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THE APPROVAL OF THE COMMITTEE ON OPINIONS

ANGELA BURTON and CLARENCE BURTON, Plaintiff, v. ETHICON, INC., ETHICON WOMEN'S HEALTH AND UROLOGY, a Division of Ethicon, Inc., GYNECARE, JOHNSON & JOHNSON, AND JOHN DOES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO. BER-L-12482-14 MASTER CASE NO. BER-L-11575-14 ***CIVIL ACTION*** In Re Pelvic Mesh/Gynecare Litigation Case No. 291

Argued: March 22, 2016

Decided: April 29, 2016

APPEARING:

For Plaintiffs Angela and Clarence Burton: Amy Collingnon Gunn, Esq. (The Simon Law Firm, P.C.); Jillian A.S. Roman, Esq. (Cohn, Placitella, and Roth, P.C.)

For Defendants Ethicon, Inc., Ethicon Women's Health and Urology, a Division of Ethicon, Inc., Gynecare, and Johnson & Johnson: Kelly S. Crawford, Esq. and Kevin J. Larner, Esq. (Riker Danzig, L.L.P.)

MARTINOTTI, J.S.C.

Before this Court is Defendants Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, and Johnson & Johnson's (collectively "Defendants") Motion to Dismiss Based on Plaintiffs' Lack of Standing, and to Judicially Estop Plaintiffs from Personally Recovering any Damages. This Motion is OPPOSED by Plaintiffs Angela and Clarence Burton (individually

"Mr. Burton" and "Mrs. Burton," collectively "Plaintiffs") as to the issue of judicial estoppel. Plaintiffs have filed a Motion for Substitution of Plaintiff in Interest, which is UNOPPOSED.

ARGUMENTS

Defendants' Motion to Dismiss for Lack of Standing, and to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action

Defendants make two arguments. First, Defendants argue Plaintiffs lack standing to bring this lawsuit, which they filed before filing their Chapter 7 bankruptcy petition, because their claim against Defendants was an asset of the bankruptcy estate. Thus, the bankruptcy trustee is the rightful party in interest. Second, Defendants argue that Plaintiffs should be judicially estopped from recovering any damages from this lawsuit, because they obtained a discharge of their debts in Chapter 7 bankruptcy based, in part, on their representation that they had no pending personal injury claims.

Defendants recount the facts giving rise to their Motion. Plaintiffs filed the instant action ("Action") on May 6, 2011. (Pl.'s Compl., Certification of Kelly Crawford ("Crawford Cert.") Ex. A.) Plaintiffs filed a voluntary petition (the "Petition") for relief under Chapter 7 of the Bankruptcy Code on May 11, 2012. Plaintiffs signed their Petition under penalty of perjury, affirming that all statements therein were true. (Crawford Cert. Ex. E.) Under penalty of perjury, Plaintiffs filed a "Declaration Concerning Debtors' Schedules," and a signed "Statement of Financial Affairs" certifying that their Schedules were true and correct. (Crawford Cert. Exs. F and G.)[1]

[1] Though these documents were signed electronically, Plaintiffs confirmed under oath at their Section 341(a) mandatory creditors meeting that they also physically signed copies of the documents.

On Schedule B, which is titled "Personal Property," Plaintiffs were required to list all personal property, including all claims or lawsuits. Plaintiffs indicated they had no such claims. (Pls.' Schedules, Crawford Cert. Ex. E). Similarly, Plaintiffs did not disclose the Action on their Statement of Financial Affairs. At Plaintiffs' mandatory creditors meeting pursuant to §341(a) of the Bankruptcy Code ("341 Meeting"), the trustee asked Plaintiffs if they "[had] any claims or lawsuits against anyone" to which Mr. Burton replied, "No." (Tr. 8:17-19, Crawford Cert. Ex. H.) Plaintiffs obtained a discharge of their debts, and the Bankruptcy Court entered a final decree and closed their case. (See August 24, 2012 Discharge Order, Crawford Cert. Ex. I; Pls.; Bankruptcy Case Docket, ECF No. 15 (showing Bankruptcy Case closed on September 14, 2012), Crawford Cert. Ex. J.)

