IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

LARRY D. LARSEN, Appellant, v. JOSEPH D. BURZOTTA and "JANE DOE" BURZOTTA, husband and wife, Respondents.	)	No. 67447-1-I DIVISION ONE UNPUBLISHED OPINION FILED: August 6, 2012

Spearman, A.C.J. — Larry Larsen failed to disclose in chapter 7 bankruptcy proceedings his personal injury claim against Joseph Burzotta. Because a debtor who fails to disclose a potential personal injury claim in bankruptcy schedules is judicially estopped from later bringing the claim, the trial court properly dismissed the case. We affirm.

FACTS

Larry Larsen was rear-ended by Joseph Burzotta while in his car stopped for traffic on about October 30, 2007. Larsen experienced neck, back and shoulder pain the day of the accident. Three months later, on January 30, 2008, Larsen filed for chapter 7 bankruptcy. In his bankruptcy petition, Larsen did not disclose his potential personal injury claim. On May 7, 2008, Larsen's bankruptcy was discharged.

On October 20, 2010, Larsen filed a lawsuit against Burzotta. On May 19, 2011, Burzotta moved for summary judgment on grounds that judicial estoppel barred

Larsen's lawsuit. Only after Burzotta moved for summary judgment did Larsen seek to reopen his bankruptcy case and amend his schedule to disclose his personal injury claim to the bankruptcy court.

On June 20, 2011, the trial court granted Burzotta's motion for summary judgment based on judicial estoppel. On June 29, 2011, the bankruptcy court granted the motion to reopen the bankruptcy. On June 30, 2011, Larsen filed a motion for reconsideration, and the trial court denied the motion. The bankruptcy trustee has not been substituted in as the real party in interest in this lawsuit. Larsen appeals.

DISCUSSION

Larsen argues the trial court erroneously applied judicial estoppel. We disagree and affirm.

We review a trial court's decision regarding the application of judicial estoppel for an abuse of discretion. Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). An abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The leading case in Washington regarding application of judicial estoppel in the context of bankruptcy proceedings is Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 537,160 P.3d 13 (2007). In Arkison, the plaintiff was injured by employees of Ethan Allen. After her injury, the plaintiff filed for chapter 7 bankruptcy, but failed to disclose her potential claim as an asset. Id. The plaintiff filed suit against Ethan Allen, but not until after her debts were discharged in the bankruptcy proceeding. Id. The bankruptcy

trustee was notified of the suit, moved to reopen the bankruptcy, and moved the trial court to be substituted as the real party in interest. Id. The trial court granted the motion to substitute the bankruptcy trustee as the real party in interest, but also granted Ethan Allen's motion for summary judgment based on judicial estoppel. Id. at 537-38.

In dismissing the case, the trial court relied on Garrett v. Morgan, 127 Wn. App. 375, 112 P.3d 531 (2005). See Arkison, 160 Wn.2d at 538. The Supreme Court overruled Garrett and reversed the trial court, holding that in general, judicial estoppel cannot be applied "to bar a bankruptcy trustee standing as the real party, from pursuing a debtor's legal claim not listed as an asset during bankruptcy proceedings." Id. at 541. The Supreme Court outlined three core factors to guide a trial court's application of judicial estoppel:

> (1) whether 'a party's later position is clearly inconsistent with its earlier position'; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) 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.

Id. at 538-39. (Citations omitted).

Regarding the first factor, Washington law is clear that it is inconsistent to fail to disclose a potential lawsuit in a bankruptcy proceeding, and then attempt to pursue the suit after discharge. See McFarling v. Evaneski, 141 Wn. App. 400, 171 P.3d 497 (2007) (debtor who did not disclose personal injury claim in bankruptcy schedules was judicially estopped from later bringing claim); Skinner v. Holgate, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel imposed against debtor who failed to disclose potential claim to bankruptcy court); Cunningham v. Reliable Concrete Pumping, Inc.,

126 Wn. App. 222, 108 P.3d 147 (2005) (applying judicial estoppel to bar debtor who did not disclose potential cause of action for personal injury in bankruptcy from bringing claim).

Here, Larsen was injured on October 30, 2007 and knew about his injuries. Three months later, on January 30, 2008, Larsen filed his bankruptcy petition and did not disclose any potential claims. On May 7, 2008, Larsen's bankruptcy was discharged. On October 20, 2010, Larsen filed a lawsuit based on the injury he sustained on October 30, 2007. Larsen did not move to have the bankruptcy reopened until after Burzotta filed a motion for summary judgment.

Larsen nevertheless argues his failure to list a personal injury claim in his bankruptcy filing is not inconsistent with his lawsuit against Burzotta, relying heavily upon Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3rd Cir. 1996), a case that was cited by our Supreme Court in Miller v. Campbell, 164 Wn.2d 529, 544, 192 P.3d 352 (2008). But the Supreme Court cited Ryan only for the proposition that "judicial estoppel protects the integrity of the judicial process, not the interest of a defendant attempting to avoid liability." Miller, 164 Wn.2d at 544. The court did not adopt the test used by the Third Circuit in applying judicial estoppel.

Indeed, the test used by the Third Circuit is far different from Washington law, and has never been used here. While Washington law requires "inconsistent positions," the Third Circuit requires that the inconsistent positions be irreconcilably different, that the change of position was done in bad faith, and that the sanction of estoppel is tailored to address the harm and cannot be remedied by a lesser sanction.

See Montrose Med. Group Participating Saving Plan v. Bulger, 243 F.3d 773, 779-80 (3rd Cir. 2001). In short, the Ryan case is not the law in Washington and is thus of no help to Larsen.

Larsen also argues that his failure to disclose was not inconsistent with the later lawsuit, because it is the result of "unclear, vague, and ambiguous" bankruptcy schedules. App. Br. at 8. But even pro se petitioners have a duty to carefully schedule assets when filing for bankruptcy. See Holgate, 141 Wn. App. at 845, 853. Likewise, we reject Larsen's argument that any failure to disclose was inadvertent. Generally, "intent to mislead is not an element of judicial estoppel," and "'the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge . . . or has no motive for their concealment." Cunningham, 126 Wn. App. at 234. Here, Larsen knew about his neck, back, and shoulder injuries the day of his car was rear-ended while he was stopped. He also had an apparent motive to conceal the claim since it would shield any potential proceeds from his creditors.

Regarding the second Arkison factor, we conclude it is satisfied. "The Bankruptcy Code and court rules 'impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.'" Cunningham, 126 Wn. App. at 230-31 (quoting In re Costal Plains, Inc., 179 F.3d 197, 207-208 (5th Cir. 1999)). As such, "[p]ossible causes of action should be listed, even if the likelihood of success is unknown." Cunningham, 126 Wn. App. at 231. Here, Larsen did not disclose his potential lawsuit, and the bankruptcy court accepted that disclosure and discharged his bankruptcy. See also Baldwin v. Silver, 147 Wn. App. 531, 537, 196

P.3d 170 (2008) ("A bankruptcy court is deemed to have 'accepted' a litigant's inconsistent position when that court discharges the debtor's debt without knowledge of the cause of action").

Larsen contends the third Arkison factor is not satisfied because Burzotta "failed to establish how [Larsen] derived an unfair advantage in this litigation." Appellant's Brief (App. Br.) at 10. This argument misconstrues the law. The third Arkison factor does not require proof that the plaintiff has an advantage in the latter litigation; rather, that factor is satisfied where a debtor gains an advantage at the expense of his creditors by not disclosing assets and then receiving a discharge of his debts. See McFarling, 141 Wn. App. at 404 (plaintiff "gained a benefit at the expense of his creditors when he received a 'no asset' discharge of his debts") (quoting Cummingham, 126 Wn. App. at 231, 233). Larsen also relies on Miller, 164 Wn.2d at 542-43, to claim that he did not derive an unfair advantage. But in Miller, unlike this case, the bankruptcy trustee was the plaintiff. The trustee was not the person who had failed to disclose and the trustee had gained no advantage over creditors. See Miller, 164 Wn.2d at 542. In short, the Arkison factors are satisfied.[1]

[1] Larsen also argues that judicial estoppel should not apply in this matter because certain factors listed in Markley v. Markley, 31 Wn.2d 605, 198 P.2d 486 (1948), are not met. But the Markley factors are not essential to the establishment of judicial estoppel. In Arkison, a case decided nearly 60 years after Markley, the Supreme Court held the factors set forth in Markley were merely "additional considerations" that "may guide a court's decision." Arkison, 160 Wn.2d at 539. In his concurrence, Justice Sanders indicated the Markley factors were "dicta" and were not "requisite ingredients to a trial court's analysis." Id. at 543 (Sanders, J. concurring). Larsen's interpretation of the Markley factors, specifically the factor requiring identity of parties, would mean judicial estoppel could never apply to bar claims undisclosed in bankruptcy. As is described above, this interpretation is at odds with years of case law applying judicial estoppel to bar claims a plaintiff failed to disclose during bankruptcy proceedings. We reject Larsen's arguments on this issue.

Finally, Larsen assigns error to the trial court's decision to grant summary judgment even though his bankruptcy case was reopened. Larsen fails to provide any argument or authority regarding this assignment of error, however, and as such, we need not address it. Ang v. Martin, 154 Wn.2d 477, 487, 114 P.3d 637 (2005); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a). But even if we reviewed the issue, Larsen's argument would fail. Indeed, this argument was considered and rejected in the Cunningham case. See Cunningham, 126 Wn. App. at 232-33 (quoting Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784 (9th Cir. 2001)) ("The courts have made clear that the failure to schedule claims about which the debtor had knowledge 'is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated'").

Affirmed.

Specrunny, A.C.J.

WE CONCUR:

Dwyer, J.

Ellington, J.