IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KENNETH J. KLEIN,	)	
	)	
Plaintiff,	)	**CIVIL ACTION NUMBER**
	)	
v.	)	N10C-03-297 JOH
	)	
MICHAEL K. HANDLEY,	)	
TERRY A. BERGER, and	)	
ROBERT J. NAIRN,	)	
	)	
Defendants.	)	

Submitted: December 29, 2011
Decided: January 20, 2012

MEMORANDUM OPINION

Upon Defendants' Motion for Summary Judgment - ***DENIED***

Appearances:

James S. Green, Sr., Esquire, and Jared T. Green, Esquire, of Seitz Van Ogtrop & Green, P.A., Wilmington, Delaware, Attorneys for Plaintiff Kenneth J. Klein.

Richard H. Cross, Jr., Esquire, and Tara M. DiRocco, Esquire, of Cross & Simon, LLC, Wilmington, Delaware, Attorneys for Defendant Michael K. Handley.

K. William Scott, Esquire, of Scott and Shuman, LLC, West Fenwick, Delaware, Attorney for Defendants Terry A. Berger and Robert J. Nairn.

HERLIHY, Judge

Defendants Michael Handley, Terry Berger and Robert Narnin ("defendants") move for summary judgment. They claim plaintiff Kenneth Klein's action is barred. He seeks contribution for payments made to satisfy debts the defendants guaranteed. Defendants first contend that Klein should be judicially estopped from asserting these claims because of representations he made in his individual bankruptcy filing. Second, they argue that the Court should not consider certain evidence in contradiction of an agreement to sell assets because of the parol evidence rule. The Court finds that the plaintiff is not judicially estopped from asserting his claims and the parol evidence rule does not preclude consideration of evidence outside the asset sale agreement. For the reasons that follow, defendant's motion for summary judgment is denied.

Factual Background[1]

Klein and the defendants constituted the Board of Directors (the "Board") of Accelapure Corporation ("Accelapure") from its date of incorporation in 2004 through 2007. The Board appointed Handley as Chief Executive Officer, Berger as President, Narin as Vice President of Sales and Marketing and Klein as Vice President of Engineering and Operations. In addition to his position at Accelapure, Klein also individually owned Klein Innovative Supply Service, Inc. ("KISS"). KISS leased and sold various pieces of equipment to Accelapure.

[1] The Factual Background is derived from the Amended Complaint, Defendant's Motion for Summary Judgment, Plaintiff's Response to Defendant's Motion for Summary Judgment, and the attached exhibits to the Motion and Response. Because this analysis addresses Defendant's motion for summary judgment, the evidence is viewed in a light most favorable to the non-moving party, Klein.

Accelapure was in the chemical business and its purpose was to "change the speed and economics of drug discovery and development through the development of purification technologies, 'succeed or fail fast' drug development processes and new lead discovery sciences."[2]

In late 2006 and early 2007 Accelapure was experiencing serious financial problems as a result of its failure to raise capital through an equity sale. Accelapure's financial problems were so severe that Handley, as CEO of Accelapure, allegedly used employee's 401(k) funds to pay general operating expenses and ceased paying employee wages. The use of employee 401(k) funds caused the corporation to become indebted to its employees for the shortfall in the 401(k) plan contributions.[3] Accelapure also owed Wilmington Trust Corporation ("WTC") approximately $335,000 for a debt which was personally guaranteed by Klein, Handley, Berger and Narin. At some point, Accelapure also fell behind in its obligation to pay KISS for leased and purchased equipment.

Klein alleges that defendants Handley, Berger and Narin "jumped the sinking ship" leaving him to handle the financial problems at Accelapure. After assuming the job of attempting to improve its financial condition, he realized that the company would have to liquidate its assets to satisfy its obligations to its various creditors. He decided to sell the equipment used in Accelapure's operations. In a memo prepared memorializing the sale of equipment to NEWCO/Lotus ("Lotus"), Klein listed Accelapure as the outright

[2] Am. Compl. ¶ 7.