1. Dismissal for Lack of Standing

Plaintiffs filed a Motion for Substitution of Plaintiff in Interest on February 24, 2016, seeking to continue the lawsuit with Charles E. Covey ("Covey" or "Trustee"), who is the Trustee of Plaintiffs' Chapter 7 Bankruptcy in the U.S. Bankruptcy Court for the Central District of Illinois as the party in interest. Defendants do not oppose the Motion. As the parties and the Trustee agree the Trustee is the proper party in interest, the Court GRANTS Defendants' Motion to Dismiss Plaintiffs based on lack of standing and allows the Trustee to be substituted as plaintiff is in this action. The Trustee should file an Amended Complaint within sixty (60) days of this Order.

2. Judicial Estoppel

Defendants argue that Plaintiffs' concealment of this action allowed them to receive a complete discharge of their debts without any creditor or the Trustee being aware of their

pending claims. They argue that judicial estoppel is the appropriate consequence for this concealment. Judicial estoppel prevents litigants from adopting inconsistent positions in more than one proceeding. Judicial estoppel stands for the premise that "if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Kimball Int'l, Inc. v. Northern Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000) (citation and quotation marks omitted). Thus, "when a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000). A party cannot make a factual assertion when (1) the party made a contrary assertion in an earlier proceeding, and (2) the party convinced the court to accept its prior assertion. Kimball, supra, 334 N.J. Super. at 606-607. The party need not have prevailed in the earlier action in order for judicial estoppel to apply to the later assertion. Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). Rather, judicial estoppel applies if "the party was allowed by the court to maintain the position [in the earlier proceeding]." Ibid.

New Jersey courts apply New Jersey law regarding judicial estoppel. New Jersey v. Gonzalez, 273 N.J. Super. 239, 260 (App. Div. 1994), *aff'd* 142 N.J. 618 (1995). Under New Jersey law, judicial estoppel does not require that the party made the contrary assertions in bad faith. Ruffin v. Kinder Morgan Liquids Terminal, LLC, 2009 N.J. Super. Unpub. LEXIS 251, *17 (App. Div. Jan. 2, 2009) (citing Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)). "Judicial estoppel . . . is an extraordinary remedy that courts invoke only when a party's inconsistent behavior will otherwise result in a miscarriage of justice." State v. Jenkins, 178 N.J. 347, 350 (2004) (citations and quotation marks omitted).

Defendants note that the Bankruptcy Code requires debtors to file petitions and schedules honestly and in good faith. See, e.g. 11 U.S.C. § 521(a)(1) (defining a debtor's filing duties); Fed. R. Bankr. P. 9011(b) (outlining requirements of proper purpose and evidentiary support in representations to bankruptcy court). Defendants argue that a "debtor's disclosure obligation extends to 'contingent assets' such as causes of action pursued against another party . . . because such disclosure 'allows the trustee and the creditors to determine whether' to pursue these assets 'on the creditors' behalf.'" In re Kane, 628 F.3d 631, 636-37 (3d Cir. 2010) (citing In re Costello, 255 B.R. 110, 113 (Bankr. E.D.N.Y. 2000)).

Defendants posit that the importance of complete disclosure to the bankruptcy process has motivated courts to impose the strict sanction of judicial estoppel when a debtor fails to schedule an action in a bankruptcy case, obtains a discharge, and then attempts to pursue and profit from the action. See Davidowski v. Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, at *17 (N.J. Super. Ct. App. Div. Jan. 30, 2012) (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419-20 (3d Cir. 1998)). Judicial estoppel is intended to protect the courts, not litigants, and "[t]he party invoking the doctrine need not have been a creditor or otherwise involved in the bankruptcy proceedings." Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, at *17 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)). Defendants note that six Circuit Courts of Appeals have ruled that parties can be judicially estopped from bringing claims they failed to disclose in bankruptcy. See Reed v. City of Arlington, 650 F.3d 571, 579 (5th Cir. 2011) ("Absent unusual circumstances, an innocent bankruptcy trustee may pursue for the benefit of creditors a judgment or cause of action that the debtor—having concealed that asset during bankruptcy—is himself estopped from pursuing."); Cannon-Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006) ("All six appellate courts that have

considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends.") (citing Payless Wholesale Distrib., Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v General Motors Corp., 337 F. 3d 314 (3d Cir. 2003); Jethroe v. Omnove Solut., Inc., 412 F.3d 598 (5th Cir. 2005); United States ex rel. Genert v. Transp. Admin. Servs., 260 F.3d 909, 917-19 (8th Cir. 2001); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001); Barger v. Cartersville, 348 F.3d 1289, 1293-97 (11th Cir. 2003)). While some Circuit Courts elected not to dismiss the bankruptcy trustee as the party in interest, all estopped the debtor from recovering damages in the previously undisclosed action.

In Reed, the Fifth Circuit ruled that a plaintiff who had won a $1 million judgement against her employer on a Family Medical Leave Act ("FMLA") claim was judicially estopped from collecting because she had not disclosed the claim in her bankruptcy. 650 F.3d at 573. The bankruptcy trustee was permitted to collect the judgment on behalf of the bankruptcy estate, and any excess after repayment of creditors was to be returned to the defendant. Ibid. The Southern District of New York reached a similar result in a more recent case. See Grammer v. Mercedes Benz of Manhattan/Mercedes Benz USA, LLC, 2014 U.S. Dist. LEXIS 33752, *19 (S.D.N.Y. Mar. 13, 2014). Our Appellate Division has reached similar results, as well. See Barzda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426 (App. Div. Mar. 3, 2010); Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 at *17.

The Appellate Division upheld the trial court's decision to judicially estop a plaintiff from recovering on a personal injury claim that he failed to disclose in Chapter 7 bankruptcy in Ruffin. 2009 N.J. Super. Unpub. LEXIS 251, at *1. Ruffin filed for Chapter 7 bankruptcy

eighteen months after he was injured. Id. at *4-5. Five months later, he filed his personal injury action. Id. at *16. The Appellate Division applied judicial estoppel to Ruffin's claim but modified the trial court's decision by allowing the bankruptcy trustee to pursue the action. Id. at *18. Defendants seek the same result in this matter.

Defendants argue that Plaintiffs' numerous failures to disclose their claims against Defendants in bankruptcy should preclude them from collecting on any judgment stemming from those claims. Defendants state that: (1) Plaintiffs failed to list their claims in the Schedules and Statement of Financial Affairs, and they perjured themselves at the 341 Meeting by claiming they had no lawsuits against anyone; (2) the Bankruptcy Court relied on Plaintiffs' testimony an determined Plaintiffs had no assets to distribute to creditors; and (3) the Bankruptcy Court, relying on Plaintiffs' statements, awarded them a discharge. The proper sanction, Defendants argue, is that Plaintiffs should be judicially estopped from profiting from this lawsuit.

Plaintiffs' Argument That the Court Should Not Judicially Estop Them From Personally Recovering in This Action

Plaintiffs concede that the Trustee is a proper party in interest and argue he should be substituted as plaintiff in this action.

1. Plaintiff's Argument That Judicial Estoppel is not Appropriate in this Case

Plaintiffs make three arguments in opposition to Defendants' assertion that judicial estoppel is appropriate in this case: (1) judicial estoppel is an extraordinary remedy; (2) the Bankruptcy Court has jurisdiction over the assets in the estate, and Congress has shown a clear intent that bankruptcy estates should be subject to uniform laws; and (3) as federal law requires a bad faith omission, Plaintiffs should not be estopped from personally recovering in this action.

a. Judicial Estoppel is an Extraordinary Remedy

Defendants argue judicial estoppel is a fact-specific doctrine that should be invoked in limited circumstances in which there is a miscarriage of justice. New Hampshire v. Maine, 532 U.S. 742, 750 (2001); Krystal Cadillac-Oldsmobile GMC Truck, Inc., supra, 337 F.3d 314, 319 (3d Cir. 2003). "[J]udicial estoppel is not automatically applicable in a subsequent proceeding because a litigant failed to list a claim." Davidowski, supra, 2012 N.J. Super. Unpub. LEXIS 192, at *17 (citing Ryan Operations G.P., 81 F.3d at 361).

b. The Bankruptcy Court has Jurisdiction Over the Distribution of the Assets of the Estate

Plaintiffs argue that the distribution of the assets of the bankruptcy estate rests within the Bankruptcy Court. Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 at *18-*19. Plaintiffs contend federal bankruptcy law preempts any state effort to determine what assets of a bankruptcy estate can be reached and for what purposes. In re McGee, 353 F.3d 537, 540 (7th Cir. 2003). Plaintiffs assert that, as even omitted assets are property of the bankruptcy estate, those assets are subject to federal law, not the various state laws.

Defendants note that in Ruffin, upon which Defendants rely in their Motion and upon which this Court relied in its decision in Velazquez v. Ethicon, No. BER-L-10304-14, *4 (N.J. Super. Ct. Law Div. Nov. 17, 2015), the Appellate Division reversed the trial court's application of judicial estoppel, determining that the trial court engaged in an abuse of its discretion. Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 at *1. Plaintiffs argue that Ruffin does not stand for the principle that judicial estoppel should bar their recovery. Rather, they interpret Ruffin as the Appellate Division's acknowledgement that the Bankruptcy Court is responsible

for determining how monies from a debtor's lawsuit should be distributed. Plaintiffs argue that if the Court does determine judicial estoppel applies, it should apply the standards of federal law.

c. Plaintiffs Did Not Omit Their Claims in Bad Faith and Judicial Estoppel Should Therefore Not Apply

Plaintiffs note that under federal law judicial estoppel applies only when a party maintained inconsistent positions in bad faith. Krystal Cadillac-Oldsmobile GMC Truck, Inc., supra, 337 F.3d at 219. Plaintiffs further argue that, despite the Ruffin court's assertion that New Jersey law does not require a finding of bad faith, the court nonetheless conducted an inquiry into whether the plaintiff/debtor acted in bad faith. Ruffin, supra, at *17 ("We conclude, the coincidence in timing cannot be attributed to mistake . . . .").

Plaintiffs argue that judicial estoppel should not apply when a plaintiff makes an assertion when confused as to the facts. See Carrasca v. Pomeroy, 313 F.3d 828, 835 (3d Cir. 2002) (declining to apply judicial estoppel to bar a plaintiff's civil rights claim stemming from a wrongful arrest, despite a guilty plea to the charged crime, because plaintiff did not understand the consequences of the plea). Plaintiffs also distinguish their situation from that in Reed, upon which Defendants rely, arguing that Reed dealt with a Chapter 7 debtor who purposefully withheld a FMLA claim from his schedules in his bankruptcy. 650 F.3d at 575. Plaintiffs assert that the court, in determining judicial estoppel should apply, found the debtor "did not act inadvertently." Id. at 574.

Plaintiffs do not dispute that they failed to include this lawsuit in their bankruptcy filings. However, they argue that their failure was an honest misunderstanding of the forms' confusing language. For example, they note that Schedule B, Item Number 21 asked them to list "[o]ther

contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." (See Pls.' Schedules, Crawford Cert. Ex. F.) Plaintiffs note there was no explanation of what the term "contingent and unliquidated claims" meant. While the form lists examples of contingent and unliquidated claims, Plaintiffs note that none of the examples is similar to a claim in a mass tort lawsuit.

Plaintiffs distinguish their failure to disclose their lawsuit from that of plaintiffs/debtors in Velazquez, whom this Court determined were judicially estopped from personally recovering in their lawsuit. Plaintiffs note that the plaintiffs/debtors in Velazquez swore at their 341 Meeting that they had never sustained any injuries nor consulted with a lawyer for any reason other than bankruptcy. Velazquez, No. BER-L-10304-14, *4 (N.J. Super. Ct. Law Div. Nov. 17, 2015).

Covey, the trustee of Plaintiffs' bankruptcy estate, submitted an affidavit in which he stated his questions during the 341 Meeting were not as "detailed and . . . thoroughly explored" as they could have been. (Affidavit of Charles Covey, ¶ 9, Certification of Jillian A.S. Roman ("Roman Cert.") Ex. 3.) Covey has modified his standard questions and now asks parties, "[D]o you have any claims or lawsuits against anyone? Are you suing anyone at the present time? Are you a plaintiff in a class action lawsuit? Have you ever responded to a TV ad to become involved in a class action lawsuit like '1-800-BAD-DRUG?' Do you believe that you have been injured or wronged and have the right to sue someone, but you just haven't done it yet?" (Id. at ¶¶ 8-9.) Further, Covey has sworn in his affidavit that he would have discharged Plaintiff's debts even if they had disclosed this action. (Id. at ¶ 11.) Thus, Plaintiffs argue they derived no unfair benefit from failing to disclose this lawsuit in their bankruptcy.

Defendants' Reply to Plaintiffs' Opposition of Their Motion to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action

Defendants refute Plaintiffs' claim that federal law, not New Jersey law, on judicial estoppel should apply. "Since the purpose of the doctrine of judicial estoppel is to protect the integrity of the tribunal before which a party seeks to contest facts which he has previously [and successfully] admitted, it is that tribunal which should determine whether or not to invoke this doctrine." City of Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006) ("New Jersey courts need not adopt or follow the jurisprudence of federal courts regarding the doctrine of judicial estoppel . . . . Thus, the forum court applies its own law regarding the applicability of judicial estoppel.") Defendants reiterate their argument—and the supporting law—that New Jersey courts can apply judicial estoppel without a finding of bad faith.

Defendants argue Plaintiffs do not deny they failed to disclose this lawsuit in their bankruptcy but rather "attempt[] to blame the Trustee" for their non-disclosure. (Defs.' Repl. at 6.) Defendants assert that, despite the Trustee's apparent acceptance of blame for Plaintiffs' non-disclosure at the 341 Meeting, the meeting was just one of several instances throughout Plaintiffs' bankruptcy in which they failed to disclose this action. Defendants contend that Plaintiffs' failure to disclose the claims on their Schedules and Statement of Financial Affairs is, alone, sufficient to implicate judicial estoppel. See, e.g. Reed, 650 F.3d at 572 (applying judicial estoppel where plaintiffs "failed to disclose [claims] on their bankruptcy schedules"); (Barda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426, at *1 (N.J. Super. Ct. App. Div. Mar. 3, 2010) (applying judicial estoppel and noting "[p]laintiff did not disclose his alleged interest in the Hightstown property in his bankruptcy petition, which contained a declaration, under penalty of perjury, that the schedules and assets listed therein were true and correct."). Defendants argue

that even if the Court accepts Plaintiffs' and the Trustee's characterizations of the 341 Meeting, they are irrelevant to the Court's analysis of whether judicial estoppel should apply.

Defendants refute Plaintiffs' claim that federal judicial estoppel doctrine must apply in this case because federal law governs bankruptcy. Rather, Defendants note that this Court is not deciding a bankruptcy case. Further, Defendants argue, the Court is not interfering with the Bankruptcy Court's disposition of estate assets. Therefore, Defendants continue, federal law does not apply to this Court's analysis of judicial estoppel in this matter.

DECISION

A. Law of the Case

The "law of the case" doctrine "applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit." State v. Hale, 127 N.J. Super. 407, 410 (App. Div. 1974) (citing Wilson v. Ohio River Co., 236 F. Supp. 96, 9 (S.D.W. Va. 1964)). Under law of the case doctrine, "once an issue is litigated and decided in a suit, relitigation of that issue should be avoided if possible." Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987) (citing Hale, 127 N.J. Super. at 410). "Prior decisions on legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous." Ibid. (citations omitted). Application of the law of the case doctrine is an exercise of discretion that requires a court to "take into account a number of relevant factors that bear on the pursuit of justice and, particularly, the search for truth." State v. Reldan, 100 N.J. 187 (1985).

This Court has applied the doctrine throughout MCL matters being managed and previously managed. In fact, this application is encouraged and is an underpinning of the goals and priorities of MDL/MCL litigation. See Manual for Complex Litigation (Fourth) § 22.1 (2004). Of course, each matter must be decided on its own facts. However, this Court has applied judicial estoppel as part of this MCL.[2]

B. Judicial Estoppel

Judicial estoppel stands for the principle that "if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Kimball, supra, 334 N.J. Super. at 607 (citation and quotation marks omitted). Thus, "when a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress, supra, 335 N.J. Super. at 412. A party cannot make a factual assertion when (1) the party made a contrary assertion in an earlier proceeding, and (2) the party convinced the court to accept its prior assertion. Kimball, 334 N.J. Super. at 606-07. The party need not have prevailed in the earlier action in order for judicial estoppel to apply to the later assertion. Cummings, supra, 295 N.J. Super. at 387. Rather, judicial estoppel applies if "the party was allowed by the court to maintain the position [in the earlier proceeding]." Ibid.

New Jersey courts apply New Jersey law regarding judicial estoppel. Gonzalez, supra, 273 N.J. Super. at 260 (finding a court should apply its own law because "the purpose of the doctrine of judicial estoppel is to protect the integrity of the tribunal before which a party seeks to contest facts which he has previously admitted through a guilty plea . . . ."). Under New

[2] Velazquez, supra, No. BER-L-10304-14, *4 (N.J. Super. Ct. Law Div. Nov. 17, 2015).

Jersey law, judicial estoppel does not require that the party made the contrary assertions in bad faith. Ruffin, supra, at *17 (citing Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)). "Judicial estoppel . . . is an extraordinary remedy that courts invoke only when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Jenkins, supra, 178 N.J. at 350 (citations and quotation marks omitted).

The Court, relying largely on the Appellate Division's ruling in Ruffin, found plaintiffs were judicially estopped from personally recovering on their claims in Velazquez, supra, No. BER-L-10304-14 at *4. Here, Plaintiffs argue on two grounds that the precedent of Ruffin is not determinative of the outcome. First, Plaintiffs note that the Appellate Division in Ruffin overturned the trial court's application of judicial estoppel, and argue that it would be inappropriate to rely on that decision to apply judicial estoppel in this matter. Second, Plaintiffs argue that, despite the Appellate Division's assertion that New Jersey's judicial estoppel doctrine does not require a finding of bad faith, the court nonetheless analyzed whether Ruffin's inconsistent statements were made in bad faith. The Court considers each argument in turn.

