United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

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Bankruptcy Caption:

Bankruptcy No. 91 B 20756

Adversary Caption: GLENN R. HEYMAN, not individually,but as trustee of the bankruptcy estate of William E. Dec, Debtor v. WILLIAM DEC, FRANCIS WARDALLRED, CELIA DEC and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS TRUSTEE U/T No. 10861300

Adversary No. 99 A 01214

Date of Issuance: September 8, 2000

Judge: Susan Pierson Sonderby

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Chapter 7
WILLIAM DEC,	)	
	)	No. 91 B 20756
Debtor.	)	
	)	Honorable Susan Pierson Sonderby
	)	
GLENN R. HEYMAN, not individually but as trustee of the bankruptcy estate of William E. Dec, Debtor,	)	Adv. No. 99 A 01214
Plaintiff,	)	
v.	)	
WILLIAM DEC, FRANCIS WARD ALLRED, CELIA DEC and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS TRUSTEE U/T No. 10861300	)	
Defendants.	)	

MEMORANDUM OPINION

Plaintiff/Trustee Glenn R. Heyman (the "Trustee") and Defendant Celia Dec ("Celia") have moved to strike portions of the answer and affirmative defenses of Defendants Francis Ward Allred and American National Bank and Trust Company of Chicago as Trustee U/T No. 10861300 (collectively "Allred").[1] For

[1] American National Bank and Trust Company of Chicago is a party to this suit in its capacity as trustee of land trust No.10861300. Allred is sole beneficiary of the land trust, which holds title to the real

the reasons set forth below, both motions are denied.

BACKGROUND

In this lawsuit, the Trustee seeks to recover valuable real property located at 632 W. Deming Place, Chicago, Illinois (the "Property"). Allred purchased the Property for $600,000 from Debtor William Dec (the "Debtor") in June 1989. At or around the time of the sale, Allred also allegedly granted an option to purchase the Property to Celia, who was then married to the Debtor. Celia in turn allegedly assigned the option to the Debtor. Per the terms of the alleged option,[2] the Property could be purchased for a base price of $600,000, an amount alleged to have been far below the Property's market value of more than one million dollars.

As assignee of the option, the Debtor arguably would have retained an interest in the Property after he sold it to Allred. Nonetheless, the Debtor did not include an interest in the Property or the option on his bankruptcy schedules when he filed a petition for relief under Chapter 7 on October 1, 1991. The Debtor did not attempt to repurchase the Property by exercising the option during the pendency of his bankruptcy case, which was not closed until August 1998. However, as part of a marital property settlement in 1995, the Debtor allegedly granted interests in the option to Celia and to his children.

Celia asserts rights under a single-page document which purportedly granted her a right to purchase the Property at anytime for a period of nine years after June 24, 1989 (the "Option Agreement"). About a month before the option would have expired in June 1998, Celia attempted to exercise it. When Allred refused to convey the Property to her, Celia brought an action to enforce rights under the Option

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property located at 632 W. Deming Place, Chicago, Illinois.

[2] Despite outstanding factual issues as to whether Allred granted the alleged option, this opinion will hereafter use the term "option," omitting the modifier "alleged." The omission is intended to simplify the discussion here, and should not be construed as a finding concerning the existence or validity of the alleged option. Similarly, the discussion in the main text may omit the term "alleged" when referring to the alleged assignment of the option by Celia to the Debtor.

Agreement in the Circuit Court of Cook County, Illinois (the "State Court").

According to Allred, he recalls signing a proposed agreement consisting of several pages that would have granted the Debtor an option to repurchase the Property. Allred further maintains that he never saw that draft agreement again or discussed the proposed option with either of the Decs. Allred denies that he ever signed the Option Agreement granting Celia a right to purchase the Property, and he contends that the signature appearing on that document was forged. The issue presently before this Court is whether, as a consequence of the litigation strategy he pursued in the State Court, Allred should be precluded from asserting a forgery defense in this Court.

Allred's Arguments in the State Court

Allred initially took the position in the State Court that his signature on the Option Agreement was a forgery.[3] Later, however, after handwriting experts concluded that the signature was in his handwriting, Allred amended his answer to assert "on information and belief" as his first affirmative defense that he had been deceived into signing the Option Agreement. Although Allred maintains that he never intended to withdraw his alternate theory that the signature on the Option Agreement might a forgery, there are no allegations in the amended answer that the signature might have been forged.[4]

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[3] To resolve the issues presented in the parties' motions to strike, the Court has reviewed those pleadings and transcripts from the State Court which the parties have chosen to submit as exhibits. The record from the State Court is incomplete, however. While the Court has considered material from the parties' submissions as background for its decision on this motion to strike, statements in this opinion that describe the State Court proceedings do not constitute findings of fact.

[4] The Trustee and Celia take the position that Allred withdrew a forgery defense, but that conclusion may be inexact. Review of the pleadings attached as exhibits to the Trustee's motion indicates that Allred originally alleged in his answer that the option was invalid because he had not signed the Option Agreement. There is no reference to forgery in the original answer, although Allred alleged in an amended counterclaim that his signature had been forged.

