SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

DON HARTMAN,

Plaintiff,

- against -

ROBERT H. HARRIS,

Defendant.

TRIAL/IAS PART 20
NASSAU COUNTY

INDEX NO. 14773/04

X X X

MOTION SUBMISSION
DATE: 4/16/08

MOTION SEQUENCE
NO. 8

The following papers read on this motion:

Order to Show Cause and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	N/A

The defendant, Robert H. Harris, (hereinafter referred to as "Harris"), moves for an order pursuant to CPLR §2221(d) granting Harris leave to reargue his prior cross-motion submitted March 14, 2008, and this Court's Short Order Form Order dated April 2, 2008, "*only to the extent that the said order did not address and rule on the relief sought by defendant's cross-motion that plaintiff's complaint and all causes of action pled are barred by the doctrine of estoppel*" (emphasis added). The moving defendant requested a stay of the trial of the within action until the hearing and determination of this motion. The parties consented to a stay of the trial, and by way of Order to Show Cause, on April 9, 2008, the trial in this matter was stayed. The plaintiff, Don Hartman, (hereinafter referred to as "Hartman"), submits opposition. The defendant, Harris, submits a reply affirmation.

As this Court's prior Short Order From Order dated April 2, 2008 did not address that branch of the defendant's prior cross-motion submitted March 14, 2008 requesting an order dismissing plaintiff's claim on the ground of estoppel, the instant motion to renew is granted.

This court will now address the defendant's contention that the plaintiff's action herein is barred by the doctrine of estoppel.

BACKGROUND

The plaintiff, Hartman, claims that he loaned the defendant, Harris, the amount of $300,000.00 in June, 1987. The plaintiff alleges that the loan was extended to the defendant and his then wife in order to enable them to purchase a residence. The plaintiff submits that the defendant agreed to repay the loan upon the sale of the residence. The defendant eventually sold the subject residence in September of 2003. Plaintiff claims that the defendant did not repay the loan and the loan remains outstanding. The defendant does not dispute the loan. The defendant claims that the loan, plus interest, was paid in mid-June of 1987.

The defendant claims that plaintiff's action is barred by estoppel, and invokes the doctrine of judicial estoppel. The defendant refers to plaintiff's prior sworn affidavit, *to wit*, plaintiff's sworn net worth statement submitted in plaintiff's matrimonial action. There, in the "Family Law Financial Affidavit" submitted to the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, under "Assets and Liabilities", in the category for "money owed to you (not evidenced by a note), the plaintiff left such amount blank. However, the plaintiff provides, under "Liabilities/Debts", that he owes Harris the amount of $35,000.00. Therefore, the plaintiff, by way of a sworn statement thereto, sworn and signed on May 8, 2000, averred that no one, including the defendant, Harris, owed him any money. Rather, the plaintiff averred that the plaintiff was indebted to the defendant, Harris, in the sum of $35,000.00.

The defendant also refers to Hartman's affidavit sworn to on March 17, 2004 in a prior lawsuit in Supreme Court, Nassau County, bearing Index Number 2561/04 entitled *1015 Broadway, Inc. v. Robert H. Harris*. The defendant points out that Hartman averred that the defendant, Harris, owes Hartman a balance of approximately $50,000.00 for valuables he had purchased and $40,000.00 for jewelry for which he has acknowledged receipt, but no payment. The defendant submits that Hartman again, by sworn affidavit to the Court, had not mentioned the alleged $300,000.00 loan or balance owed to Hartman by Harris.

Discussion

It is well settled that the doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed. (*Festinger v. Edrich*, 32 AD3d 412, citing *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435; *Kimco of NY v. Devon*, 163 AD2d 573, and *Environmental Concern v. Larchwood Constr. Corp.*, 101 AD2d 591). "The doctrine rests upon the principle that a litigant should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise". (*Environmental Concern v. Larchwood Constr. Corp., supra*, quoting Note, The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings, 59 Harv. Law Rev. 1132). The doctrine is invoked to estop parties from adopting contrary positions because the judicial system "cannot tolerate this 'playing "fast and loose with the courts".' (*Id.*, citing *Scarano v. Central Ry Co.*, 203 F2d 510).

The plaintiff, Hartman, does not refute the fact that he did not disclose the alleged debt owed to him from Harris, the subject $300,000.00 loan, in his net worth statement provided to the Florida

Court in his divorce proceedings. The plaintiff, in opposition, and upon the record herein, does not provide any explanation whatsoever for his inconsistent statements, *to wit*, plaintiff's prior sworn statement that no monies were owed to him, (yet he owed Harris monies), and plaintiff's sworn statement in the instant action that Harris owes him $300,000.00. Rather, plaintiff's counsel provides, in opposition the instant motion, that "because the divorce was voluntarily settled by an informed stipulation and *both parties agreed to not to publicly 'reveal all' of their assets on financial forms that there was no advantage taken* (emphasis added)". Plaintiff's counsel makes reference to plaintiff's ex-wife's affidavit sworn to on March 12, 2007, submitted by the defendant, whereby Rita Hartman averred that during their divorce, she and her former husband, plaintiff, Hartman, "agreed that some financial form documents that might become public would not reveal all of our assets". The Marital Settlement Agreement submitted by the plaintiff provides that plaintiff's former wife accepted $100.00 a month as alimony "based upon the husband's representation that he is suffering from financial difficulty at the present time".