[3] Am. Compl. ¶ 12 (The U.S. Department of Labor began an investigation into Accelapure's misuse of 401(k) funds as Accelapure's financial situation deteriorated in 2006. Klein alleges he used his own assets to satisfy Accelapure's obligation to fund employee's 401(k) accounts during the Department of Labor's investigation).

owner of the equipment. However, in his deposition in this case, Klein explained that the equipment belonged to himself, KISS and Accelapure. Klein testified he listed Accelapure as the only owner in the memo, bill of sale and transfer documents so that Lotus would not have any issues regarding clear title to the equipment.

Originally, Klein expected one half of the proceeds from the sale of equipment to go to satisfy the obligations of Accelapure and the other half to go to KISS and/or himself as co-owners of the equipment. Out of an abundance of caution, Lotus contacted WTC to confirm that they had no interest in the equipment to be sold. Because Accelapure owed a significant amount of money to WTC, Lotus requested that WTC provide a written authorization for the sale of the equipment. WTC provided a written authorization under the condition that the proceeds from the sale would go directly to WTC to satisfy the balance due on the WTC loan. Despite WTC's condition, Klein went through with the sale of equipment to Lotus. As a result, Klein and KISS did not recover any of the money owed to them by Accelapure as owners of the equipment.

In addition to his failure to recover for his ownership in the liquidated property, Klein also alleges in his amended complaint that he was required to make significant personal contributions to pay settlements for claims arising from past due wages and underfunded 401(k) plan contributions. Klein alleges he individually paid $133,100 to satisfy these obligations – which, he claims, the defendants were and are liable to make contributions for but have failed to do so.

When Klein filed for personal bankruptcy in June, 2007, he did not list on Schedule B of his petition, as an asset, the contribution claim against the defendants he now seeks in this action.

Parties' Contentions

First, defendants assert Klein should be judicially estopped from claiming that they are liable for contribution because of his failure to identify these claims during his personal bankruptcy filing. In that bankruptcy filing, he did not correctly list the contribution claims sought in this suit as assets of his bankruptcy estate. Defendants claim the bankruptcy court accepted Klein's position that he had no contribution claims against the defendants in its decision to discharge him from bankruptcy. Second, defendants contend that the funds raised by Accelapure in the sale to Lotus rightfully belonged to Accelapure only and Klein should not be allowed to present evidence in contradiction of the asset sale agreement because of the parol evidence rule. In support of this argument defendants point to the memo, bill of sale and transfer documents memorializing the sale to Lotus. Those documents state that all equipment belonged only to Accelapure. Defendants argue that the transfer documents are not ambiguous and the parol evidence rule prohibits the Court from considering any evidence outside of those documents, namely that Klein and/or KISS had any ownership interest in the equipment.

Klein responds by arguing that judicial estoppel is not implicated by his failure to identify these claims in his personal bankruptcy filing. Additionally, he contends that genuine issues of material fact exist precluding summary judgment on the present record.

Standard of Review

Summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[4] The Court must view the evidence in the light most favorable to the non-moving party.[5] The moving party carries the burden to show there are genuine factual issues, and when properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[6]

Discussion

The present controversy presents the specific issue of whether defendants can prove that they are entitled to judgment as a matter of law. Defendants are only entitled to judgment as a matter of law if: (1) the Court finds Klein is judicially estopped from raising the present claims because of representations made in his individual bankruptcy filing; or (2) the Court finds Accelapure was the owner of the equipment sold to Lotus and the parol evidence rule precludes any contradictory testimony. While the Court finds there are many factual disputes in this case possibly requiring resolution at trial, the facts related to the two legal issues raised in this Motion are largely undisputed and the Court is able to make its decision on the present record.

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[4] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[5] *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 828-29 (Del. 2005).

[6] *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

Judicial Estoppel does not prevent plaintiff's claims

Judicial estoppel is an equitable doctrine that seeks to prevent a litigant from advancing an argument that contradicts one previously taken in the same or earlier legal proceeding.[7] The goal of the doctrine is to protect the integrity of the judicial proceedings.[8] "The basic principle … is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."[9] Judicial estoppel is applicable where the litigant's present position contradicts another position that the litigant previously took and that the court was successfully induced to adopt in a judicial ruling.[10] The decision regarding whether or not the doctrine is applicable is made on a case-by-case basis. Several factors typically considered are:

> whether the party's later position is 'clearly inconsistent' with its earlier position, whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[11]

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[7] *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008).

[8] *Id.*

[9] *Ryan Operations G.P., v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 (1981), p. 782).

[10] *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del. Ch. Jul. 13, 1998).

[11] *Julian v. E. States Const. Serv., Inc.*, 2009 WL 1211642, at *6 (Del. Ch. May 5, 2009) (quoting *In re LJM Co-Inv., LP*, 866 A.2d 762, 782 n. 64 (Del. Ch. 2004)).

While Delaware case law provides a good overview of the law regarding judicial estoppel[12] the issue raised in the instant case the Third Circuit more thoroughly discussed in *Ryan Operations G.P., v. Santiam-Midwest Lumber Co.*[13] Because of factual similarities and comparable arguments in *Ryan Operation* and the present case, the Court finds the Third Circuit's discussion useful in resolving the judicial estoppel argument raised by Defendants. In *Ryan Operations*, the plaintiff filed suit against a debtor who had not been listed as a debtor in plaintiff's Chapter 11 bankruptcy petition.[14] Similar to the arguments in this case, the debtor argued that the plaintiff should be judicially estopped from asserting a claim against a debtor not listed in plaintiff's bankruptcy disclosure. The Third Circuit held that only certain statements of inconsistent positions trigger application of the judicial estoppel doctrine.[15] The determination of whether the judicial estoppel doctrine is implicated by inconsistent positions requires the facts to satisfy a two-part inquiry: (1) the plaintiff's position is inconsistent with a position asserted in the bankruptcy proceedings; and (2) the plaintiff asserted either or both

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[12] *See Motorola*, 958 A.2d at 859.

[13] 81 F.3d 355 (3d Cir. 1996).

[14] *Id.*

[15] *Id.* at 361.

positions in bad faith.[16] "Only if both prongs are satisfied is judicial estoppel an appropriate remedy."[17]

The Third Circuit relied on decisions from the D.C. Circuit and the Seventh Circuit to define bad faith; which is required to trigger the judicial estoppel doctrine. Bad faith is found to exist in situations where a party employs a scheme or commits an intentional wrongdoing to mislead the court.[18] A mistake made in good faith does not give rise to use of the judicial estoppel doctrine.[19] Use of the judicial estoppel doctrine is reserved for situations of intentional wrongdoing as a means of obtaining unfair advantage.[20] In *Ryan Operations*, the Third Circuit found that the plaintiff did not act in bad faith and was not judicially estopped from pursuing a claim against a debtor not listed as a debtor in the bankruptcy filings.[21]

This Court adopts the Third Circuit's analysis of whether or not the doctrine of judicial estoppel applies because of Klein's failure to list, in his bankruptcy proceeding, the claims asserted in this action. Klein's failure to list defendants as debtors in his

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[16] *Id.*

[17] *Id.*

[18] *Id.* at 362 (citing *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1428 (7th Cir. 1993)).

[19] *Id.* (citing *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980)).

[20] *Id.*

[21] *Id.*

Chapter 7 bankruptcy filings do not give rise to the application of judicial estoppel in this action for contribution.

Defendants are the movants in this motion and, therefore, bear the burden of proving that Klein's inconsistent positions were an intentional wrongdoing as a means of obtaining an unfair advantage; i.e. he acted in bad faith. They have not produced any evidence to show that Klein made an intentional or bad faith representation in his bankruptcy filings. Klein testified that he was not aware that he had a potential claim against the Defendants in this case, testifying in his deposition:

