

Fennhahn v Brenntag N. Am., Inc.
2019 NY Slip Op 30939(U)
April 1, 2019
Supreme Court, New York County
Docket Number: 190099/2016
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ **PART 13**
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION
MARGOT FENNHahn, Individually and as Personal Representative of the Estate of **STEFAN JOSEPH GLADYSZEWSKI**, Deceased,

INDEX NO. 190099/2016
MOTION DATE 3/13/2019
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

Plaintiff(s),
- against -
BRENNTAG NORTH AMERICA, INC., *et al.*
Defendants.

The following papers, numbered 1 to 5 were read on the Nunc Pro Tunc motion of Margot Fennhahn, Individually and as Personal Representative of the Estate of Stefan Joseph Gladyszewski:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1-3</u>
Answering Affidavits – Exhibits _____	<u>4-5</u>
Replying Affidavits _____	_____

Cross-Motion: Yes No

FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff, Margot Fennhahn, Individually and as Personal Representative of the Estate of Stefan Joseph Gladyszewski's, (hereinafter, "Fennhahn") motion for an order Nunc Pro Tunc pursuant to CPLR § 5015: (1) vacating the No Opposition Summary Judgment Order "So Ordered" on October 19, 2016 (hereinafter, "the NOSJM"); and (2) withdrawing the No Opposition Summary Judgment Motion filed by Kaiser Gypsum Company, Inc. (hereinafter, "Kaiser Gypsum") on October 12, 2016 is denied.

Plaintiff commenced this lawsuit in the Supreme Court of the State of New York, New York County on or around April 8, 2016. Kaiser Gypsum was named as a defendant in this action. On September 30, 2016, Kaiser Gypsum filed a Voluntary Petition for Bankruptcy in the United States District Court for the Western District of North Carolina (Aff. in Supp., Exh. A). A few days later, on October 3, 2016, Kaiser Gypsum submitted a Notice of Suggestion of Pendency of Bankruptcy and Automatic Stay of the Proceedings, notifying the Court and plaintiff of the bankruptcy petition and the automatic stay (Aff. in Supp., Exh. B). Faced with an indefinite stay and the remote possibility that claims against Kaiser Gypsum would not survive the bankruptcy proceedings, plaintiff sent on October 4, 2016, a NOSJM and Order pursuant to CPLR § 3212 with respect to the claims against Kaiser Gypsum. Kaiser Gypsum filed the proposed Order via ECF on October 12, 2016. On October 20, 2016, Kaiser Gypsum sent a letter to the Court requesting that the proposed NOSJM be withdrawn (Aff. in Supp., Exh. C). In this letter, Kaiser Gypsum stated that it wished to withdraw the NOSJM and Order and asked that it not be so-ordered given the bankruptcy proceedings and corresponding automatic stay. On October 19, 2016, prior to receipt of Kaiser Gypsum's letter, the Court "So Ordered" the NOSJM. The "So Ordered" NOSJM was filed by the court via ECF on October 24, 2016 (Aff. in Supp., Exh. D).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

On January 13, 2017, defendant Colgate-Palmolive Company (hereinafter "Colgate") filed and served a letter on the Court requesting the NOSJM Order be vacated (Aff. in Supp., Exh. E). Colgate later filed a motion to vacate the Court's order on March 21, 2017 (Aff. in Supp., Exh. F). In its motion, Colgate argued that the NOSJM Order was null and void because it was "So Ordered" and entered after all pending litigation against Kaiser Gypsum was stayed upon the filing of the petition for bankruptcy, and pursuant to the United States Bankruptcy Code, an automatic stay is effective immediately, without any action by the Bankruptcy Court (see 11 USCA § 362[a][1]). Kaiser Gypsum's filing of the Voluntary Petition for Bankruptcy automatically triggered a stay in the present case on September 30, 2016, and the stay effectively took away the Court's authority to later "So Order" the NOSJM, thereby, rendering the NOSJM and Order null and void. (see Aff. in Supp., Exh. F).

Plaintiff opposed Colgate's motion to vacate the order, arguing that the Court did not have the authority to vacate its order and reinstate the claims against Kaiser Gypsum. The Court denied Colgate's motion to vacate, noting that the automatic stay barred litigation of Colgate's motion to reinstate claims against Kaiser Gypsum (Aff. in Supp., Exh. G).

On August 9, 2018, the bankruptcy court lifted the stay with respect to personal injury claims against Kaiser Gypsum effective October 29, 2018. According to the court's order granting relief from the stay, the automatic stay is lifted with respect to claimants who have executed an Acknowledgment and Release and emailed the release to Kaiser Gypsum's bankruptcy counsel. Plaintiff's counsel executed the Acknowledgement and Release and forwarded it to Kaiser Gypsum's bankruptcy counsel on January 14, 2019 (Aff. in Supp., Exh. H). After the lifting of the stay, plaintiff reexamined her claims against Kaiser Gypsum as well as the NOSJM and Order.

Plaintiff brings this motion for an order nunc pro tunc vacating the NOSJM Order and withdrawing the NOSJM as requested by Kaiser Gypsum in its October 20, 2016 letter to the Court.

In support of its motion, plaintiff argues that the Court did not have the authority to "so order" the NOSJM at issue because there was an automatic stay already in place at the time of the order. This was on account of Kaiser Gypsum's bankruptcy proceeding filed on September 30, 2016 (Aff. in Supp., Exh. A).

In opposition, Kaiser Gypsum argues that this motion should be denied because the plaintiff should be judicially estopped from now arguing the opposite of what it argued in opposing Colgate's motion to vacate the NOSJM.

