STATE OF MICHIGAN

COURT OF APPEALS

SUSAN A. SNYDER,

Plaintiff-Appellant,

v

BERNARD F. FINN and SINAS, DRAMIS, BRAKE, BOUGHTON, McINTYRE & REISIG, P.C.,

Defendants-Appellees.

UNPUBLISHED
March 17, 1998

No. 194648
Ingham Circuit Court
LC No. 95-079892-NM

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

Plaintiff appeals by right from an order granting summary disposition to defendants under MCR 2.116(C)(7) and (10) on the basis of judicial estoppel. We affirm.

Defendants represented plaintiff in a divorce action in 1992 which was resolved by a consent agreement. Plaintiff subsequently brought a legal malpractice action against defendants as a result of that representation. Specifically, plaintiff alleged that defendant Finn (defendant) had breached professional duties owed to her in that he, inter alia, failed to negotiate a fair and equitable property settlement in the divorce case, largely through his failure to ascertain, through formal discovery or otherwise, the extent and value of the assets of the divorcing parties.[1] In support of their motion for summary disposition, defendants contended solely that the doctrine of judicial estoppel barred plaintiff's malpractice claim. Defendants specifically argued that plaintiff had successfully taken a position in a previous proceeding (i.e., the divorce hearing) inconsistent with her instant allegation that the result of defendant Finn's efforts was in fact an unfair settlement.

Plaintiff testified at the underlying divorce settlement hearing that she understood that the consent judgment itself contained language indicating it to be a fair judgment, that she herself believed that the judgment represented a fair disposition of the divorce action, and that she was aware that further discovery of marital assets could be had, but that she did not want to proceed with further discovery. Plaintiff responded appropriately at the hearing in the underlying action, acknowledged that she had

gone over six or seven drafts of the agreement with her attorney, and agreed that her former spouse would receive the corporate and partnership assets, including Mooney Oil Corporation, along with the stocks, mutual funds and bonds. Plaintiff suggested at the hearing that she wanted to get the divorce over with and indicated that she considered the matter extremely private.[2] Based upon plaintiff's sworn averments, the trial court approved the property settlement and entered a judgment of divorce.

After the entry of the judgment of divorce, plaintiff alleged that she discovered that the marital estate was many multiples of what she had believed it to be at the time of the property settlement. Accordingly, plaintiff has now sued her prior lawyer for malpractice for failing to effectively investigate and negotiate a fair and equitable property settlement. Significantly, plaintiff has averred in deposition and by affidavit that she has no recollection of the events proceeding entry of the divorce judgment. Therefore, she cannot factually challenge the testimony of the defendant concerning the counsel he gave her on whether to accept the property settlement.

The dispositive issue before us is whether plaintiff, having sworn under oath that she understood the terms of the property agreement and her right to further discovery, and that she accepted the agreement as a fair one, is judicially estopped from abandoning this position in her subsequent malpractice lawsuit against her lawyer. We conclude that she is.

As our Supreme Court recently stated, judicial estoppel is a doctrine designed to protect the judicial process itself by precluding litigants from abusing that process by successfully asserting under oath one position and abandoning it in another proceeding. *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). The elements of judicial estoppel are: (1) the successful assertion of a position in one proceeding; and (2) the wholly inconsistent assertion of another position in a different proceeding. *Id.*

Defendant has fully demonstrated on this record that both elements of judicial estoppel have been met. The critical fact in this case is that, by law, no agreement between the parties could become effective without judicial approval. Plaintiff's testimony was an essential step in obtaining that judicial approval. Accordingly, we affirm the trial court's dismissal of plaintiff's action on judicial estoppel grounds.

Plaintiff argues that the trial court erred in denying plaintiff the opportunity to amend her complaint. However, plaintiff's motion to amend her complaint was never heard by the trial court prior to the summary disposition hearing. Therefore, this issue has not been preserved for appeal. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). The record reveals that plaintiff's motion was made and noticed for hearing for a time *after* the summary disposition motion hearing. Plaintiff not only failed to request that the trial court delay the summary disposition hearing until the court could hear and rule on plaintiff's amendment motion, but plaintiff's written motion specifically sought otherwise, i.e., that "Defendants' Motion for Summary Disposition should be denied [and, i]n addition, Plaintiff's *upcoming* (April 1, 1996 at 3:00 p.m.) Motion To Amend should be granted."

Furthermore, to the extent plaintiff implies that she was unable to preserve this issue owing to the "short shrift" her counsel received at the summary disposition motion hearing, such is not supported

by the record. While the trial court at one point did make an extremely brief comment in passing that it had other litigants waiting to be heard, there is no indication that either party was rushed or precluded from making any record they wished to make.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] Plaintiff states in her brief on appeal, without any citation to the record, that, after a ten-year marriage, she received a property settlement of approximately $400,000 from an alleged $8,750,000 marital estate.

[2] Plaintiff gave the following testimony, in relevant part, in the prior proceeding:

> *Q.* Now, you and I along with Mr. Lapka, Mr. Woodworth and any number of other individuals and Mr. Mooney have gotten together to work out the contents of the [j]udgment of [d]ivorce, isn't that true?
>
> *A.* True.
>
> *Q.* The fact of the matter is that this judgment of divorce has gone through perhaps six or seven drafts at least, isn't that right?
>
> *A.* True.
>
> *Q.* And you and I have gone over each and every one of those drafts as they have been prepared there?
>
> *A.* True.
>
> *Q.* We made modifications and changes, and there's been accommodations made on both sides, isn't it true?
>
> *A.* True.
>
> *Q.* The [j]udgment of [d]ivorce that has been approved – has been presented to the judge for approval. Is this the judgment that you wish the Court to enter today?
>
> *A.* Yes.

* * *

Q. Do you understand that it's represented at the end of this judgment that this is a fair and appropriate, complete [j]udgment of [d]ivorce? You understand that?

A. True.

Q. Do you understand that you believe that it is a fair disposition of this case under all of the circumstances?

A. True.

Q. Is there anything that you would wish to communicate to me or to the Court about the contents of the judgment?

A. No.

* * *

Q. Now one other thing, Mrs. Mooney. We have in this case taken many depositions. We have engaged in numerous avenues of discovery, interrogatories back and forth, taken your husband's deposition I think at least twice, taken doctor's deposition, financial advisor's depositions.

You understand that if you wish, we could continue to take additional discovery and do additional things in the effort to try and discover assets that your husband may own? You understand that?

A. True.

Q. You've decided to settle this matter without proceeding further with that discovery, is that true?

A. True.