Consistent with his original answer, in ¶¶ 3 and 21 of his amended answer, Allred denied Celia's allegations that on or about on or about June 24, 1989, he and Celia executed the Option Agreement.

Allred's second amended affirmative defense was that Celia had no interest in the option because she had assigned it to the Debtor. According to Allred, the issue whether the Debtor had an interest in the option arose during discovery in the State Court litigation, when his attorney obtained a copy of a document captioned "Assignment of Option Agreement" (the "Assignment Agreement"). By the terms of the Assignment Agreement, which bears the same date as the Option Agreement, Celia would have relinquished any rights under the Option Agreement to the Debtor. Celia testified at deposition that the Option Agreement had disappeared in the early 1990's, but reappeared in March 1998, when the Debtor presented it to her and told her to exercise the option. According to Celia's deposition testimony, the Debtor told her that he could not exercise the option, and that she should forget about the assignment.

Allred states that based on the evidence concerning the assignment, he theorized that if Celia had no interest in the option in 1998, it would moot the question whether he had in fact signed the Option Agreement. Allred therefore filed a motion for summary judgment in which he argued that because Celia had assigned her interest in the option to the Debtor, she lacked standing to enforce it. In his motion for summary judgment, Allred also argued that enforcement of the option would facilitate an act of bankruptcy fraud, since the Debtor had failed to include his interest in the option on his bankruptcy schedules.

Allred filed both his amended answer and his motion for summary judgment shortly before the State Court action was set for trial. Protesting that the change in Allred's theory was untimely, Celia sought to strike the amended answer and to bar witnesses that would testify in support of the new defense that Allred had been deceived into signing the Option Agreement. At a May 26, 1999 status hearing, Allred's attorney responded affirmatively to the State Court judge's question "So therefore we are no longer saying it might be a forgery." Ultimately, the State Court denied Celia's motion to strike, concluding that there was enough time in which her attorney could depose Allred's witnesses. Allred's motion for summary judgment was denied as untimely, apparently without any discussion of the merits of Allred's argument that Celia had

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While the amended answer contains no allegations of forgery, the record here does not reveal whether Allred had withdrawn his amended counterclaim.

assigned her interest in the option to the Debtor. That issue would have remained pending, since the State Court did not strike Allred's affirmative defense that Celia had relinquished any option by assigning it to the Debtor.

Looking to the text of Allred's motion for summary judgment, there are numerous references to the "purported option." Neither the motion for summary judgment nor any other State Court pleading in this record contains an admission by Allred that the signature on the Option Agreement was authentic.

Allred's Arguments in the Bankruptcy Court

On June 10, 1999, four days before trial was set to begin in the State Court, Allred moved to reopen the Debtor's bankruptcy case. The motion to reopen informed this Court of the pending State Court litigation, and of Allred's refusal to honor the option. As grounds for reopening the case, Allred alleged that the Debtor had failed to schedule a "significant asset," which was never administered by the Trustee.

There were a number of inconsistencies in the allegations of Allred's motion to reopen. Although the motion at several points characterized the Debtor's interest in the option as a valuable asset of the estate, the motion also used the term "alleged" in several references to the option. For example, in ¶ 10 of the motion, Allred stated that Celia had attempted to exercise "the nebulous and alleged option." As explanation of the facial inconsistencies in the pleading, Allred states that although he continued to deny that the Option Agreement created rights with respect to the Property, he believed that the most economical way to terminate the controversy with Celia was to purchase the bankruptcy trustee's rights under the Option Agreement. To that end, Allred concluded the motion to reopen by stating that he was willing to purchase the Trustee's interest in the option for $75,000.

Allred admits that his attempt to purchase the option from the bankruptcy estate was a legal maneuver taken after it became clear that he would not be able to avoid trial in the State Court. In Allred's words, "having failed to convince [the State Court] to grant summary judgment based on the Assignment, and not being in a position to prove that the document was a forgery, I retained separate counsel to petition

the Bankruptcy Court to administer the Option. . . . I concluded that the most economical way to end this controversy was for me to purchase the Option from the bankruptcy Trustee, whether or not it was genuine." Allred Aff., ¶ 14. According to Allred, he did not anticipate that the Trustee would attempt to enforce the option, instead of accepting his offer to purchase the bankruptcy estate's interest in the option.

The Trustee states that after the bankruptcy case was reopened, his first step was to review the pleadings and transcripts from the litigation in the State Court. In addition, the Trustee met with counsel for Allred and Celia in an attempt to settle the matter. It was only after attempts at settlement failed that the Trustee brought this adversary proceeding. Most counts of the Trustee's complaint are directed at recovery of the Property under theories of constructive or resulting trust and fraudulent transfer. Other theories are that the series of transactions in 1989 constituted a financing relationship rather than a sale of the Property, and that Celia holds the option as agent or trustee for the Debtor.

