Circuit Court for Baltimore City
Case Nos. 24-C-18-0011270
24-C-18-0011557

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1268

September Term, 2019

METRO-CON METROPOLITAN CONSTRUCTION, INC. *ET AL.*

v.

GEORGE KRITIKOS *ET AL.*

Meredith*
Kehoe,
Beachley,
JJ.

Opinion by Kehoe, J.

Filed: September 22, 2020

*Meredith, J., now retired, participated in the hearing and conference of this case while an active member of the Court. He participated in the adoption of this opinion after being recalled pursuant to Maryland Constitution, Article IV, Section 3A.

This is an appeal from a judgment entered by the Circuit Court for Baltimore City, the Honorable Shannon E. Avery, presiding, in a consolidated civil action between Metro-Con Metropolitan Construction, Inc. and J&M Investments on the one hand, and George Kritikos and 36 S. Eutaw, Inc. on the other. The trial court denied relief to both parties. Unsatisfied with this result, appellants present three issues to us which we have reworded:

> 1. Did the trial court err in denying appellants' motion in limine to apply the doctrine of judicial estoppel to anticipated trial testimony by 36 South Eutaw and Kritikos?
>
> 2. Did the trial court err by failing to fully consolidate the underlying civil actions?
>
> 3. Did the trial court err when it granted a motion for judgment against appellants?

Our answer to each of these questions is no and we will affirm the court's judgment.

Background

The facts are known to the parties. To get our bearings, 36 S. Eutaw, Inc. operates a "gentleman's club" located in Baltimore. The corporation is owned by Kritikos. (We will refer to 36 S. Eutaw and Kritikos collectively as "36 S. Eutaw" except when it becomes necessary to differentiate between them.) In 2013, 36 S. Eutaw entered into an oral contract with Metro-Con for the latter to complete the remodeling of the club. Metro-Con is owned by Mark Haynes. He also owns J&M Investments. At some point during the course of the project, 36 S. Eutaw and Kritikos had difficulty in making payments to Metro-Con so they signed a note and deed of trust in the amount of $416,000 to J&M. Although not all of the

loan documents are in the extract, Metro-Con asserts that the interest rate on the balance due on the loan was 20% per annum. 36 S. Eutaw does not dispute this.

The parties fell into two related disputes: 36 S. Eutaw and Metro-Con disagreed as to what had been paid and what was owed under the oral construction contract, and 36 S. Eutaw and J&M were not in agreement about what was due under the deed of trust note. Eventually, Metro-Con sued 36 S. Eutaw and Kritikos (the "Metro-Con action") (Case No. 24-C-18-0011557) and 36 S. Eutaw and Kritikos sued Metro-Con and J&M (the "36 S. Eutaw action") (Case No. 24-C-18-0011270). Additionally, J&M filed an action to foreclose the deed of trust. (Just when this occurred is unclear.)

On March 6, 2019, and as the result of a scheduling conference, the Honorable Lawrence P. Fletcher-Hill signed an order consolidating the 36 S. Eutaw action and the Metro-Con action "for all purposes" and designating the Metro-Con action as the lead case. The parties say that proceedings in the foreclosure action were stayed.

Trial began on the consolidated cases on July 11, 2019. The Metro-Con action was tried first. At the close of the plaintiffs' case, the defendants, that is, 36 S. Eutaw and Kritikos, moved for judgment. Judge Avery granted the motion. The court then called the 36 S. Eutaw action. At the close of the plaintiffs' case, the defendants, that is, Metro-Con and J&M moved for judgment. Judge Avery granted that motion as well. 36 S. Eutaw filed a motion for reconsideration in which it asked the court to issue a declaratory judgment regarding what was owed under the deed of trust. This motion is pending.

1.

Metro-Con asserts that the trial court erred in refusing to apply the principle of judicial estoppel in this case. We will provide some additional information.

In 2013, 36 S. Eutaw and Kritikos had two hearings before Baltimore City Board of Liquor License Commissioners regarding the transfer of the liquor license for the bar from the prior licensee to Kritikos. At the time of the earlier hearing, which occurred on January 17, 2013, the license transfer application had been pending for more than four years. At the hearing Henry Maeser, IV, Kritikos's architect for the project, testified as to the slow progress on the renovation project and the reasons for the delay.[1] The primary factual focus of the hearing pertained to Mr. Maeser's assessment of how much remained to be done on the project and how long it would take to finish. Kritikos's lawyer represented to the Board that his client had "like $250,000" invested in the building. After the conclusion of the hearing, the board decided to defer a decision on whether to dismiss the application for 179 days to give Kritikos an opportunity to complete the project and to obtain all necessary use and occupancy permits. The rationale for the board's decision was explained by its chair on the record. The chair's explanation did not refer to Kritikos's investment in the project.

[1] The information presented to the Board indicated that there were at least three reasons: disruption and delay caused by a prior contractor's "walking off the job," changing code requirements and a health problem on Mr. Maeser's part that prevented him from working on the project.

The second hearing occurred on October 31, 2019. At that time, the project was not quite finished and Kritikos requested a further extension to permit the City to complete a water line extension for the club's newly installed sprinkler system. In his argument to the board, Kritikos's lawyer stated that his client had "$600,000 invested" in the property. The board granted a 29 day extension. Once again, the basis for the board's decision was explained by its chair on the record and that explanation did not refer to Kritikos's investment in the project.

In their pre-trial statement, 36 S. Eutaw and Kritikos asserted that they intended to establish that the value of Metro-Con's work on the renovation project was $294,995. Metro-Con filed a motion in limine arguing that 36 S. Eutaw and Kritikos "must be estopped from presenting any evidence that the work [on the project] was less than $600,00 as a matter of law." Judge Avery denied the motion.

Metro-Con argues that the trial court erred. It says that the doctrine of judicial estoppel operates to prevent 36 S. Eutaw and Kritikos from denying at trial that "$600,000 was spent on the project." Any other result, says Metro-Con, would permit the appellees to testify falsely in one of the two proceedings. We do not agree.

In *Bank of New York Mellon v. Georg*, the Court explained:

> Judicial estoppel has been defined as a principle that precludes a party from taking a position in a subsequent action that is inconsistent with a position taken by him or her in a previous action. Judicial estoppel applies when it becomes necessary to protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system.

> Before judicial estoppel may be applied, three circumstances must exist: (1) one of the parties takes a position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage.

456 Md. 616, 624–25 (2017) (cleaned up).[2]

Even though the principle of judicial estoppel is often expressed in terms of inconsistent positions taken by parties in *judicial* proceedings, we agree with Metro-Con that the concept has been applied by Maryland courts when the prior forum was an administrative agency. *See, e.g.*, *Abrams v. American Tennis Courts*, 160 Md. App. 213, 224 (2004).

[2] Maryland courts have sometimes limited the doctrine of *judicial* estoppel to cases in which the party is estopped from taking inconsistent *factual* positions in litigation. *See, e.g. Dashiell v. Meeks*, 396 Md. 149, 171 (2006). The Court of Appeals has applied the principle of "estoppel by admission" to prevent a party from maintaining a position that is "directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action." *Eagan v. Calhoun*, 347 Md. 72, 87–88 (1997). The passage from *Bank of New York v. Georg* that we have quoted in the main text suggests that the Court may have merged the two concepts under the title "judicial estoppel." Another example of the Court's use of the term in the broader sense is *Lillian C. Blentlinger, LLC v. Cleanwater Linganore*, 456 Md. 272, 298–99 (2017).

The broader meaning of judicial estoppel is consistent with the Supreme Court's use of the term. *See New Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001) "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule [is] known as judicial estoppel[.]"

At this point, however, we part company with Metro-Con. In our view, none of the requirements for application of judicial estoppel are present in this case.

First, there is no conflict between 36 S. Eutaw's position before the liquor board, namely that Kritikos had invested $600,000 in the bar project, and the position that 36 S. Eutaw took in the lawsuit with Metro-Con, which was that the *value* of Metro-Con's work was slightly less that $300,000. Metro-Con does not assert that J&M financed Kritikos's purchase of the property, and at the first hearing, Kritikos's lawyer alluded to the fact that there had been another contractor who had withdrawn from the project at some point in the past. Kritikos's representation to the Board that he had spent $600,000 in acquiring and remodeling the property is not inconsistent with 36 S. Eutaw's position that the work actually performed by Metro-Con was *worth* no more than $300,000.

Second, there is no indication that Kritikos's representations as to the amount of money that he had invested in the project had been "accepted" by the board as a basis for its decision. The board made no formal or informal findings of facts, so all we have to go on is the board's explanations of its decisions. Nothing in those explanations gives us a basis to conclude that the board relied on either proffer in reaching its decisions.

Finally, we cannot see how anyone was prejudiced by Kritikos's counsel's representations. The licensing board did not rely on them and, from what we can tell from the record, Kritikos's application was unopposed. Metro-Con argues that the prejudice requirement was satisfied because it was not permitted to rely on judicial estoppel in the present action, but it's skipping an analytical step. In order to invoke estoppel, it is

necessary to show that someone relied on the statement in the prior action to that person's detriment. This does not appear to have been the case.

2.

Metro-Con asserts that Judge Avery failed to "fully consolidate" all of the claims raised by the parties. It explains in its brief:

> The issue with the failure to fully consolidate and hear all of the claims in full is that [Metro-Con] does not hold all of the claims against the Appellees, as without the Loan Documents, there can be no interest accruing nor any claim for attorney's fees. Thus, without any interest, as required by the Loan Documents, then [Metro-Con's] claim for money owed does indeed fall apart, as without the interest agreed to by the Appellees as consideration for obtaining the credit from Appellants, then there likely was in fact no money owed. But twenty percent interest over five or more years changes the transaction, as this Court can take judicial notice that money owed at twenty percent doubles over that period of time.
>
> The trial court, however, refused to hear any such claim, focusing, as noted above, on the "oral contract" of [Metro-Con]. See supra, note 3.[3] [J&M] had no opportunity to put on evidence as to money it advanced, interest owed to it, or transactional expenses related to the Loan, even though [the 36 S. Eutaw action] led by Appellees sought a declaration that no money was in fact owed to [J&M]. and the Court's March 6th, 2019, Order in the Foreclosure Matter ordered that the trial judge resolve that issue.[4] See, e.g., E at 34, Compl. in 1270 Matter (requesting a declaration that no money was owed to Appellants); E. at 62-63, Order Consolidating Cases.

[3] Metro-Con's citation is to a part of the trial record in which Judge Avery explained the concept of the burden of proof to Metro-Con's counsel. It does not address what issues Metro-Con was permitted to address in the action.

[4] The March 6, 2019 order was Judge Fletcher-Hill's order consolidating the cases. It says nothing about the foreclosure action. There is no order from the foreclosure action contained in the record extract or either of the appendices that we can find.

Metro-Con's argument is not legally sustainable. J&M was not a party to the Metro-Con action. If Metro-Con wished to assure that the amount due on the deed of trust note secured was adjudicated, the proper course would have been for it to have filed an amended complaint adding J&M as a party and setting out whatever relief it sought from the court. J&M and Metro-Con could have accomplished the same result by filing a counter claim in the 36 S. Eutaw action. But they did neither.

Additionally, the procedure actually followed by the trial court tracked what Metro-Con's own counsel asked the court to do at trial:

> MR. WHITAKER [counsel for Metro-Con]: [T]he agreement, in part from [Judge Fletcher-Hill] and part by the parties, was that this matter would be heard, the consolidated law matter, would be heard and it would be determined by Your Honor . . . . what liability, if any, the Defendants had—or what liabilities exist between the parties as to debt. And then if there was debt on the part of the Defendants owed to the Plaintiffs, then there would be a separate proceeding to establish the validity of the foreclosure documents, and then to proceed on the foreclosure.
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> THE COURT: I see.
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> MR. GREENBAUM [trial counsel for 36 S. Eutaw]: And that's our understand[ing] too.

The trial court did exactly what the parties asked it to do—adjudicate the existing liabilities between the parties. Metro-Con and J&M now assert the trial court unfairly prejudiced them by granting *their* motion for judgment at the close of the plaintiffs' case in the 36 S. Eutaw action. As we understand their argument, they assert that they were planning on presenting evidence as to the running balance due on the note during the defendants' phase of the trial in the 36 S. Eutaw action and that the trial court's granting

their motion for judgment unfairly prejudiced them. The answer to this contention is that it was Metro-Con and J&M who moved for judgment at the close of 36 S. Eutaw's case. It's difficult to understand how they can now complain about the trial court's granting their own motion. We can detect no error on the trial court's part.

3.

Metro-Con's final argument is that the trial court erred in granting 36 S. Eutaw's motion for judgment at the close of the plaintiffs' case in the Metro-Con action. It states in its brief:

> [T]he Appellants put on substantial evidence in favor of their claims against Appellees, including not just an admittedly-flawed spreadsheet that the Appellees and the trial judge focused on, but the testimony of the man who did the work, Mr. Haynes, photos of the same work, independent testimony of an expert that was accepted into evidence as to the value of the work, and contemporaneous statements by the Appellees, as reflected in the Liquor Board Hearing transcripts. The defense put on by the Appellees in the [Metro-Con action] consisted of cross-examination focusing almost entirely on one single exhibit, which was a corroborative exhibit demonstrative of contemporaneous recordation of expenses.

This contention is not a basis for appellate relief.

Md. Rule 2-519 states in pertinent part (emphasis added):

> (b) Disposition. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by *the court, the court may proceed, as the trier of fact, to determine the facts* and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

When Judge Avery granted 36 S. Eutaw's motion for judgment at the close of Metro-Con's case, she explained that her ruling did not turn on her assessment of the subjective credibility of Metro-Con's witnesses but rather on the probative value, or rather the absence of probative value, of the evidence introduced through those witnesses. The court was particularly concerned about Metro-Con's exhibit 19, which was a spreadsheet tracking charges to 36 S. Eutaw. Judge Avery characterized the accuracy of the charges as being "rather comprehensively impeached on cross-examination" and also noted that Haynes (Metro-Con's owner) "did not appear to understand the spreadsheet itself." From this, the court concluded that the evidence introduced by Metro-Con "reflected an overall inability of the Plaintiff to meet [their] burden of proof."

Metro-Con's argument that the trial court erred misapprehends the role of an appellate court in cases of this nature. Md. Rule 8-131(c) states that, when the trial court acts as the finder of fact, an appellate court "will not set aside the judgment of the court on the evidence unless clearly erroneous." In such cases, the trial court is "the judge of the weight to be attached to the evidence [and] the appellate court should not substitute its judgment for that of the trial court on its findings of fact[.]" *Ryan v. Thurston*, 276 Md. 390, 392 (1975) (cleaned up). Additionally, the trial judge is "entitled to accept—or reject—*all*, *part*, or *none* of the testimony of any witness, including testimony that was not contradicted by any other witness." *In re Gloria H.*, 410 Md. 562, 577 (2009) (emphasis in original) (cleaned up).

In effect, Metro-Con is asking us to make an independent evaluation of the evidence and to conclude that the evidence Judge Avery found was not probative was in fact probative. Doing so in this case would flout Md. Rule 8-131(c). We decline Metro-Con's invitation.

THE JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY ARE AFFIRMED. APPELLANTS TO PAY COSTS.