, it is the bankruptcy court’s order that ultimately creates the obligation to pay fees under § 330, which “is the sole mechanism by which fees may be enforced.” *Dery, supra* at 330-331. Consequently, the bankruptcy court’s fee order, which expressly resolved all objections and responses and denied any other objections or responses, is dispositive on the issue of plaintiff’s recovery of fees for the services provided regardless of how creatively plaintiff frames the issue in state court.

Second, judicial estoppel bars plaintiff’s claims because plaintiff “successfully” asserted his prior position in the bankruptcy proceeding. A party successfully asserts a position for purposes of judicial estoppel even where the party eventually reaches a settlement agreement in a prior proceeding if the party raises an issue that cannot be challenged in a later proceeding. *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 17; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich 913 (2007). Here, although plaintiff settled its claims in the bankruptcy proceeding, the position underlying his claims, i.e., that his sole source of compensation was NBC’s estate, successfully underlay the settlement agreement and fee order. As noted above, the fee order resolved the issue of plaintiff’s recovery for services provided to NBC. Consequently, plaintiff “successfully” asserted his claim below. Therefore, judicial estoppel bars plaintiff’s claims against both Dery and Century Auction in the instant case, and plaintiff may not seek to recover fees he failed to recover in the bankruptcy proceeding under the guise of state law fraud and conversion claims.

⁵ Cases from foreign jurisdictions may be used as persuasive authority. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 717; 742 NW2d 399 (2007).

⁶ Given this, plaintiff’s argument that Dery and Century Auction were not parties to the bankruptcy action is inconsequential.

Plaintiff claims that the trial court erred in applying judicial estoppel for several reasons. First, plaintiff asserts he was not a professional because he did not perform services for a debtor specifically relating to a bankruptcy action, but rather performed services because of Dery's misrepresentations. Also, plaintiff claims that his fee application evidences his belief that he was not employed as a professional under § 327. This argument, however, ignores that the employment order nunc pro tunc expressly permitting NBC to employ plaintiff was entered only after the employment application and affidavit of disinterestedness were filed pursuant to Rule 2014(a), which relates specifically to § 327. Therefore, plaintiff was employed as a professional and this claim fails.

Second, plaintiff contends the court failed to address plaintiff's claims relating to services performed before the bankruptcy proceedings commenced. However, plaintiff fails to specify to what services he is referring. In any event, plaintiff indicated in his fee application that he was owed \$830,770.15 in fees. The invoice to NBC reflecting this amount relates only to work performed as early as November 12, 2002 – nearly five months after NBC filed for bankruptcy. Therefore, this argument is meritless.

Third, plaintiff contends that Dery is personally liable for NBC's debt as a guarantor. This claim fails. "[A] personal guarantee cannot be implied from language that fails to clearly and unambiguously reflect an intention to assume such a responsibility." *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 514; 620 NW2d 531 (2001). Here, even if Dery made the assurance plaintiff asserts, there was no assurance of a personal guarantee. On the contrary, plaintiff averred, "Mr. Dery represented to me that *his company* currently had more than sufficient funds and assets to pay me in full" (emphasis supplied.) Plaintiff also claimed, "Mr. Dery induced me to continue to provide materials and render services . . . by continuing to represent that *New Boston Coke Corporation* currently had sufficient funds and assets to pay me" (emphasis supplied.) Thus, there is no indication that Dery "clearly and unambiguously" intended to assume responsibility for NBC's payment of plaintiff's fees.⁷

Fourth, plaintiff argues that the fee order permitted the instant claims because it provided that its entry was "without prejudice or waiver of any and all other claims . . . Gil Mains, Jr., . . . may have against the Debtor or any other party." This argument is without merit. As noted *supra*, plaintiff's claims here pertain to recovery of fees. Consequently, because the bankruptcy court's fee order conclusively resolved that issue, this clause does not provide plaintiff leeway in which to assert the claims at issue. Thus, his argument fails.

Fifth, plaintiff asserts that issues of fact exist regarding whether plaintiff owned the equipment Century Auction sold, whether Century Auction was aware that the equipment belonged to plaintiff, and whether Century Auction misrepresented that plaintiff would receive the proceeds of the auction, and that judicial estoppel is inapplicable because these issues are

⁷ Plaintiff contends that Dery is liable based on *Aero Taxi-Rockford v Gen Motors Corp*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 2006 (Docket No. 259565). However, unpublished opinions are not precedentially binding under stare decisis. MCR 7.215(C)(1).

unrelated to the bankruptcy proceeding. However, as noted *supra*, plaintiff claims that it was the transfer of such equipment that induced him to continue providing services to NBC. Indeed, attached to plaintiff's fee application was his invoice for services to NBC billing NBC for the auction of the front-end loaders. Thus, the sale of the construction equipment related to fees plaintiff sought from NBC. The bankruptcy court's fee order conclusively resolved that issue. *Dery, supra* at 330-331. Therefore, this claim fails.

Plaintiff also contends that the trial court erred in dismissing its fraud claims with respect to Dery. But even if Dery made the misrepresentations plaintiff alleges, plaintiff cannot establish two elements required to support a claim of fraud.

The elements of fraud are: (1) that the charged party made a material representation; (2) that it was false; (3) that when he or she made it he or she knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he or she made it with the intention that it should be acted upon by the other party; (5) that the other party acted in reliance upon it; and (6) that the other party thereby suffered injury. [*Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005).]

An action for fraud must relate to past or existing facts, not future events Furthermore, "the mere fact that statements relate to the future will not preclude liability for fraud if the statements were intended to be, and were accepted as, representations of fact, and involved matters peculiarly within the knowledge of the speaker." *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005), quoting *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930).

According to plaintiff, Dery promised "that his company currently had more than sufficient funds and assets to pay me in full" Although the word "currently" was used, the alleged promise was for payment after plaintiff completed his work. Hence, the alleged promise related to a future event. Further, given that NBC had filed its petition for bankruptcy, NBC's financial condition was not peculiarly within Dery's knowledge.

In any event, plaintiff cannot establish that his reliance on Dery's alleged misrepresentations were reasonable. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999) (a party's reliance must be reasonable to support a fraud claim). This is so because despite any assurance plaintiff received, plaintiff was aware that, by virtue of NBC's filing of the bankruptcy petition, NBC was on unstable financial ground. Indeed, on account of NBC's financial status, plaintiff acted accordingly to protect its own interest by adjusting its standard payment terms for service.

Plaintiff contends that Century Auction's cross-claim against Dery created a genuine issue of material fact concerning whether Dery committed fraud and wrongfully converted the proceeds from the auction. This argument is without merit. Although Century Auction alleged in its cross-complaint that it relied on Dery's representation that he owned the equipment at issue in conducting the auction, this is insufficient to overcome a summary disposition motion. Indeed, where the nonmoving party bears the burden of proof at trial, that party must show there is a genuine issue of material fact by setting forth documentary evidence. *Karbel, supra* at 97.

Thus, reference to Century Auction's cross-complaint cannot create a genuine issue of material fact. Therefore, this claim fails.

Next, plaintiff argues that the trial court erred in failing to permit him to amend his complaint to include claims of promissory estoppel against Dery and unjust enrichment against Dery and Century Auction. We disagree. Where summary disposition is based on MCR 2.116(C)(8), (9), or (10), a trial court should freely provide the nonprevailing party the opportunity to amend its complaint unless such would not be justified. MCR 2.116(I)(5). "An amendment, however, would not be justified if it would be futile. We will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004) (internal citation omitted). A trial court abuses its discretion when its decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

An amendment of the complaint to include a claim of promissory estoppel against Dery would have been futile. "The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably expect to induce action or forbearance on the part of the promisee, (3) that in fact induces such action or forbearance, and (4) injustice can be avoided only by performance of the promise." *Gore v Flagstar Bank, FSB*, 474 Mich 1075, 1079; 711 NW2d 330 (2006). "Promissory estoppel requires reasonable reliance on the part of the party asserting estoppel." *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859; 714 NW2d 287 (2006).