On January 13, 2017, counsel for Colgate filed and served a letter to the Court and all remaining parties requesting that the Court vacate the NOSJM, again reiterating their argument that the NOSJM should not have been signed due to the stay (Aff. in Opp., Exh. H). In response, plaintiff's counsel submitted a letter to the Court opposing Colgate's request to vacate the Order dismissing claims against Kaiser Gypsum and restating that plaintiff chose to voluntarily dismiss

their claims against Kaiser Gypsum (see plaintiff's correspondence dated January 20, 2017, Aff. in Opp., Exh. I). On March 21, 2017, Colgate filed a motion to vacate the NOSJM (Aff. in Opp., Exh. J). On March 31, 2017 plaintiff filed an affirmation in opposition to Colgate's motion (see Exh. K).

An automatic stay of proceedings is provided for in 11 USC § 362 and it is effective immediately without further filing (see *Carr v McGriff*, 8 SD3d 420, 422 [2d Dept 2014]). This provision provides, in relevant part, that filing bankruptcy provides a stay of "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title ..." (11 USCA § 362).

It should be noted, however, that counsel for plaintiff in this case (Levy Koningsberg LLP), sent an unsolicited, signed No Opposition Summary Judgment Motion Order to Philip O'Rourke (attorney for Kaiser Gypsum) for his signature (Aff. in Opp., Exh. B contains Brendan Robert's email to Mr. O'Rourke dated October 4, 2016 with the attached NOSJM). Counsel for Kaiser Gypsum did not draft the NOSJM Order, nor did it seek a dismissal for Kaiser Gypsum. This NOSJM, signed by counsel for both plaintiff and Kaiser Gypsum, was filed on October 12, 2016 (Aff. in Opp., Exh. C). It should be noted that in opposition to Colgate's motion, plaintiff took the position that she voluntarily dismissed her claims against Kaiser Gypsum and that Colgate cannot force her to maintain these claims.

Plaintiff's current motion is trying to argue the opposite of what it argued earlier in the procedural posture of this case. Essentially, the plaintiff wants to now change the path of this litigation by bringing Kaiser Gypsum back into the litigation after having earlier insisted upon taking it out of the proceedings. "Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 626 NYS2d 527 [1995] citing to *Prudential Home Mtge. Co. v Neildan Constr. Corp.*, 209 AD2d 394, 618 NYS2d 108 [1994]; *Piedra v Vanover*, 174 AD2d 191, 197, NYS2d 675 [1992]; *Environmental Concern v Larchwood Constr. Corp.*, 101 AD2d 591, 594, 476 NYS2d 175 [1984]). "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*, at 593, quoting Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv L Rev 1132). The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system 'cannot tolerate this 'playing fast and loose with the courts'" (*Environmental Concern v Larchwood Constr. Corp.*, *supra*, at 594, quoting *Scarano v Central Ry. Co.*, 203 F2d 510, 513)" (*id.*).

“The doctrine of judicial estoppel 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 (*see Festinger v Edrich*, 32 AD3d 412, 820 NYS2d 302 [2006]). The doctrine will be applied where the party has secured a judgment in his or her favor by adopting a certain position in the prior proceeding (*see Matter of One Beacon Ins. Co. v Espinoza*, 37 AD3d 607, 830 NYS2d 287 [2007]; *Matter of State Farm Mut. Auto. Ins. Co. v Allston*, 300 AD2d 669, 751 NYS2d 795 [2002])” (*Tedesco v Tedesco*, 64 AD3d 583, 584, 882 NYS2d 298 [2d Dept 2009]). Here, judicial estoppel must be applied because plaintiff has already secured a judgment in its favor in a prior proceeding according to an earlier position which it took (i.e., that it wanted Kaiser Gypsum out of this litigation) (*see id.*).

It also particularly applies to what plaintiff attempts to do in this case, “judicial estoppel may be invoked to prevent a party from ‘inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding’” (*Zanghi v. Laborers Intl. Union of N. Am., AFL-CIO*, 21 AD3d 1370, 1372, 801 NYS2d 646), where the party had prevailed with respect to the earlier position (*see Zedner v United States*, 547 US 489, 504, 126 S Ct 1976, 164 L.Ed.2d 749)” (*Lorenzo v Kahn*, 100 AD3d 1480, 1482-83, 954 NYS2d 331 [4th Dept 2012]). Here, judicial estoppel applies because the position taken by plaintiffs in opposition to the motion filed by Colgate is “directly contrary to or inconsistent with” the position they assumed in their motion to vacate the NOSJM, and they prevailed with respect to that position against Colgate (*see id.*). Therefore, it is, likewise, appropriate to apply judicial estoppel in the instant case.

“The underlying purpose of judicial estoppel is to protect the integrity of the judicial process (*see New Hampshire*, 532 US at 749–750, 121 S Ct 1808)” (*id.*). In keeping with this, “a key factor in determining the applicability of the doctrine of judicial estoppel is whether the party against whom the doctrine is asserted ‘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’” (*id.*). “A litigant should not be permitted to lead a tribunal to find a fact one way and then attempt to convince a court in the same proceeding that the same fact should be found otherwise; the litigant should be bound by the prior stance that he or she clearly asserted” (*id.*).

In this case, the plaintiff has already “succeeded in persuading [the] Court to accept [the] party’s earlier position” that it wanted Kaiser Gypsum out of the litigation (*see id.*). Judicial acceptance of the plaintiff’s current position that it wants Kaiser Gypsum back in this litigation “would create the perception that either the first or the second court was misled.” (*see id.*).


Therefore, the plaintiff is for all the reasons discussed above, estopped from moving to have the NOSJM Order vacated and the No Opposition Summary Judgment Motion filed by Kaiser Gypsum on October 12, 2016 withdrawn.

Accordingly, the plaintiff's motion to vacate and withdraw the NOSJM is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: April 1, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE