

IN THE SUPREME COURT OF THE STATE OF NEVADA

SCHINDLER ELEVATOR
CORPORATION,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JAMES M. BIXLER, DISTRICT JUDGE,
Respondents,
and
REBECCA JOHNSON; AND KENNETH
JOHNSON,
Real Parties in Interest.

No. 58456

FILED

OCT 04 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER GRANTING IN PART AND DENYING IN PART
PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order denying summary judgment. Petitioner Schindler Elevator Corporation asks this court to issue a writ of mandamus directing the district court to vacate its order denying Schindler's motion for summary judgment and enter an order granting summary judgment in Schindler's favor. On March 30, 2012, this court issued an order granting Schindler's petition for a writ of mandamus. Subsequently, real parties in interest Rebecca and Kenneth Johnson (collectively, the Johnsons) filed a petition for rehearing. This court granted the petition. Accordingly, we

vacate our March 30, 2012, order granting Schindler's writ petition and enter in its place the instant order granting the petition in part and denying the petition in part.

Rebecca Johnson alleges she was injured when the elevator doors at the Clark County employee parking garage closed on her as she entered the elevator. She and her husband, Kenneth Johnson, filed a personal injury complaint in August 2008 against Schindler, Thyssenkrupp Elevator Corp., Inc.,¹ and the Clark County Regional Justice Center.² During the pendency of this personal injury action, the Johnsons filed a voluntary petition for Chapter 13 bankruptcy and filed a schedule of assets and liabilities; however, the Johnsons failed to include their pending personal injury action against Schindler as required on the schedule. Thereafter, the bankruptcy trustee issued a notice of a proposed Chapter 13 distribution plan, which was confirmed by consent of the Johnsons' creditors.

Schindler learned of the Johnsons' bankruptcy filing during discovery and filed a motion for summary judgment asserting judicial estoppel. Schindler claimed that the Johnsons were estopped from prosecuting this personal injury action because they failed to disclose the lawsuit in their bankruptcy filings. In opposition, the Johnsons argued judicial estoppel did not apply because the omission was inadvertent.

¹Thyssenkrupp Elevator Corp., Inc. filed a joinder to Schindler's motion for summary judgment in the district court; however, it is not a party to this petition.

²The Clark County Regional Justice Center was dismissed from the action under the exclusive remedy rule.

The district court denied Schindler's motion, finding that the doctrine of judicial estoppel did not apply because this personal injury action was filed before the Johnsons filed their voluntary petition for bankruptcy. The district court determined that the doctrine is applicable only to the Johnsons' bankruptcy proceedings and that Schindler must seek relief in the bankruptcy court.

A writ of mandamus may be issued to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160; International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within this court's discretion. ANSE, Inc. v. Dist. Ct., 124 Nev. 862, 867, 192 P.3d 738, 742 (2008). Moreover, extraordinary relief is available only when a petitioner has no plain, speedy, and adequate legal remedy. NRS 34.170, quoted in D.R. Horton v. Dist. Ct., 125 Nev. 449, 453-54, 215 P.3d 697, 700 (2009). The petitioner must demonstrate that extraordinary relief is warranted. Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

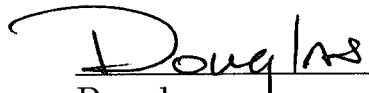
Generally, this court will not consider a petition challenging the district court's denial of a summary judgment motion, "unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification." D.R. Horton, 125 Nev. at 453, 215 P.3d at 700 (quoting ANSE, Inc., 124 Nev. at 867; 192 P.3d at 742). It is this court's view that Schindler's petition raises an important issue of law and that no speedy and adequate legal relief exists; therefore, we exercise our discretion to address the petition on the merits.


Whether judicial estoppel applies is a question of law that we review de novo. NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). The primary purpose of judicial estoppel is to protect the judiciary's integrity and is meant to prevent litigants from "playing fast and loose with the courts." Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (quotations omitted); see also NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). However, it does not prohibit a change in position that is not intended to sabotage the judicial process. NOLM, 120 Nev. at 743, 100 P.3d at 663. Judicial estoppel is generally limited to situations where there is intentional wrongdoing or an attempt to obtain an unfair advantage. Id. at 743, 100 P.3d at 663; see also Southern California Edison v. Dist. Ct., 127 Nev. ___, ___, 255 P.3d 231, 237 (2011).

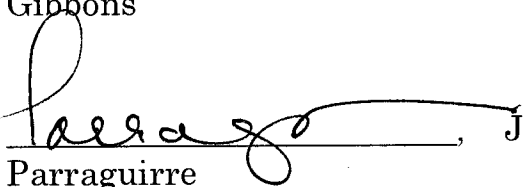
The Johnsons argue that the district court properly concluded that judicial estoppel does not apply in this action, and that it would only apply in the second of two actions in which a party takes inconsistent positions. The Johnsons cite no case law in which judicial estoppel has been applied in this manner; however, a number of courts have applied judicial estoppel to dismiss lawsuits initiated prior to bankruptcy where the lawsuit was not disclosed on the subsequent bankruptcy petition. See, e.g., Moses v. Howard University Hosp., 606 F.3d 789 (D.C. Cir. 2010); Eastman v. Union Pacific R.Co., 493 F.3d 1151 (10th Cir. 2007); Jethroe v. Omnova Solutions, Inc., 412 F.3d 598 (5th Cir. 2005). Further, an examination of the policy behind judicial estoppel reveals no rationale to support the argument that an action's commencement date should be relevant to whether judicial estoppel applies.

Based on the foregoing, we conclude that the district court erred in holding judicial estoppel does not apply based on the fact that the underlying action was commenced prior to the bankruptcy action.³ Accordingly, we

ORDER the petition GRANTED IN PART AND DENIED IN PART AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate the order denying summary judgment and to reconsider the motion in light of this order.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

³We do not consider whether the elements of judicial estoppel were established in Schindler's motion for summary judgment because the district court erred in holding judicial estoppel is not applicable to the underlying case. Upon reconsideration, the district court should review relevant authority discussing judicial estoppel's application when parties fail to disclose lawsuits in their bankruptcy petitions, and in such situations, important policy considerations involved in limiting the debtor's ability to use inadvertence and mistake as grounds to avoid judicial estoppel. See, e.g., In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. ~~2006~~).

1999

REPLACED "2006" WITH "1999" PER ORDER FILED 11/30/12.

cc: Hon. James M. Bixler, District Judge
Perry Spann & Westbrook/Las Vegas
Christensen Law Offices, LLC
Eighth District Court Clerk