

STATE OF MICHIGAN
COURT OF APPEALS

RIETBERG REALTY COMPANY, INC., and
RUSTY RICHTER,

UNPUBLISHED
September 27, 2012

Plaintiffs/Garnishee Plaintiffs-
Appellants,

v

No. 307891
Kent Circuit Court
LC No. 08-011880-CK

DAWN MARIE GRADY,

Garnishee Defendant-Appellee,
and

GRADY GROUP PROPERTIES CORP, KEVIN
GRADY, JR., SELECT BANK, PILLAR 2,
L.L.C., KEYBANK NATIONAL ASSOCIATION,
LANDMARK CONSTRUCTION, L.L.C.,
KELVIN GRADY, COURTNEY GRADY,
ROBERT BELL, and DANIELLE GRADY,

Defendants.

Before: KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In this garnishment action, Rietberg Realty Company, Inc. (hereafter “Rietberg”) and Rusty Richter, plaintiffs/garnishee plaintiffs appeal as of right the trial court order dismissing their garnishment action against garnishee defendant Dawn Marie Grady (hereafter “Dawn”). Because we conclude that the doctrine of judicial estoppel should not be applied in this case, we affirm.

The underlying judgment that gives rise to this garnishment action is a February 2009 money judgment against Kevin Grady and Grady Group Properties for breach of a real estate listing contract. Pursuant to the listing contract, Richter, who is a licensed real estate broker and works for Reitberg, a real estate company, secured a purchase agreement for the sale of a building leased to Dawn Marie’s Banquet and Conference Facility located at 3321 East Paris Avenue (hereafter “Dawn Marie’s Banquet”), and owned by Grady. Grady refused to close as

required by the purchase agreement, which resulted in the entry of the judgment upon which plaintiffs seek to collect in this garnishment action.

In May 2009, a request and writ for periodic garnishment of Dawn was issued, and in August 2009, a request and writ for nonperiodic garnishment of Dawn was issued. Plaintiffs sought to recover the rental money allegedly owed by Dawn Marie's Banquet to Grady Group Properties, and maintained that garnishment of Dawn was proper because she owned the business and signed a commercial lease agreement (hereafter "the lease"). The lease was executed on July 17, 2006, between Dawn Marie's Banquet and Grady Group Properties; it provided for a term of 84 months and rent in the amount of \$6500 per month. Dawn returned a garnishee disclosure denying liability and claiming that she was not indebted to Grady or Grady Group Properties for any sum of money because she did not own Dawn Marie's Banquet and did not have any knowledge regarding the operation of the business. Whether Dawn was the owner and operator of Dawn Marie's Banquet and signer of the lease agreement, and therefore obligated to pay the rent owing on it, was the disputed issue in the trial court.

The record in this case shows that Grady, owner of Grady Group Properties signed the lease as the landlord. The lease also bears the signature of "Dawn M. Ablebay" for the tenant, Dawn Marie's Banquet. At the time the lease was entered into, Dawn was married to Grady, and her legal name was Dawn Marie Grady. Dawn and Grady were divorced in 2010, and at the time of the bench trial in this case, which was conducted on October 26, 2011, Dawn's legal name was Dawn Marie Abel-Bey.

The litigation in this case proceeded to a bench trial regarding whether garnishment of Dawn for the debt of Dawn Marie's Banquet was proper. Dawn was the only witness to testify at the bench trial. The trial court also received seven exhibits: the garnishment, the garnishee disclosure, Dawn's interrogatory answers, the lease, a certification of bank records showing that Grady wrote rent checks on behalf of Dawn Marie's Banquet, the complaint verified by Dawn from a previous proceeding regarding Dawn Marie's Banquet, the motion for a temporary restraining order filed in the previous proceeding regarding Dawn Marie's Banquet, and a transcript of Dawn's deposition.

In regard to the lease, Dawn testified that she had never seen it before, that she did not sign it and her name must have been forged. She also noted that her name was misspelled by whoever signed it. Dawn further testified that she never authorized any person to sign on her behalf. Dawn acknowledged that the complaint in the 2009 case bore her signature; however, she maintained that she signed it at the behest of her then-husband Grady and was not aware of its contents. Dawn testified that she had no involvement in the management of Dawn Marie's Banquet, and knew nothing about the operation of the business. She explained that she did not own the business, and previously answered affirmatively when she was asked if she was the

business owner because the business was named after her, not because she had any actual investment or involvement in the business.¹

In response, plaintiffs argued that the doctrine of judicial estoppel should be applied to prohibit Dawn from denying ownership of Dawn Marie's Banquet based on assertions made in a separate case that Dawn commenced in May 2009. In that case, a complaint and a motion for a temporary restraining order were filed against plaintiffs, who were defendants in that case. The complaint, which names "Dawn Marie Grady" as the plaintiff and is signed and verified by Dawn, alleged that by preventing Dawn from accessing Dawn Marie's Banquet, plaintiffs in this case "unlawfully" took "an assertive dominance over" her personal property. The complaint further alleged that plaintiffs in this case refused to allow Dawn to enter the property "for the purpose of conducting her catering and banquet business." The complaint also alleged that Dawn was unable to access her corporate books and records. In a motion for a temporary restraining order filed in conjunction with the complaint, Dawn similarly alleged that she "is the owner of Dawn Marie Catering, also located at 3321 East Paris Avenue, Kentwood, Michigan" and that books and records for the business are located on the property. It also specifically stated that Dawn operates Dawn Marie's Banquet. The motion requested a temporary restraining order to prevent plaintiffs in this case from seizing real and personal property from the location and from denying access to Dawn. In that case, the trial court granted the temporary restraining order.

