ORIGINAL

No. 19-8517

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
OCT 30 2020
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EDWARD F. NOVOTNY III,

Petitioner,

v.

PLEXUS INC. et al.

Respondents,

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR REHEARING

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STATUTES AND RULES

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PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, petitioner Edward F. Novotny III, ("petitioner or Mr. Novotny") respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's October 5, 2020, order denying certiorari, and (3) re-disposing of this case by granting the petition for a writ of certiorari, vacating the judgment, and remanding back to the Seventh Circuit for further consideration in light of New Hampshire v. Maine, S. Ct. 1808 (2001), for the purpose of determining whether the application of judicial estopple in Novotny v. Plexus et. al was correctly applied.

As grounds for this petition for rehearing, petitioner states the following:

1. Mr. Novotny filed a complaint against the respondent Plexus Corp. in about May 2013 in the Seventh Circuit District Court, alleging age and race discrimination, 13-cv-5881.

2. Mr. Novotny sought chapter 7 debt relief in the U.S.

Bankruptcy Court of the Northern District of Illinois on 2-18-2016, case number 16-05301.

3. Mr. Novotny received a discharge of his debts in the Bankruptcy Court on 5-24-2016.

4. Mr. Novotny reopened the Bankruptcy case to amend his schedules to include the Plexus claim and notify all his creditors on 9-14-2017.

5. Bankruptcy Trustee Richard J. Mason filed a "no asset" report in the bankruptcy, effectively disclaiming any interest in the Plexus suit and abandoning the Plexus claim back to Mr. Novotny on 11-2-2017.

6. The District Court granted the respondent Plexus motion for summary judgment that Mr. Novotny was judicially estopped from pursuing the Plexus claim on 3-8-2018.

7. Mr. Novotny timely filed an appeal in the Seventh Circuit Court of Appeals.

8. Mr. Novotny timely filed for a writ of certiorari before this Supreme Court on 2-15-2020.

9. Mr. Novotny received a letter from the Office of the Clerk of the Supreme Court on 10-5-2020 stating that the petition for a writ of certiorari filed by Mr. Novotny had been denied.

10. Mr. Novotny now petitions this Supreme Court for rehearing, granting a writ of certiorari, and remanding this case back to the District Court for further proceedings in this matter, because the District Courts and the Appellate Courts decision was incorrect to judicially estopped Mr. Novotny from proceeding with the Plexus civil suit.

The District Court and the Appellate Court in their opinions in this matter have incorrectly relied on the respondent's quotation of Cannon-Stokes v. Potter in this matter.

Mr. Novotny inadvertently, carelessly, and mistakenly omitted the Plexus claim from his bankruptcy schedules.

Once the Defendants raised the issue, Novotny was granted leave by the District Court to reopen his bankruptcy and amended his bankruptcy schedules to offer the Plexus claim to the Trustee and the creditors.

Under 11 U.S.C. § 350(b), Mr. Novotny can reopen in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause. Mr. Novotny must report all of his assets whether they were previously omitted or not. The success of our bankruptcy laws requires a debtor's full and honest disclosure.

To not allow Mr. Novotny to reopen his bankruptcy and amend his schedules for the benefit of his creditors would be wrong and harmful to the creditors and should not be considered "Backing Up" or an "Escape Hatch for Mr. Novotny.

As the Seventh Circuit has recognized in unanimous opinions, *Biesek v. Soo Line R.R. Co.,* 440 F.3d 410 (7th Cir.2006), and *Cannon–Stokes v. Potter,* 453 F.3d 446 (7th Cir.2006), and as Judge Stapleton recognized in dissent in *Oneida,* those justifications do not withstand scrutiny. First, and perhaps most importantly, once a plaintiff-debtor has amended his or her-bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information,

two of the three primary *New Hampshire* factors are no longer met.

Although the plaintiff-debtor initially took inconsistent positions, the bankruptcy court ultimately *did not accept* the initial position. The Supreme Court put it well: "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations and thus poses little threat to judicial integrity." *New Hampshire*, 532 U.S. at 750–51, 121 S.Ct. 1808 (citation and internal quotation marks omitted).

The District Court in its opinion to judicially estopped Mr. Novotny and grant the respondent's motion for summary judgment, claims that Mr. Novotny's motive to conceal his Plexus claim from the bankruptcy court was that Mr. Novotny stood to receive all the proceeds from the Plexus case.

This is not true at all, first off, when a civil litigant files for bankruptcy, any civil claim the debtor owns becomes part of

his bankruptcy estate and therefore becomes the property of the trustee in the bankruptcy. Mr. Novotny would have no standing to pursue the Plexus claim; secondly Mr. Novotny did reopen the bankruptcy and did list the Plexus claim for the trustee and all his creditors which could have pursued the Plexus claim for themselves, *See Dunmore v. U.S.*, 358 F.3d 1107, 1113 (9th Cir. 2004) (holding that the district court's allowing the plaintiff-debtor to reopen his bankruptcy case, thereby preventing the plaintiff-debtor "from having his cake and eating it too," "was a permissible alternative to judicial estoppel that prevented [him] from deriving an unfair advantage if not estopped").