Here, even if Dery made the alleged assurances plaintiff asserts, plaintiff's reliance was not reasonable. As noted *supra*, plaintiff was aware that NBC's financial situation was uncertain by virtue of its filing the bankruptcy petition and its proposal letter changing its standard terms of payment "[d]ue to the financial status of [NBC]." Thus, it can hardly be said that reliance on Dery's alleged assurances was reasonable.

Regardless, there was no injustice given plaintiff's assertion of inconsistent positions. In any event, plaintiff's claim for promissory estoppel seeks to recover fees allegedly promised by Dery for services and materials rendered to NBC. The fee order, however, conclusively resolved all fees to which plaintiff was entitled for his services to NBC. *Dery, supra* at 330-331. Consequently, the court did not err in denying plaintiff's request to amend the complaint in this respect.

Similarly, an amendment to include claims of unjust enrichment against both defendants would have been futile. "The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).

Regarding Dery, plaintiff provided services and materials for NBC, not for Dery. Thus, Dery was not the beneficiary. Regarding Century Auction, although Century Auction received a ten percent commission from the proceeds of the total auction sale, plaintiff cannot show an inequity where he failed to assert in the bankruptcy court that Century Auction owed plaintiff any amount of proceeds from the sale. Indeed, plaintiff specifically billed NBC for the proceeds from the front-end loaders sold at auction as part of the fees owed plaintiff and attached this

invoice to its fee application in which plaintiff asserted that its only compensation for services and materials was NBC's estate. Given that the bankruptcy court's fee order conclusively resolved the amount of fees to which plaintiff was entitled, *Dery, supra* at 330-331, no inequity would result here.

Further, given that plaintiff asserted in the bankruptcy court that NBC alone was liable for the proceeds at issue but asserts now that Century Auction wrongfully retained the proceeds from the auction, plaintiff has argued mutually exclusive positions. Thus, plaintiff arguably does not have clean hands to pursue an equitable remedy against Century Auction. *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). ("The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.") Thus, the court properly denied plaintiff's request to amend the complaint.

Next, plaintiff argues that the court's order granting summary disposition was premature. We disagree. "As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Dep't of Social Services v Aetna Cas & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989) (internal citation omitted).

In this case, even if Dery and Century Auction made the assurances plaintiff claims, additional discovery supporting these allegations would not support plaintiff's position, which is barred by judicial estoppel. Further, given that plaintiff's complaint seeks to recover fees for services and materials provided to NBC and the bankruptcy court order conclusively resolved the fees to which plaintiff was entitled, any additional discovery would have been futile. Therefore, summary disposition was not premature.

Finally, plaintiff argues that the trial court erred in permitting Dery to maintain its counterclaim against plaintiff. We disagree. This Court reviews unpreserved issues for plain error affecting substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

In reviewing a motion for summary disposition, MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

The rule does not expressly require a motion under MCR 2.116(C) in order to grant summary disposition; nor does the rule in question expressly forbid summary disposition absent a motion under MCR 2.116(C). Indeed, the rule mandates that if one of two conditions is met, then the court "shall render judgment without delay." These conditions are: the "pleadings show that a party is entitled to judgment as a matter of law" and "the affidavits or other proofs show that there is no genuine issue of material fact." [*Boulton v Fenton Twp*, 272 Mich App 456, 462-463; 726 NW2d 733 (2006).]

Dery filed counterclaims of fraud/misrepresentation and false pretenses against plaintiff on the grounds that plaintiff submitted false invoices regarding work it failed to complete for NBC and that plaintiff took items from NBC's worksite. However, application of judicial estoppel to plaintiff's claims was predicated upon a professional's right to collect fees from a debtor under 11 USC 330 and the disclosure requirements necessary for the professional to collect fees. Dery's counterclaims have no bearing on a professional's disclosure requirements in bankruptcy. Therefore, plaintiff's claim fails. In any event, plaintiff stipulated to dismissal of Dery's counterclaim. Thus, this issue is moot and plaintiff has failed to establish outcome determinative error.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald