

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13772
Non-Argument Calendar

D.C. Docket No. 1:18-cv-21028-KMW

MIMI KORMAN,

Plaintiff - Appellant,

versus

JULIO IGLESIAS,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(June 20, 2019)

Before MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

This is not the first lawsuit that Mimi Korman has filed against Julio Iglesias over his 1978 song “Me Olvidé de Vivir.”

In 1990, Korman’s first federal suit sought damages in tort for Iglesias’s theft of the song. She alleged that she co-authored with the song with him but he never paid her share of the royalties from it. In that litigation, Korman gave a deposition detailing the collaborative process by which she and Iglesias had co-written the song, as well as a sworn affidavit to that effect. The district court accepted as true Korman’s assertion of co-authorship but rejected her tort claims as time-barred by the statute of limitations. *Korman v. Iglesias*, 825 F. Supp. 1010, 1016–17 (S.D. Fla. 1993), *aff’d*, 43 F.3d 678 (11th Cir. 1994) (mem.).

In the present action, a copyright suit,¹ Korman has changed her tune. She now alleges that “Korman alone authored the Work.” Compl. ¶ 11. Following Iglesias’s motion to dismiss, the district court took judicial notice of the court orders and Korman’s deposition and affidavit in the earlier litigation. The court found that judicial estoppel barred her new claim because Korman had previously asserted that she is the co-author, not the sole author, of the song.² Although

¹ The Copyright Act’s three-year statute of limitations restarts each time a work is republished. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014) (citing 17 U.S.C. § 507(b)).

² These facts matter because the Copyright Act considers a “joint work” an inseparable “unitary whole,” 17 U.S.C. § 101, and authors of a joint work “are coowners of copyright in the work,” *id.* § 201(a). Each joint author therefore “automatically acquires an undivided ownership in the entire work.” 1 *Nimmer on Copyright* § 6.03 (2018). As a result, “an action for infringement

Korman responded that her earlier position was a mistake based on Iglesias's fraudulent representations and her counsel's advice, the district court dismissed the copyright claim with prejudice.³

We review a district court's decision to apply judicial estoppel for an abuse of discretion. *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 n.4 (11th Cir. 2017) (en banc). Judicial estoppel is an equitable doctrine intended to protect the integrity of the courts from "parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment." *Id.* at 1176. The rule of judicial estoppel is that, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Judicial estoppel may be applied when the plaintiff "took a position under oath in the [prior] proceeding that was inconsistent with the plaintiff's pursuit of the [present] lawsuit" and she thus "intended to make a mockery of the judicial system." *Slater*, 871 F.3d at 1180. We typically also consider whether the inconsistency is clear, whether the party had

between joint owners will not lie because an individual cannot infringe his own copyright." *Weissmann v. Freeman*, 868 F.2d 1313, 1318 (2d Cir. 1989).

³ Korman also alleged a claim under the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*, which the district court dismissed without prejudice. Korman has filed this appeal rather than amending her complaint, and she raises no FDUTPA issues on appeal.

success in persuading the earlier court to accept the position, and whether an unfair advantage or detriment would accrue in the present litigation if not estopped. *Id.* at 1181 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).

Korman challenges the application of judicial estoppel to her copyright claim on three main grounds. First, she argues that a court may not make a finding of intent “to make a mockery of the judicial system” without discovery, citing various nonprecedential decisions. We disagree. Though there may be instances in which the plaintiff’s intent is not clear from the pleadings, this is not one of them. The clear assertion of sole authorship on the face of Korman’s complaint, in light of her previous allegations, is the epitome of “‘the old sporting theory of justice’ or the use of the federal courts as a forum for testing alternate legal theories *seriatim*.” *Fla. Evergreen Foliage v. E.I. DuPont de Nemours & Co.*, 470 F.3d 1036, 1042 (11th Cir. 2006). Her affirmative change of position plainly reflects “cold manipulation and not an unthinking or confused blunder.” *Slater*, 871 F.3d at 1181 (quoting *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973)).

Second, Korman argues that considering her 1992 deposition and 1993 affidavit was improper without converting Iglesias’s motion to dismiss into a motion for summary judgment and entering those documents into evidence. *See* Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) . . . matters outside the

pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”) We disagree. Our Court has articulated an exception to Rule 12(d)’s conversion provision when considering materials attached to a motion to dismiss that are both central to the plaintiff’s claim and undisputed. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Korman’s earlier statements on the subject of the authorship of the song are certainly central here, and neither party disputes the authenticity of her deposition and affidavit. Their consideration was thus within the discretion of the district court.

Third, Korman argues that her prior statements of co-authorship are not materially or legally inconsistent, because they were the result of Iglesias’s fraudulent inducements. Again, we disagree. Whatever promises Iglesias may have made to Korman to induce her to work on the song, her 1992 deposition consistently portrays a collaborative co-writing process. That testimony is plainly and pervasively inconsistent with Korman’s present claim of sole authorship. As she testified, that process began with Iglesias giving Korman handwritten notes of his early ideas for the song; the two then met together at least eight times to work on the lyrics; and the final lyrics involved further changes to what Korman had felt was her final contribution. Korman even spent a significant portion of the deposition going through the song line by line, identifying which specific lyrics

were hers and which were Iglesias's. Similarly, Korman's 1993 affidavit avers under oath that "Mr. Iglesias and I worked together for about two weeks and both contributed to the adaptation. . . . There is no question that I am a co-author of this song along with Mr. Iglesias." Although Korman now asserts that she claimed that she and Iglesias were co-authors only because Iglesias said they were, the substance of her testimony does not support her new claim of sole authorship. The district court reasonably rejected Korman's attempts to harmonize her previous position on the song with her present one.

In sum, the district court did not abuse its discretion when it invoked the flexible, equitable doctrine of judicial estoppel here. "Equity eschews mechanical rules' and 'depends on flexibility.'" *Slater*, 871 F.3d at 1187 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)). We affirm the district court's consideration of "all facts and circumstances in evaluating the plaintiff's intent," *id.*, as well as its exercise of its discretion in defense of the integrity of the judicial process. Korman's current position is clearly inconsistent with her earlier one, which was fully accepted by the 1990s district court. Although that acceptance did not result in success for Korman, allowing her to proceed with her new position would still create the perception that the first court was misled. Allowing Korman's new position would also give her an unfair advantage, granting her a second chance to litigate a timeworn claim. *See generally New Hampshire*, 532 U.S. at 750–51. The

district court was entitled to defend itself against Korman's attempt to circumvent the time bar by asserting diametrically opposed facts. The balance of equities here favors barring Korman's present complaint in order to "protect the judiciary, as an institution, from the perversion of judicial machinery." *See Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982).

Finally, we note that Iglesias has moved for the sanction of attorney's fees. *See Fed. R. App. P. 38* ("If a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee."). Although we find reasonable the district court's conclusion that Korman intended to make a mockery of the judicial system, we do not find Korman's appeal of that decision patently frivolous.

Accordingly, we **AFFIRM** the dismissal with prejudice of Korman's copyright claim, and we **DENY** Iglesias's Rule 38 motion for attorney's fees.