IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MANUEL ANTONIO SALAZAR-ABREU
AND GLADYS MARIA SALAZAR,

Appellants,

v. Case No. 5D17-2135

WALT DISNEY PARKS AND RESORTS U.S., INC.,

Appellee.

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Opinion filed December 28, 2018

Appeal from the Circuit Court
for Orange County,
Bob Leblanc, Judge.

Sonia Roca, of Lopez Roca, P.A., Miami, for Appellants.

Angela C. Flowers, of Kubicki Draper, Ocala, for Appellee.

PER CURIAM.

Manuel Antonio Salazar-Abreu and Gladys Maria Salazar (Appellants) appeal the final summary judgment entered in favor of Walt Disney Parks and Resorts U.S., Inc. (Disney) based on judicial estoppel. Appellants argue, inter alia, that the trial court improperly applied the standard adopted by the United States Court of Appeals for the Eleventh Circuit rather than the Florida standard for judicial estoppel when ruling on

Disney's motion for summary judgment and thus, erred in denying their motion for rehearing on the matter. We agree and reverse.

Appellants filed their negligence and loss of consortium claims against Disney for a slip and fall in the Epcot Center parking lot while Manuel had a preexisting Chapter 13 bankruptcy petition pending before the United States Bankruptcy Court for the Southern District of Florida. Disney was not a party in Manuel's bankruptcy case.

It is undisputed that Manuel failed to disclose the existence of his claim against Disney to the bankruptcy court. A debtor in bankruptcy has a continuing duty to disclose assets, including new causes of action, to the bankruptcy court after the petition is filed. 11 U.S.C. § 521(a)(1)(B)(i); Allen v. C & H Distribs., LLC, 813 F.3d 566, 573 (5th Cir. 2015) (citing Flugence v. Axis Surplus Ins. Co. (In re Flugence), 738 F.3d 126, 129 (5th Cir. 2013)); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 785 (9th Cir. 2001) (citing In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999)). The bankruptcy court confirmed a Chapter 13 plan, but it later dismissed the bankruptcy case without discharge upon motion by the trustee due to Manuel's failure to make payments under the plan. The dismissal without discharge essentially returned the parties to the bankruptcy case to the positions they had occupied before the bankruptcy petition was filed. See 11 U.S.C. § 349(b); In re Lopez, 897 F.3d 663, 670 (5th Cir. 2018) (quoting In re Oparaji, 698 F.3d 231, 238 (5th Cir. 2012)). Based on Manuel's failure to disclose the lawsuit as a potential asset in the bankruptcy proceedings, Disney moved for summary judgment relying on a theory of judicial estoppel.

"Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial,

proceedings." Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001) (quoting Smith v. Avatar Props., Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)); accord Mid-Continent Cas. Co. v. R.W. Jones Constr., Inc., 227 So. 3d 785, 788 (Fla. 5th DCA 2017). The doctrine "protects the integrity of the judicial process and 'prevents parties from "making a mockery of justice by inconsistent pleadings," and "playing fast and loose with the courts."'" Grau v. Provident Life & Accident Ins. Co., 899 So. 2d 396, 400 (Fla. 4th DCA 2005) (citations omitted) (reversing trial court's use of judicial estoppel in breach of contract case against disability insurer where debtor disclosed disability insurance policy in bankruptcy case but valued it at zero as he was unsure if he was disabled at that time (citing Blumberg, 790 So. 2d at 1066)).[1]

In Florida, judicial estoppel encompasses the following four elements:

> [1] A claim or position successfully maintained in a former action or judicial proceeding [2] bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, [3] to the prejudice of the adverse party,[2] [4] where the parties are the same in both actions, subject to the "special fairness and policy considerations" exception to the mutuality of parties requirement.

Grau, 899 So. 2d at 400 (original footnote omitted) (citing Blumberg, 790 So. 2d at 1066); accord Town of Ponce Inlet v. Pacetta, LLC, 226 So. 3d 303, 312 (Fla. 5th DCA 2017)

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[1] The "mockery of justice" language was taken from an Eleventh Circuit case, American National Bank v. Federal Deposit Insurance Corp., 710 F.2d 1528, 1536 (11th Cir. 1983), but it was not incorporated into the Florida rule. Grau, 899 So. 2d at 400 (quoting Blumberg, 790 So. 2d at 1066).

[2] Prejudice "occurs when 'the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.'" Grau, 899 So. 2d at 400 n.3 (quoting New Hampshire v. Maine, 532 U.S. 742, 751 (2001)).

(quoting In re Adoption of D.P.P., 158 So. 3d 633, 639 (Fla. 5th DCA 2014)); HFC Collection Ctr., Inc. v. Alexander, 190 So. 3d 1114, 1117-18 (Fla. 5th DCA 2016) (quoting Leitman v. Boone, 439 So. 2d 318, 322 (Fla. 3d DCA 1983)). Stated differently, Florida's rule is that "[j]udicial estoppel applies when a party in a current proceeding has successfully maintained an inconsistent position in a prior proceeding to the prejudice of the adverse party in the current proceeding." Landmark Funding, Inc. ex rel. Naples Syndications, LLC v. Chaluts, 213 So. 3d 1078, 1080 (Fla. 2d DCA 2017) (citing Blumberg, 790 So. 2d at 1066). This requires "not only a showing of inconsistent statements, but also the identity of parties (or an exception to that requirement), the successful maintenance of the inconsistent position, and prejudice." Id. Judicial estoppel does not apply when "both parties are equally in possession of all the facts pertaining to the matter relied on as an estoppel; where the conduct relied on to create the estoppel was caused by the act of the party claiming the estoppel, or where the positions taken involved solely a question of law." Blumberg, 790 So. 2d at 1066 (quoting Chase & Co. v. Little, 156 So. 609, 610 (Fla. 1934)).

While Florida courts cite federal cases on judicial estoppel, the factors of judicial estoppel in federal courts are not the same as in Florida. The United States Supreme Court has recognized that "this estoppel doctrine is equitable and thus cannot be reduced to a precise formula or test," but it has listed factors that guide its application. See Zedner v. United States, 547 U.S. 489, 504 (2006) (quoting New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001)). It listed these factors as follows:

> [S]everal factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in

> persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled[.]" Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire, 532 U.S. at 750-51 (citations omitted). The Supreme Court further stated that "[i]n enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." Id. at 751. It noted that "[a]dditional considerations may inform the doctrine's application in specific factual contexts." Id. One of those additional considerations can be whether "a party's prior position was based on inadvertence or mistake." Id. (citing John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 29 (4th Cir. 1995)). Notably, the United States Supreme Court's factors in New Hampshire differ from Florida's rule in that there is no mutuality factor. Compare New Hampshire, 532 U.S. at 750-51, with Grau, 899 So. 2d at 400 (citing Blumberg, 790 So. 2d at 1066).

The United States Circuit Courts of Appeals for the First, Second, Seventh, Eighth, Ninth, and Tenth Circuits essentially adhere to the factors enumerated in New Hampshire. See Sexual Minorities Uganda v. Lively, 899 F.3d 24, 32-33 (1st Cir. 2018); Clark v. AII Acquisition, LLC, 886 F.3d 261, 266-67 (2d Cir. 2018); Ah Quin v. Cty. of Kauai Dep't of Transp., 733 F.3d 267, 271, 277 (9th Cir. 2013); Grochocinski v. Mayer Brown Rowe & Maw, LLP, 719 F.3d 785, 795 (7th Cir. 2013); Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156-57 (10th Cir. 2007); Stallings v. Hussmann Corp., 447 F.3d 1041, 1047 (8th Cir. 2006); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 783 (9th Cir. 2001).

However, the United States Circuit Courts of Appeals for the Third, Fourth, Fifth, Sixth, and Eleventh Circuits do not. Relevant to this case is the test articulated by the Eleventh Circuit.

The Eleventh Circuit declined to adopt the New Hampshire factors in cases where there is no mutuality of parties. See Slater v. U.S. Steel Corp., 871 F.3d 1174, 1182 (11th Cir. 2017) (en banc). Instead, it reaffirmed a test for judicial estoppel that has two factors, namely: "whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were 'calculated to make a mockery of the judicial system.'" Id. at 1181 (quoting Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002)). The first factor relates to the plaintiff's actions while the second factor relates to his motives. Id. Inadvertence or mistake does not rise to the level of intent to make a mockery of justice as that factor "looks towards cold manipulation and not an unthinking or confused blunder." Id. (quoting Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973)).

Here, the trial court determined that Appellants "made inconsistent statements under oath in two different proceedings" and that "these inconsistent statements were calculated to make a mockery of the judicial system." This is the Eleventh Circuit rule. See Slater, 871 F.3d at 1181-82. The Eleventh Circuit rule differs from the Florida rule because it does not consider whether the inconsistent claim was successfully asserted in the prior action, whether there was prejudice to the opposing party, or whether there was mutuality of the parties subject to the special fairness and policy considerations exception. Compare id., with Grau, 899 So. 2d at 400 (citing Blumberg, 790 So. 2d at 1066). Because the federal Eleventh Circuit rule for judicial estoppel is not the same as the

Florida rule, and because every element of the Florida rule must be applied, this was error. See Anfriany v. Deutsche Bank Nat'l Tr. Co. for Registered Holders of Argent Sec., Inc., Asset-Backed Pass-Through Certificates, Series 2005-W4, 232 So. 3d 425, 429 (Fla. 4th DCA 2017).

Accordingly, we reverse the final summary judgment entered by the trial court and remand for rehearing utilizing the correct standard. See id. (reversing for applying federal rule rather than Florida rule on judicial estoppel).

REVERSED AND REMANDED.

TORPY, BERGER and WALLIS, JJ., concur.