FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-560 / 91-655

WILLIAM R. STRUVE and **BERTHA M. STRUVE,**

Plaintiffs-Appellants,

vs.

JAMES K. BRANT, DARLENE K. BRANT,

Defendants-Appellees,

and

R.F.K. HOGS UNLIMITED, INC., VERNE E. FOLKMANN, DAVID L. RUSK, and **JEFFREY H. KROMMINGA,**

Defendants.

Appeal from the Iowa District Court for Benton County, Lynne E. Brady, Judge.

The Struves appeal from a district court ruling granting the Brants' motion for summary judgment and dismissing the Struves' case against them. **AFFIRMED.**

Morris L. Eckhart of Milroy and Eckhart, Vinton, for appellants.

R.L. Sole of Glasson, Grove, Sole & McManus, Cedar Rapids, for appellees.

Considered en banc.

PER CURIAM

Plaintiffs-appellants William R. and Bertha M. Struve filed a declaratory action against defendants-appellees James K. and Darlene K. Brant. Plaintiffs sought to have the court declare defendants violated a stay order in bankruptcy when defendants forfeited a real estate contract defendants had entered into with plaintiffs for the sale of real estate. After the action was filed, defendants filed a motion for summary judgment which plaintiffs resisted. The trial court sustained defendants' motion and dismissed plaintiffs' action. Plaintiffs have appealed contending there was a fact question as to whether they had ownership in the real estate when the notice of forfeiture of real estate contract was filed and the trial court incorrectly applied the doctrine of judicial estoppel in ruling on the motion for summary judgment. We affirm.

In 1977 plaintiffs purchased Benton County real estate from defendants. In 1978 the land was divided into two parcels, and plaintiffs sold the land on a second contract to two separate parties. Plaintiffs sold the parcels for more than they owed defendants for the property. A month later plaintiffs bought a parcel back and again resold it on contract. Again the land was sold for more than plaintiffs owed defendants.

On April 5, 1979, plaintiffs assigned all their interests in all the contracts to R.F.K. Hogs Unlimited, Inc.

On July 30, 1982, plaintiffs filed a petition for a chapter 13 bankruptcy. In their listing of assets in the bankruptcy, plaintiffs did not claim any interest in any of the Benton County real estate they purchased from defendants. Plaintiffs' chapter 13 plan was confirmed on December 13, 1984. On May 9, 1986, defendants caused to be served on plaintiffs a notice of forfeiture of real estate contract seeking to forfeit all plaintiffs' interest in the Benton County real estate. After being served with the notice of forfeiture, plaintiffs made no effort to cure the claimed defaults. On May 9, 1986, plaintiffs received a discharge in bankruptcy. This action was filed in July of 1989. Defendants filed a motion for summary judgment contending plaintiffs' action for declaratory judgment should be dismissed because plaintiffs had no interest in the real estate when the notice of forfeiture was served; consequently, plaintiffs had no standing to bring this action. The trial court agreed with defendants and sustained their motion for summary judgment.

Plaintiffs contend the motion for summary judgment should not have been granted because there was a factual issue concerning their ownership in the land and the trial court incorrectly determined the issue was resolved by the doctrine of judicial estoppel.

To obtain a summary judgment the moving party has the burden to show there are no existing material facts. See Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423

(Iowa 1988). We view the evidence in the light most favorable to the plaintiffs, who are the parties resisting the motion for summary judgment. See Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). A fact question is generated if reasonable minds can differ on how the issue should be resolved. Milne, 424 N.W.2d at 423.

Defendants' motion for summary judgment alleged that any interest plaintiffs had in the real estate had been assigned and/or transferred to R.F.K. Hogs Unlimited, Incorporated and the doctrine of judicial estoppel prevented plaintiffs from relitigating the issues.

Plaintiffs resisted the motion for summary judgment by filing an affidavit stating that in executing the assignments they thought they would receive what they called "the override of the sale price for the sale of the farm in excess of the unpaid balance of the purchase price." We have examined the assignments. They are clear and unambiguous on their face. They clearly assigned all of plaintiffs' interests in the contract to R.F.K. Hogs Unlimited, Inc. The assignments were recorded, and defendants had the right to rely on the fact the assignments clearly showed plaintiffs' interest in the real estate had been assigned and plaintiffs retained no interest. The affidavit of plaintiffs fails to generate a fact issue on which reasonable minds can differ. See Milne, 424 N.W.2d at 423.

The trial court applied the doctrine of judicial estoppel in resolving the issue against plaintiffs. We find the doctrine of judicial estoppel is not applicable because there is no showing there was a judicial acceptance of an inconsistent position in the bankruptcy action. In Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987), the court found the doctrine of judicial estoppel should not be applied to the case because the court in the prior action did not rely on the information (a specific date) as it was immaterial in reaching a finding and conclusion. In Ezzone v. Hansen, 474 N.W.2d 548, 550 (Iowa 1991), the court went one step further and rejected the doctrine of judicial estoppel because of the absence of privity or prejudice. There is no showing in the bankruptcy action that the court relied on issues of plaintiffs' ownership of this land, and defendants have not shown they were privy to the prior action. We disagree with the trial court on this issue.

AFFIRMED.

All judges concur except Donielson, J., who specially concurs.

DONIELSON, J. (specially concurring)

I concur in the result only. I do not agree with the majority's finding the doctrine of judicial estoppel to be inapplicable.

I agree there must be a showing of judicial acceptance of an inconsistent position in the bankruptcy action. See Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987). However, I find there exists a successful assertion of a noninterest in the disputed property and judicial acceptance thereof.

At no time during the course of the bankruptcy proceedings did the Struves make a formal disclosure of the property interest at issue--despite the fact they were under oath. When the Struves sought protection of the bankruptcy code, they were required to list and disclose all of their assets. 11 U.S.C. § 521 (1988). This disclosure is required on specific forms and may be under penalty of perjury. Fed. R. Bankr. P. 1007, 1008.

When the bankruptcy court considered the Struves' Chapter 13 plan and the appropriateness and extent of a discharge, the court relied upon the information listed in the bankruptcy schedules. A debtor is denied a discharge where the debtor has knowingly and fraudulently, in connection with the bankruptcy case, made a false oath or withheld any recorded information relating to the debtor's property or financial affairs. 11 U.S.C. § 727(a)(4) (1988). Also, a discharge may be revoked where the

discharge was obtained through debtor's fraud or the debtor acquired and concealed property from the court. 11 U.S.C. 727(d) (1988).

Finally, a Chapter 13 reorganization proceeding adjusts the debts of the debtor based upon the financial condition of the debtor, as evidenced by these schedules. Reliance upon these schedules clearly constitutes judicial acceptance of the Struves' lack of an interest in the disputed property.

In addition, I do not agree the absence of privity or prejudice necessarily precludes the application of judicial estoppel. Although the court in Ezzone v. Hansen, 474 N.W.2d 548, 550 (Iowa 1991), rejected the doctrine of judicial estoppel because of the absence of a showing of privity or prejudice, I do not agree such a showing is always required. The court in Ezzone further stated, although such a showing should ordinarily be required, "Without totally rejecting any possibility of applying the doctrine [of judicial estoppel] in the absence of privity or prejudice, we agree with the court of appeals." Id. (emphasis added).

I believe this case is easily distinguished from the facts in Ezzone. Here, the two situations in which the inconsistent positions of the Struves were asserted are closely related--a bankruptcy schedule listing all the debtor's property interests and the court's subsequent confirmation of the Chapter 13 plan, and an alleged

violation of the automatic stay in connection with the same bankruptcy case. In Ezzone, the situations in which inconsistent positions were asserted were very dissimilar--a dissolution in Florida, and a civil action alleging conversion of business assets in Iowa. Id. at 549.

Furthermore, I believe the assertion of a noninterest in the disputed property may have prejudiced the defendants to the extent the defendants were affected by the Struves' bankruptcy petition and its subsequent treatment by the bankruptcy court.

However, I do not agree this particular situation should require a showing of privity or prejudice to the defendants. I would affirm the trial court, based upon a finding of judicial estoppel.