Plaintiffs also argued that the lease, whether signed by Dawn or by Grady on behalf of Dawn Marie's Banquet, should be enforced against Dawn because Grady must be considered her agent. Finally, plaintiffs argued that Dawn would be liable for the reasonable rental value of the property even if there was no written lease because Dawn used the property as part of her business. Dawn maintained that she never signed the lease and could not be bound by it, and further that she did not own Dawn Marie's Banquet and had no involvement in the business. Dawn alleged that plaintiffs were wrongfully attempting to hold her responsible for Grady's debts.

In its written opinion, the trial court first addressed what it referred to as plaintiff's argument that Dawn "is *collaterally* estopped from claiming that she is not bound by the lease because she previously filed a claim seeking an injunction against plaintiff[s] and alleging conversion of her business records and other chattels." (Emphasis added.) The trial court concluded that collateral estoppel did not apply because Dawn's "exact rights and obligations" under the lease were not "actually and necessarily determined in the prior proceeding." Accordingly, the trial court concluded that Dawn was not estopped from arguing that she was not bound by the lease. The trial court went on to conclude that the evidence supported the

¹ Dawn was deposed before the trial in this case, and during her deposition she was asked whether she acknowledged that she owned the business, and she stated: "from my understanding, it was in my name, so yes." Later, she was asked why she thought she owned the business, and she explained she felt like she owned it because the business was named after her, and that she did not actually know anything about the business and that Grady ran the business.

conclusion that Dawn never signed the lease and that her signature was forged. Thus, the trial court concluded that plaintiffs failed to demonstrate that Dawn was bound by the lease, and accordingly, garnishment of Dawn for the rent due pursuant to it was not permissible. The trial court also addressed what it characterized as plaintiffs' second argument, that it should enforce the lease against Dawn regardless of whether she signed it. The trial court found that pursuant to the statute of frauds, MCL 566.132(1)(a), the lease was unenforceable without Dawn's signature because it could not be performed within one year. Consequently, the trial court dismissed plaintiffs' request to garnish Dawn.

After the trial court issued its opinion, plaintiffs filed a motion for reconsideration. In their motion, plaintiffs argued that the trial court failed to address all the facts and legal theories they presented. Specifically, plaintiffs argued that the trial court "misunderstood" their argument about judicial estoppel.² Plaintiffs clarified that they were not arguing that judicial estoppel applied to the signature on the lease itself, but rather that Dawn was judicially estopped from denying ownership of Dawn Marie's Banquet based on her successful assertion of that fact in a different case. Plaintiffs also claimed the trial court failed to address two arguments. First, plaintiffs maintain the trial court failed to address their argument that Dawn is bound by the lease even if she did not sign it because Grady signed it and he was Dawn's agent. Second, the argument that even if the lease is invalid, Dawn, as the owner of the business, is responsible for the fair rental value of the property. The trial court denied plaintiffs' motion for reconsideration without substantive comment.

On appeal, plaintiffs first argue that the trial court erred in failing to invoke the equitable doctrine of judicial estoppel to prohibit Dawn from denying ownership of Dawn Marie's Banquet.

The application of judicial estoppel is an equitable doctrine that we review de novo. *Spohn v Van Dyke Pub Sch*, __ Mich App __; __ NW2d __ (2012), slip op at 5. We review a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. *Chelsea Investment Group LLC v City of Chelsea*, 288 Mich App 239, 250; 792 NW2d 781 (2010). "A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 251. We give the trial court's findings of fact "great deference because it is in a better position to examine the facts." *Id.*

The equitable doctrine of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (quotation and citation omitted). Judicial estoppel is sometimes described as "the doctrine against the assertion of inconsistent positions" and is "widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play 'fast and loose' with the

² During the trial, plaintiffs referred only to the "concept of estoppel," and did not specifically state that they were asking the trial court to apply judicial estoppel. However, plaintiffs' trial brief specifically mentions judicial estoppel, as did their motion for reconsideration. Accordingly, the issue was properly raised before the trial court.

legal system.” *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994), quoting Bigelow, Estoppel (6th ed), p 783.

Applicable in this case, the “prior success model” of judicial estoppel prevents “a party who has *successfully* and unequivocally asserted a position in a prior proceeding . . . from asserting an inconsistent position in a subsequent proceeding.” *Spohn*, __ Mich App at __ (slip op at 5) (quotations omitted, emphasis in original), citing *Paschke*, 445 Mich at 509. Accordingly, mere assertion of inconsistent positions is not sufficient to invoke estoppel. *Id.* Some indication that the court in the earlier proceeding actually accepted the asserted position as true is also necessary before judicial estoppel is properly applied. *Id.* However, it is not necessary for the party against whom the doctrine is invoked to have prevailed on the merits. *Id.* at slip op at 6. Moreover, the claims must be “wholly inconsistent” in order for the doctrine of judicial estoppel to apply. *Id.*

Accordingly, the basic predicates for the application of the doctrine of judicial estoppel are present in this case. The complaint and motion for a temporary restraining order filed in 2009 unequivocally assert that Dawn owns Dawn Marie’s Banquet, and that she operated the business. This position is wholly inconsistent with her claim in this case that she does not own the business and has never had any involvement in its operation. Further, the inconsistent assertions made in 2009 were successful because the trial court granted the temporary restraining order, and would not have done so unless is accepted those assertions as true.

Nevertheless, technical satisfaction of the elements of judicial estoppel does not mandate the application of the doctrine. Judicial estoppel is “an equitable doctrine invoked by a court at its discretion” because its purpose is to “protect the integrity of the judicial process.” *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999) (citation and quotation omitted). Accordingly, the doctrine of judicial estoppel “should be applied with caution to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement.” *Spohn*, __ Mich App at __ (slip op at 5) (quotation and citation omitted). Judicial estoppel is an “extraordinary remedy to be invoked when a party’s inconsistent behavior will otherwise result in a miscarriage of justice,” the doctrine “is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims.” *Opland*, 234 Mich App at 364 (citation and quotation omitted).

Here it is clear that the trial court failed to comprehend that the issue presented was one of judicial estoppel, not collateral estoppel, which are significantly different equitable principles.³ It is also clear from the trial court’s analysis that it was applying collateral estoppel,

³ Judicial estoppel bars a party who prevailed on a position in one proceeding from asserting a wholly inconsistent position in a subsequent proceeding. *Wolverine Power Coop v DEQ*, 285 Mich App at 548, 566-567; 777 NW2d 1 (2009). Collateral estoppel bars the relitigation of issues previously addressed, and applies when “(1) a question of fact essential to the judgment [was] actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there [is] mutuality of

not judicial estoppel. Ordinarily, this type of error would require remand with directions to address and apply the actual legal principle raised, particularly in a case such as this where the factual predicate for application of the legal principle arguably has been established by the evidence in the case, as previously discussed.

However, judicial estoppel is an equitable principle that we review de novo. *Spohn*, ___ Mich App at ___ (slip op at 5). In this case, we note that the trial court found Dawn's signature was forged on the lease. In light of Dawn's specific testimony that she never signed the lease, and that her name was misspelled as signed on the lease, this finding was not clearly erroneous.⁴ Because of this forgery, on de novo review of the issue whether judicial estoppel should be applied in this case, we conclude that it should not. Rather, we find that the entire circumstances surrounding the rental of this property and who may or may not be liable for rent must be determined without reliance on the application of judicial estoppel. To invoke judicial estoppel under circumstances where there is evidence of the kind of wrongdoing present in this case, in our judgment, would undermine, rather than protect, the integrity of the judicial process. See *Opland*, 234 Mich App at 364-365. Accordingly, we find that the trial court's failure to consider and apply judicial estoppel does not constitute error requiring reversal or remand.

Plaintiffs also argue on appeal that the lease should be binding on Dawn regardless of whether she actually signed it. Plaintiffs theorize that Grady must have signed Dawn's name on the lease, and that she should be bound based on an agency theory because she is the owner of the business and Grady, who she admits was managing the business, is her implied agent. This argument requires the assumption that Dawn is the owner of the business. On review of the entire record, we find no evidence independent of the evidence related to the previous litigation that plaintiffs claim should be a basis for the application of judicial estoppel to support plaintiffs' assertion that Dawn owns the business. While the evidence regarding the previous litigation may be used to impeach Dawn's credibility in this case, it does not affirmatively establish that Dawn owned the business without the application of judicial estoppel. Rather, Dawn's testimony in this case was that she did not own the business, and had no involvement in its operation. Accordingly, because we decline to apply the doctrine of judicial estoppel to bar Dawn from denying ownership of the business in this case, plaintiffs' argument regarding agency has no merit because the record does not support the conclusion that Dawn is or ever was the owner of Dawn Marie's Banquet.⁵

Plaintiffs' final argument, that Dawn must pay the reasonable rental value for the property regardless of whether she signed the lease because she made use of the property, similarly relies on the premise that Dawn is the owner and operator of Dawn Marie's Banquet. However, this factual premise is not supported by the record in this case without the application

estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (internal quotation and citation omitted).

⁴ Moreover, we note that plaintiffs do not argue on appeal that the trial court clearly erred in determining that Dawn's signature on the lease was forged.

⁵ We further note that this argument assumes that Grady signed Dawn's name on the lease, a fact that was never established in the trial court and for which the record contains no evidence.

of judicial estoppel. Because we determined that judicial estoppel should not be applied under the circumstances of this case, plaintiffs' argument has no merit.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens