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DA 19-0331

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 34

MARK E. KUCERA,

Plaintiff and Appellant,

v.

CITY OF BILLINGS and JOHN DOES 1-10,

Defendant and Appellee.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DV-13-1116
Honorable Rod Souza, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Peter L. Helland, Helland Law Firm, pllc, Glasgow, Montana


For Appellee:

Gerry P. Fagan, Adam Warren, Moulton Bellingham PC,
Billings, Montana

Submitted on Briefs: January 8, 2020

Decided: February 11, 2020

Filed:


Clerk

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Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Mark Kucera appeals an April 23, 2019 Thirteenth Judicial District Court order granting summary judgment for the City of Billings and John Does 1-10, dismissing Kucera's claims for negligence and nuisance. We affirm.

¶2 We address the following issue on appeal:

Whether the District Court erred in granting summary judgment for the City of Billings, dismissing Kucera's claims for negligence and nuisance, based on its determination that Kucera's claims were barred by judicial estoppel.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Kucera resides in Billings, Montana. On July 21, 2011, a City water line near Kucera's residence burst, sending thousands of gallons of water into his neighborhood. On August 8, 2011, Kucera filed a claim with his homeowner insurance carrier for water damage. Kucera's claim stated that he discovered the damage upon returning home after being gone for several days. Kucera reported that he believed that a rainstorm caused the damage. The insurance claim form described damage to Kucera's roof, carpet, and sheetrock. Evidently, after speaking with his insurance company, Kucera also believed he had a claim against the City. On August 15, 2011, Kucera presented a claim to the City for damages to his home from the water line break.¹ On August 26, 2011, the City denied Kucera's claim.

¹ On October 4, 2011, Kucera had a structural engineer inspect his home after he allegedly observed cracks in the foundation. The engineer originally attributed the cracks to historical foundation settlement. In January 2012, the engineer re-inspected Kucera's home, concluding that the settlement was actually caused by the break in the water line.

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¶4 On June 1, 2012, nearly ten months after filing his claim against the City, Kucera filed a petition for relief under Chapter 13 of the United States Bankruptcy Code.² Kucera concurrently filed a personal property schedule in which he stated under penalty of perjury that he had no “contingent and unliquidated claims of any nature” despite the fact that he already asserted a claim for damages against the City and had a potential cause of action. On February 21, 2013, Kucera obtained a plan of reorganization in his bankruptcy proceeding.

¶5 On September 3, 2013, over two years after the City denied his claim, Kucera filed a complaint in District Court against the City for negligence, nuisance, and inverse condemnation, alleging the City was liable for compensatory damages caused by the water leak. On January 6, 2015, the City filed its first Motion for Summary Judgment, arguing that Kucera’s claims were barred by judicial estoppel because he failed under penalty of perjury to disclose the potential claims on his bankruptcy petition.³ In response, on January 9, 2015, Kucera re-opened his bankruptcy case and amended his personal property schedule to disclose his lawsuit against the City. Kucera’s action stayed the litigation, interrupting the City’s motion. On September 25, 2018, the City again filed a motion for summary judgment for all three claims. Kucera conceded judgment on the inverse condemnation claim but contested judgment on his nuisance and

² In 2005, Kucera obtained a \$205,000 loan from Wells Fargo Bank, secured by a deed of trust on his home. Kucera eventually defaulted on his loan obligation. In January 2012, Wells Fargo commenced a non-judicial foreclosure of its deed of trust, scheduling a foreclosure sale for June 4, 2012. Kucera filed the bankruptcy petition to stay the pending foreclosure sale.

³ The City also argued, as it does now, that Kucera’s claims for inverse condemnation and nuisance were barred by the two-year statute of limitations pursuant to § 27-2-207(1), MCA.

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negligence claims. On April 23, 2019, the District Court granted the City's motion and dismissed Kucera's claims, holding that both of Kucera's claims were barred by judicial estoppel, and alternatively, that Kucera's negligence claim was barred by the statute of limitations. Kucera appeals.

STANDARD OF REVIEW

¶6 We review a district court's ruling on a motion for summary judgment de novo, applying the same standards under M. R. Civ. P. 56 as the district court. *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 388 Mont. 214, 164 P.3d 913. Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Davis v. Westphal*, 2017 MT 276, ¶ 9, 389 Mont. 251, 405 P.3d 73. We view the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in their favor. *Hughes*, ¶ 7.