Plaintiffs' assertion that the Ruffin court reversed the trial court's application of judicial estoppel is accurate. See Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 at *17-*18. However, the Appellate Division did not reverse the trial court on the grounds that Ruffin, who had failed to disclose his personal injury claims in his Chapter 7 bankruptcy, should be entitled to recover on those claims. Rather, the Appellate Division stated explicitly that the trial court erred by not giving the bankruptcy trustee the option of pursuing the claim, which was the property of the estate. Id. at *1 ("We reverse the December 21, 2007 order because the trial court did not give notice to the Chapter 7 Trustee, who on behalf of plaintiff's creditors is the legal owner of the claim. The trustee must determine whether to prosecute the claim against

defendant on behalf of the creditors of the debtor's estate or abandon his interest."). Here, Defendants seek, and Plaintiffs have consented, to have the Trustee substituted as the Plaintiff in Interest. Defendants seek precisely the result that the Appellate Division reached in Ruffin. Id. at *18 ("[T]he trustee may examine the debtor or other evidence to assess the prospects of recovery for the estate to be distributed for benefit of the creditors. If he chooses to assume the presentation of the claims as pled, trial shall be rescheduled.").

Plaintiffs' additional argument—that the Ruffin court conducted a "bad faith" analysis—is unavailing. The Appellate Division did note that Ruffin's filing of his personal injury action just weeks after the deadline for creditors to object to his discharge "cannot be attributed to mistake, as the claim was concealed from creditors with the expectation the recovery would be retained by plaintiff." Id. at *17. But the court followed this observation by stating "[p]laintiff's assertion he did not act in bad faith is unavailing . . . . We have rejected the position advanced by plaintiff, concluding the required finding of 'bad faith' is not a requirement under New Jersey law." Ibid. (citation and internal quotation marks omitted). The Appellate Division's analysis of Ruffin's apparent bad faith was not necessary to the court's holding. Rather, the court's consideration of bad faith emphasized that its ruling would be the same even under a more plaintiff-friendly standard than the one it was compelled by precedent to apply.

Plaintiffs cite a more recent Appellate Division ruling to argue a court need not reflexively estop a plaintiff from pursuing a claim because he or she failed to disclose the claim in bankruptcy. See Davidowski, supra, 2012 N.J. Super. Unpub. LEXIS 192. However, Davidowski involved highly unusual circumstances not present here. The plaintiff/debtor was judicially estopped from suing her son and her son's friend for defrauding her out of an interest in real estate after she filed a bankruptcy petition in which she did not disclose any interest in the

property nor any claim against the defendants. Id. at *2. The Appellate Division overturned the trial court's application of judicial estoppel, but only after finding the trial court never considered whether the plaintiff/debtor's son could have defrauded his mother into filing for bankruptcy. Id. at *8. In other words, judicial estoppel is not appropriately applied to a party who does not *knowingly* adopt inconsistent positions. Davidowski would prevent judicial estoppel in this matter only if Plaintiffs submitted their bankruptcy petition without knowing they were doing so.

The facts presently before the Court are not significantly different from those in Velazquez. A difference is the Trustee's sworn statement that his question at the 341 Meeting was not as thorough as it could have been. However, as Defendants note, there were several instances throughout the bankruptcy in which Plaintiffs had an opportunity and yet failed to disclose this action. Whether these mistakes were honest is irrelevant. New Jersey courts apply New Jersey law regarding judicial estoppel. Gonzalez, supra, 273 N.J. Super. at 260. Under New Jersey law, judicial estoppel does not require that the party made the contrary assertions in bad faith. Ruffin, supra, 2009 N.J. Super. Unpub. LEXIS 251 at *17 (citing Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action is GRANTED. Plaintiffs' Motion to Substitute the Chapter 7 Trustee as the Proper Party in Interest is GRANTED as unopposed. A copy of this Decision shall be served on the Trustee. If the Trustee fails to amend the Complaint

within sixty (60) days, Defendants may file an Order to Show Cause to compel the Trustee to show cause as to why this matter should not be dismissed.[3]

[3] On November 17, 2015, the Court issued an Order in Velazquez, supra, No. BER-L-10304-14, substituting the Chapter 7 Trustee as the proper party in interest. The Trustee has yet to file an amended complaint in that action. Defendants may file an Order to Show Cause to compel the Trustee to show cause as to why that matter should not be dismissed.