Mr. Novotny had no motive to conceal the Plexus claim from the bankruptcy court and being Pro Se, Mr. Novotny did not even know what kind of damages to seek from the Plexus claim until the District Court ordered the case to settlement conference and Mr. Novotny spoke with Pro Se counsel months after filing his bankruptcy, as to what kind of damages to seek from the

respondents. Indeed, Mr. Novotny could not have possibly contemplated what kind of damages he might be entitled to considering his lack of legal knowledge and expertise in this area, especially months before being called upon to do so for the first time.

Incidentally, the case in which the respondent Plexus relies heavily upon, *Cannon-Stokes v. Potter,* in that case, Traci Cannon-Stokes never moved the Court to reopen her bankruptcy to offer her discrimination claim against the U.S. Postal Service to the trustee and her creditors.

Mr. Novotny had at least offered up the Plexus claim to the bankruptcy trustee and his creditors.

In any event, the bankruptcy system already provides plenty of protections. The bankruptcy court or trustee may reopen a case if it uncovers deception, (Here, Mr. Novotny voluntarily initiated the reopening.) A case may be reopened even if it has long been closed 11 U.S.C. § 350 (b); Fed. R. Bankr.P. 5010.

A bankruptcy court or trustee can impose sanctions, including denial of a discharge. And, of course, a case may be referred to the United States Attorney's office for criminal prosecution. *See* 18 U.S.C. § 152 (criminalizing the concealment of assets, false oaths, and claims). "The availability of such a course of action would in most cases adequately deter intentional nondisclosure."

The Petition for the writ of certiorari demonstrates that there is an increasingly recurring conflict among the circuits regarding their treatment of "inadvertence, mistake, and or, motive to conceal" in the bankruptcy context in determining the application of judicial estoppel to bar a plaintiff from pursuing a meritorious claim as set forth in *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).

The increased litigation is due, in large part, to the disparate interpretations of "inadvertence, mistake, ort motive to conceal" the claim from the Bankruptcy Court as set forth in *New Hampshire*.

Panels, like the one here, refuse to consider evidence of the debtor's actual inadvertence and instead apply a presumption of deceit on the debtor's part where he has knowledge of a potential claim but failed to disclose it in his bankruptcy.

The District Court should not have granted the Respondents motion for summary judgment and applying judicial estopple solely on the basis of the trustee of the Bankruptcy rejecting Petitioners Civil Rights claim of age and race discrimination.

When the District Court granted the Petitioner Novotny leave to reopen the Bankruptcy, which Novotny did promptly, and amended his schedules to include his Novotny v. Plexus claim, that was omitted by mistake, error, carelessness, and without any motive to hide the claim from the original Bankruptcy schedules, the inconsistent positions that the Respondent Plexus claims Mr. Novotny took between the Plexus claim and the Bankruptcy were gone.

The Bankruptcy Trustee eventually rejected the Novotny v. Plexus et.al. Claim and so standing to pursue the Plexus claim reverted back to Novotny.

Had the Bankruptcy Trustee in this matter pursued Petitioner

Novotny's claim of discrimination, the District Court would not have granted Respondents motion for summary judgment based upon the grounds of judicial estopple, but since the Bankruptcy Trustee rejected Novotny's Plexus claim, the District Court only then granted the Respondent Plexus motion for summary judgment, citing that Mr. Novotny is Judicial Estopped.

The bankruptcy trustee should not be the person who decides who will be judicially estopped.

If the bankruptcy trustee rejects the civil claim and files a "no asset" report back to the bankruptcy court, then and only then, should the claim revert back to the debtor and that that individual be free to proceed with that claim and not let a wrong doer off the hook for their illegal actions.

Which in this case, is more important to the interests of justice? A claim of age and race discrimination, or the failure to list a potential civil claim in a bankruptcy preceding that occurred while the civil claim had been pending and was eventually placed before the trustee of bankruptcy, and rejected by the trustee?

Oddly enough, the Courts of this United States believe that the failure to list a potential civil claim in a bankruptcy is more important than a claim of age and race discrimination.

Where and when will we find justice in these United States if not in our own court systems?

CONCLUSION

For the foregoing reasons, petitioner Edward F. Novotny III, prays that this Court (1) grant rehearing of the order denying his petition for a writ of certiorari in this case, (2) vacate the the Court' s October 5th 2020, order denying certiorari, and (3) grant the petition for a writ of certiorari, vacate the judgment and remand to the Seventh Circuit for further consideration in light of New Hampshire v. Maine, S. Ct. 1808, (2001) for the purpose of determining whether the judgment of the District Court was correct under the doctrine of Judicial estopple.

Date: October 30, 2020

Respectfully submitted,

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10-30-20