DISCUSSION

¶7 *Whether the District Court erred in granting summary judgment for the City of Billings, dismissing Kucera's claims for negligence and nuisance, based on its determination that Kucera's claims were barred by judicial estoppel.*

¶8 Kucera argues that the doctrine of judicial estoppel does not apply because he amended his bankruptcy disclosure two years later. We disagree.

¶9 Judicial estoppel is an equitable doctrine intended to protect the integrity of the judicial process from manipulation by litigants who seek to prevail, twice, on opposite theories. *State v. Darrah*, 2009 MT 96, ¶ 12, 350 Mont. 70, 205 P.3d 792 (citations omitted). Judicial estoppel precludes a party to an action from taking a position inconsistent with the party's prior judicial declarations. *Darrah*, ¶ 12. Generally, a

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debtor who fails to disclose a contingent and unliquidated claim in a bankruptcy proceeding is judicially estopped from pursuing that claim after being discharged from bankruptcy. See *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001) (“In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor’s schedules or disclosure statements.”). As a threshold consideration, the court must also determine whether the party being estopped sought to intentionally manipulate the courts by taking inconsistent positions; the doctrine does not apply when a party’s prior position was based on inadvertence or mistake. *Dovey v. BNSF Ry.*, 2008 MT 350, ¶ 16, 346 Mont. 305, 195 P.3d 1223 (citing *U.S. v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008)).

¶10 In *Dovey*, we considered whether Dovey was judicially estopped from pursuing a Federal Employers Liability Act (“FELA”) complaint against BNSF Railway after he failed to list his potential claim as an asset when he filed for Chapter 7 bankruptcy. *Dovey*, ¶ 21. We ultimately remanded to the district court because Dovey presented evidence that he did not consider suing BNSF until *after* he filed for bankruptcy, creating a genuine issue of material fact as to whether he intentionally omitted his FELA claim from his bankruptcy petition. *Dovey*, ¶ 21. However, we held that once a debtor realizes he has a potential claim against a creditor, he has a duty to update his bankruptcy schedule accordingly. *Dovey*, ¶ 21 (citing *Hamilton*, 270 F.3d at 785 (9th Cir. 2001)).

¶11 It is undisputed that Kucera did not disclose his potential claims against the City in his bankruptcy petition and schedules. Unlike *Dovey*, however, Kucera did not present any evidence to the District Court, nor does he argue now, that his failure to include the

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potential claims on his bankruptcy schedule was a result of inadvertence or mistake. Rather, Kucera argues judicial estoppel does not apply because he eventually re-opened and amended his bankruptcy petition to include his claims against the City. Kucera's argument rests entirely on one sentence from a Ninth Circuit opinion: "Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the *pendency* of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset." *Hamilton*, 270 F.3d at 784 (emphasis added).

¶12 Kucera's argument is unfounded. *Hamilton* stands for the proposition that so long as a debtor updates a bankruptcy schedule or disclosure during the pendency of the bankruptcy, not after bankruptcy has closed, then judicial estoppel will not apply. *See Hamilton*, 270 F.3d at 785. As *Hamilton* further explains, "The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding." *Hamilton*, 270 F.3d at 785; *see also* Fed. R. Bankr. P. 1009(a) (schedules may be amended as a matter of course before the case is closed).

¶13 Here, on August 15, 2011, Kucera made a claim directly to the City's insurance company. The City denied Kucera's claim on August 26, 2011, at which point Kucera could potentially pursue a cause of action against the City. When Kucera filed for bankruptcy in June 2012, ten months later, he had a duty to disclose his potential claim at the time of filing, or at the very least, prior to closure of bankruptcy in February 2013. *See Dovey*, ¶ 21. Instead, Kucera waited until after the City filed its first Motion for

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Summary Judgment, nearly two years later, to re-open his bankruptcy claim and amend his petition. Kucera's omission can hardly be interpreted as a result of a mistake or inadvertence. The District Court did not err in granting summary judgment in favor of the City of Billings. Because judicial estoppel is dispositive of the issue, we need not address whether Kucera's claims were time-barred.

CONCLUSION

¶14 Kucera did not disclose his potential claims against the City of Billings on his bankruptcy petition or anytime during the duration of the bankruptcy. Accordingly, Kucera's negligence and nuisance claims are barred by judicial estoppel. The District Court did not err in granting summary judgment for the City of Billings.

¶15 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ BETH BAKER

/S/ JIM RICE