This Court finds plaintiff counsel's argument that because the divorce was voluntarily settled by an "informed" stipulation, that no advantage was taken, repugnant. The Florida Court accepted a stipulation based upon information intentionally withheld by the plaintiff.

The plaintiff herein is clearly playing fast and loose with the courts. The judicial system cannot tolerate such behavior. The plaintiff obviously made a tactical decision to not disclose the alleged $300,000.00 loan in his sworn affidavit before the Florida Court in his matrimonial action. The fact that plaintiff swore that he himself was indebted to Harris in the sum of $35,000.00 is further illustrative of plaintiff's manipulation of the judicial system as it clearly satisfied plaintiff's then interest by reducing his overall assets and increasing his liabilities.

Plaintiff's counsel also argues that judicial estoppel is inapplicable because the plaintiff did not obtain a favorable *"judgment"* in his marital action as the Florida Court accepted a *"stipulation of settlement"* entered into between the parties, *albeit*, that the stipulation was eventually incorporated into a Final Decree of Divorce. However, as a result of plaintiff's submission to the Florida Court, the plaintiff's then spouse agreed to accept monthly alimony payments in the sum of $100.00 based upon plaintiff's representation that he was suffering from financial difficulty at the time. The plaintiff's argument that he did not obtain a "favorable judgment" is offensive and not persuasive.

In any event, the doctrine of judicial estoppel is not limited to *"judgments"*. The Court in *D&L Holdings, LLC v. RCG Goldman Company, LLC*, 287 AD2d 65, stated that while the doctrine has been said to "preclude a party who assumed a certain position in a prior proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interest have changed", citing *Jones Lang Wootton USA v. LeBouf, Lamb, Green & MacRae*, 243 AD2d 168, "this rule has, properly been applied as well to court rulings that are not denominated as 'judgments'". The policy behind the doctrine of judicial estoppel, *to wit*, to prevent the abuses of the judicial system when a party obtains relief by maintaining one position, and later, in a different action, maintains another position, would not be served by limiting its application to cases where the issue ruled upon was in the context of a "judgment". (*Id.*) Judicial estoppel has been applied in the context in which the plaintiff, in a prior federal criminal prosecution advised the United States District Court that he was '"broke", that he had no money or assets", was estopped from asserting his interest in certain real property. (*Festinger v. Edrich, supra.*) The court in *Festinger v. Edrich* made reference to various scenarios not involving "judgments" where the

doctrine of judicial estoppel was invoked. In *Donovan Leisure Newton & Irvine v. Zion*, 168 AD2d 373, and *Kimco of NY v. Devon, supra*, where the lenient sentence receive constituted a benefit for the purposes of judicial estoppel, and in *Mantia v. Squire*, 289 AD2d 304, where the doctrine was essential to avoid a fraud upon the court and a mockery of the truth seeking function of the court. (*Id.*) It has also been held that a party cannot state one position in his tax return, and thereafter assume a contrary position with respect to a Supreme Court action. (*Mahoney-Buntzman v. Buntzman*, 13 Misc.3d 1216(A)).

Here, the plaintiff is judicially estopped from asserting the instant claim that the defendant is indebted to the plaintiff in the sum of $300,000.00. The doctrine of judicial estoppel has been properly invoked by the defendant herein. It is quite evident that plaintiff's omission of the defendant's alleged debt in his prior matrimonial proceeding served his interests then. In the instant proceeding, the plaintiff is taking a contrary position simply because his interests have changed. The plaintiff will not be permitted to lead a court to find a fact one way, and then contend in another judicial proceeding that the same fact should be found otherwise. (*Environmental Concern v. Larchwood Constr. Corp., supra*). It would be inequitable for this Court to turn a blind eye and deaf ear to plaintiff's prior sworn affidavit where another court accepted the sworn statement to the benefit of the plaintiff. To allow the plaintiff to take a contrary position *sub judice* to further serve his interests would be a gross injustice.

In light of the foregoing, that branch of the defendant's cross-motion precluding plaintiff's action on the grounds of estoppel is granted, and therefore, plaintiff's action is dismissed.

ENTER:

J.S.C.

Dated: June 6, 2008

cc: Law Offices of Michael D. Solomon
Nathaniel M. Swergold, Esq.