

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

July 27, 2018

Lyle W. Cayce
Clerk

No. 17-20324
Summary Calendar

MARK ANTHONY FORNESA; RICARDO FORNESA, JR.,

Plaintiffs - Appellants

v.

FIFTH THIRD MORTGAGE COMPANY, also known as Fifth Third Bank,

Defendant - Appellee

MARK ANTHONY FORNESA; RICARDO FORNESA, JR.,

Plaintiffs - Appellants

v.

FIFTH THIRD MORTGAGE COMPANY,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before JONES, SMITH, and COSTA, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Mark Fornesa and his father, Ricardo Fornesa, Jr., sued Fifth Third Bank for foreclosing on a property in violation of the automatic stay imposed

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during Ricardo's Chapter 13 bankruptcy. *See* 11 U.S.C. § 362(a). Following a bench trial, the district court granted judgment for Fifth Third and held, *inter alia*, that the plaintiffs were judicially estopped from claiming a stay violation because Ricardo failed to adequately disclose his assets in bankruptcy. We AFFIRM.

BACKGROUND

In February 2010, Mark Fornesa obtained a secured loan from Fifth Third to purchase a piece of real property. Mark subsequently entered an equity sharing agreement with his father. This agreement gave Ricardo an equitable interest in the property and required Ricardo to make payments for three years. Ricardo voluntarily made payments to Fifth Third pursuant to Mark's loan. Mark and Ricardo did not record the equitable interest or inform Fifth Third.

In 2012, Ricardo sought Chapter 13 bankruptcy. In his 2012 bankruptcy schedules, Ricardo listed an "[e]quity sharing agreement in son's house," but he did not list the property's address or list Fifth Third as a creditor. By its own terms, the equity sharing agreement expired in February 2013.

In January 2014, Ricardo surrendered his own homestead in the bankruptcy and moved into his son's house. In November 2014, Mark and Ricardo stopped making payments on the Fifth Third loan. Then, in January 2015, Mark signed a quitclaim deed, conveying the property to Ricardo. This deed was recorded, but Ricardo did not amend his bankruptcy schedules. Nor did anyone inform Fifth Third about the transfer.

Fifth Third gave notice of default and intent to accelerate the loan in March 2015. The loan was accelerated and posted for foreclosure on April 6, 2015. Ricardo claims that on April 28 he sent Fifth Third a check for the delinquent loan payments along with a package containing his bankruptcy

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papers, the quitclaim deed, and the equity sharing agreement. Fifth Third disputes that it received the bankruptcy documents. Fifth Third returned the check because, as of May 1, the check constituted only a partial payment and could not bring the loan current. On May 4, Ricardo again allegedly sent a package containing his bankruptcy papers to Fifth Third. This package would not have been received before May 5. The property was sold at a foreclosure sale that afternoon. After the sale, Fifth Third contacted Mark, indicating that he had two weeks to redeem the property. Mark declined.

Instead, Mark and Ricardo brought a pro se lawsuit against Fifth Third for wrongful foreclosure, violation of the Emergency Stabilization Act, and violation of the automatic stay under 11 U.S.C. § 362(a).¹ The plaintiffs sought actual damages of \$50,000 and punitive damages of \$450,000. Fifth Third removed the case to federal district court. Mark and Ricardo filed a second lawsuit in state court, which was also removed and consolidated with the first case. In early 2016, Ricardo filed an adversary proceeding in bankruptcy, urging similar arguments. The bankruptcy judge entered a report to the district court recommending a withdrawal of the reference, and the district court entered an order withdrawing the reference. The consolidated action in federal district court proceeded to a bench trial. The district court held that the plaintiffs' claims lacked merit, entered judgment for Fifth Third, and denied a motion for a new trial. Following these orders, the district court reviewed Fifth Third's objections to the plaintiffs' evidence and denied admittance of several exhibits.

The plaintiffs timely appealed.

¹ The plaintiffs have waived their claims for wrongful foreclosure and for violation of the Emergency Stabilization Act by failing to argue them in their appellate briefing. See *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 183 n.24 (5th Cir. 2003).

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STANDARD OF REVIEW

We review a district court's determination of judicial estoppel for abuse of discretion. *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012). "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts." *Id.* (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003)). We review a district court's evidentiary rulings and denial of a motion for a new trial under the same standard. *Maurer v. Independence Town*, 870 F.3d 380, 383 (5th Cir. 2017); *United States v. Sertich*, 879 F.3d 558, 562 (5th Cir. 2018).

DISCUSSION

"The doctrine of judicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position in a legal proceeding that is inconsistent with a position taken in a previous proceeding." *Love*, 677 F.3d at 261. In this way, the doctrine "protect[s] the integrity of the judicial process." *Allen v. C & H Distribs., L.L.C.*, 813 F.3d 566, 572 (5th Cir. 2015) (citations omitted). Judicial estoppel has three elements: (1) the party against whom estoppel is sought has asserted a position plainly inconsistent with a prior position, (2) a court accepted the prior position, and (3) the party did not act inadvertently. *See id.* (citing *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013)). "Judicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Love*, 677 F.3d at 261-62 (quoting *Jethroe v. Omnova Sols., Inc.*, 412 F.3d 598, 600 (5th Cir. 2005)). The district court did not abuse

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its discretion in finding that Ricardo was estopped from pursuing his claim for a violation of the automatic stay.

The first and second elements of judicial estoppel are satisfied by Ricardo's failure to amend his bankruptcy schedules to disclose the quitclaim deed or his putative claims against Fifth Third. Chapter 13 debtors have a continuing obligation to amend financial schedules to disclose assets acquired post-petition. *See Allen*, 813 F.3d at 572 (quoting *Flugence*, 738 F.3d at 129). Therefore, Ricardo's failure to fulfill his Chapter 13 duty by amending his asset schedules "impliedly represented" to the bankruptcy court that his financial status was unchanged. *In re Flugence*, 738 F.3d at 129. This was plainly inconsistent with his subsequent assertion of an undisclosed claim based on the undisclosed asset. *Id.* The bankruptcy court, moreover, implicitly accepted the representation by operating as though Ricardo's financial status were unchanged. *See id.* ("Had the court been aware . . . it may well have altered the plan.").

Establishing the defense of inadvertence would require Ricardo to prove (1) that he did not know about the inconsistency or (2) that he lacked a motive for concealment. *See Allen*, 813 F.3d at 573. It is insufficient, however, for Ricardo to have been unaware of his duty to disclose; rather, he must have actually been unaware of the relevant underlying facts. *See id.* Ricardo cannot show this lack of knowledge because he was aware that he had received the quitclaim deed and aware of the basis for his claims against Fifth Third. This court has also held that a motive to conceal is "self-evident" when a debtor fails to disclose an asset to the bankruptcy court due to the "potential financial benefit resulting from the nondisclosure." *See id.* at 574 (quoting *Love*, 677 F.3d at 262). Ricardo had a motive to conceal his changed financial status.

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In sum, the district court did not abuse its discretion in holding that Ricardo was judicially estopped from claiming Fifth Third violated the automatic stay. For the same reason, the district court did not abuse its discretion in denying the plaintiffs' motion for a new trial.

Nor have the plaintiffs shown that the district court abused its discretion in excluding several of their exhibits. These exhibits were (1) a third-party expert's appraisal of the property at issue, (2) documents pertaining to an eviction proceeding against the plaintiffs that was eventually non-suited, (3) several of Fifth Third's responses to interrogatories, (4) mailing receipts indicating when Fifth Third received the package containing Ricardo's bankruptcy documents, and (5) Ricardo's real estate license and his own appraisal of the property.

The plaintiffs' briefing on the evidentiary rulings fails to explain any legal or factual errors made by the district court. Fifth Third objected to the third-party's appraisal and Ricardo's appraisal because they were not adequately disclosed during discovery. The plaintiffs' briefing on these exclusions does not address their tardy designation of the evidence.² Likewise, the plaintiffs have not countered Fifth Third's objections that some exhibits were inadmissible for lack of authentication or were irrelevant to the disputed claims. None of the excluded evidence, moreover, bears on the merits of Fifth Third's judicial estoppel defense.

For these reasons, we **AFFIRM** the judgment of the district court.

² Instead, the plaintiffs merely cite Federal Rules of Evidence 703 and 705 regarding the permissible basis for expert opinion. These arguments are inapposite.

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee (\$500.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
Total \$ _____					Costs are taxed in the amount of \$ _____			

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
 County of _____

By _____
 Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

 (Signature)

*SEE REVERSE SIDE FOR RULES
 GOVERNING TAXATION OF COSTS

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 27, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 17-20324 Mark Fornesa, et al v. Fifth Third Mortgage
Company
USDC No. 4:15-CV-2094
USDC No. 4:15-CV-2240

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that plaintiffs-appellants pay to defendant-appellee the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

Erica Benoit

By: _____
Erica A. Benoit, Deputy Clerk

Enclosure(s)

Mr. Mark Anthony Fornesa
Mr. Ricardo Fornesa Jr.
Mr. Matt Delmore Manning