> Q: Were you aware prior to the date of filing [the bankruptcy petition] that you could have a potential claim against the defendants today, against Handley, Nairn and Berger?
> A: No, I wasn't.
> Q: Okay. Why weren't you aware of that?
> A: Number one, I didn't have money to seek that kind of specific legal counsel to have any guidance on that. Number two, I was just overwhelmed with all the stuff that I was dealing with.
> You have got to remember that for five months I had been completely abandoned by all my partners, and they were basically ducking and running as fast as rats on a sinking ship. And I had been unpaid for -- unemployed for six months. I had just started a job the beginning of June, and I was trying to get up to speed on a new job and start to emotionally rebuild from all that.
> And at that time I wasn't thinking ahead towards possible liabilities or judgments. I was just trying to figure out a path for the next week.[22]

Klein's statements show the unintentional nature of his failure to include the defendants as debtors in his bankruptcy filings. In fact, he listed $218,000 in back wages

[22] Klein Dep. 162:6-163:3, June 16, 2011.

and reimbursables as accounts receivable on Schedule B of the bankruptcy filing.[23] Had this asset been listed again as potential claims against defendants, the bankruptcy filing would appear to count the same asset twice. This fact is strong evidence that Klein *unintentionally* listed these claims incorrectly in his bankruptcy case. Even if the bankruptcy court relied on his misrepresentation in his bankruptcy filings, this is not the type of situation where the Court will invoke the judicial estoppel doctrine for the same reasons the Third Circuit did not apply it in *Ryan Operations*. Defendants have not produced sufficient evidence to convince the Court that Klein acted in bad faith. Klein did not take any steps to intentionally mislead a court and even if he ultimately prevails in this action, it will not create the perception that either the bankruptcy court or this Court was misled.

Parol Evidence Rule does not apply

Defendants' second argument is that no genuine issue of material fact exists that the proceeds from the sale to Lotus belonged to Accelapure. This argument is predicated upon a finding by the Court that Klein is prohibited from introducing evidence contradictory to the memorandum of sale, bill of sale and transfer documents which listed Accelapure as the sole owner of the equipment sold to Lotus. Defendants argue the parol evidence rule prohibits him from introducing evidence contradicting those writings.

[23] Bankruptcy Petition, Klein at 755.

The parol evidence rule is only applicable where the parties have entered into a "fully integrated agreement."[24] Once applicable, the rule prevents consideration of evidence other than that on the face of the writing.[25] Exceptions to the parol evidence rule, which allow the Court to consider evidence other than the writing, arise when the terms of the agreement are ambiguous, or when one party wishes to show that the agreement is invalid, void or voidable because of fraud, illegality, duress, mutual mistake, lack of consideration or incapacity.[26] Otherwise, the parol evidence rule bars a party from introducing extrinsic evidence to alter, modify or contradict the terms of a writing.[27]

Three factors must be considered to determine whether the parties intended to enter into a "fully integrated agreement."[28] Those factors are: "whether the writing was carefully and formally drafted, whether the writing addresses the questions that would naturally arise out of the subject matter, and whether it expresses the final intention of the

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[24] *Concord Mall, LLC v. Best Buy Stores, L.P.*, 2004 WL 1588248, at *4 (Del. Super. July 12, 2004).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Taylor v. Jones*, 2002 WL 31926612, at *3 (Del. Ch. Dec. 17, 2002).

parties."[29] A contract is completely integrated where, on its face, it is clear that the parties intended the writing to be a final and total expression of their agreement.[30]

Although the memorandum of sale, bill of sale and transfer documents all list Accelapure as the only owner of the equipment sold to Lotus, the parol evidence rule does not bar evidence to the contrary. The Court cannot find any indication that these documents are fully integrated. In addition, the Defendants were not even a direct party to the contract from which they now are seeking protection. Klein asserts in his complaint and deposition testimony that those documents were not factually accurate. During his deposition testimony, Klein explained the basis for the inaccurate statement of ownership in the documents he prepared. He stated that Lotus was concerned about title to the equipment and it was easiest to make them believe Accelapure was the sole owner of it to consummate the sale. Therefore, Klein is permitted to introduce evidence contrary to the wording of the documents thereby creating a genuine issue of material fact.

Conclusion

For the above-listed reasons, Defendants' motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

J.

[29] *Id.* (citing *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309, 316 (Del. Super. 1973).

[30] *Concord Mall, LLC*, 2004 WL 1588248, at *4.