Responding to the allegations in ¶ 20 of the Trustee's complaint, Allred states as follows:

> 20. As part of the agreement, the Debtor, through Celia, purportedly received an option contract to repurchase the Real Estate ("Option"). Celia then purportedly assigned the Option to the Debtor ("Assignment"). Copies of the Option and Assignment are attached hereto as Exhibits I and J and are incorporated by reference herein.
>
> ANSWER: Allred admits that as part of the transaction whereby he purchased the Real Estate, he discussed giving the Debtor an option to purchase the Real Estate. Allred denies that any assignment of the option was part of his contract with the Debtor, and denies that he was aware of the purported assignment as of the closing. Allred denies the authenticity of the purported Option attached to the Complaint as Exhibit I, and is without knowledge sufficient to form a belief as to the authenticity of the purported assignment attached to the Complaint as Exhibit J. Except as answered above, Allred denies the allegations of this paragraph.

Allred's fifth affirmative defense is the following:

> Fraud/Lack of Agreement. Allred does not recall signing or agreeing to an option contract in the form attached to the Complaint. Allred recalls signing a multi-page option agreement, with the Debtor as the optionee, which was then marked up with further proposed changes but never re-tendered to him for signature or other acknowledgment in modified form. Allred was not informed that Celia was to be the optionee, or that there was to be any assignment of the option. Therefore, alternatively and to the extent that the Trustee is allowed to enforce the Option as successor to the Debtor despite the Trustee's failure to assert it within the period provided in the Option, Allred asserts that the Option, in the form asserted, is either a forgery or a document which he signed

> without being aware of its content or nature due to fraud by the Debtor, Celia, and/or some third party.

Regarding the resurrected forgery defense, Allred states that in the time interval that the State Court litigation has been stayed, he has assembled new evidence relevant to his defense that his signature on the Option Agreement was forged.

The Trustee has moved to strike the fifth affirmative defense and ¶ 20 of Allred's answer, and Celia has joined in the motion. Both argue that under the doctrines of judicial estoppel, "mend the hold," and equitable estoppel, Allred should be precluded from asserting a forgery defense.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7012(b) makes Federal Rule of Civil Procedure ("Rule") 12(f) applicable in adversary proceedings. Rule 12(f), dealing with motions to strike, provides as follows:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

Fed. R. Civ. P. 12(f).

Under Rule 12(f), when allegations bear no relation to a controversy or may cause undue prejudice to the objecting party, those allegations may be stricken. Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 664 (7th Cir. 1992). A motion to strike is also the appropriate means for challenging an insufficient or irrelevant affirmative defense. Van Schouwen v. Connaught Corp., 782 F. Supp. 1240, 1245 (N.D. Ill. 1991). Motions to strike can serve a useful purpose by saving the time and expense that would otherwise be spent litigating issues that will not affect the outcome of a case. United States v. Walerko Tool and Engineering Corp., 784 F. Supp. 1385, 1387-88 (N.D. Ind. 1992). For instance, vague allegations that raise defenses of dubious legal merit may be stricken for "indefiniteness." Raleigh v. Mid American Nat'l Bank and Trust Co. (In re Stoecker), 131 B.R. 979, 982 (Bankr. N.D. Ill. 1991).

However, motions to strike affirmative defenses are generally disfavored, as they potentially serve

only to delay. Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989). It is preferable that a defense be heard if the possibility exists that the defense may succeed after a full hearing on the merits. United States v. 416.81 Acres of Land, 514 F.2d 627, 631 (7th Cir. 1975).

The grounds for a motion to strike must be readily apparent from the face of the pleadings or from materials that may be judicially noticed. Wailua Assoc. v. The Aetna Casualty & Surety Co., 27 F. Supp. 2d 1211, 1216 (D. Haw. 1998). When considering a motion to strike, as it does on a motion for judgment on the pleadings, the court must view the challenged pleading in the light most favorable to the nonmovant. Id. A motion to strike will ordinarily be denied where the allegations under attack are of such a nature that their sufficiency should not be determined summarily, but should be decided only after a hearing or decision on the merits. Stoecker, 131 B.R. at 982.

As applied here, it does not appear that Allred's forgery defense falls within those categories of matters that may be stricken under Rule 12(f). If Allred is allowed to assert the defense, time and effort may be spent litigating the issue of forgery, but incremental costs of litigation are not in themselves justification for striking a defense if there is some basis for the defense. Here, the Trustee and Celia have not argued or demonstrated that Allred's forgery defense is redundant, immaterial or insufficient.

The Trustee and Celia instead seek application of principles of estoppel, an equitable concept which prohibits a party from asserting a defense, but does not eliminate that defense. See In re Cassidy, 892 F.2d 637, 642 (7th Cir.), cert. denied, 498 U.S. 812, 111 S.Ct. 48 (1990). A party asserting estoppel effectively asks the court to take the extraordinary step of rejecting a litigant's entire argument without any consideration of its merit. UNUM Corp. v. United States, 886 F. Supp. 150, 158 (D. Me. 1995). Because of the severe consequences of estoppel, due process would normally require some form of hearing before precluding a defense that has not been shown to be insufficient.

In the absence of a showing that Allred's forgery defense lacks merit, requirements of due process dictate that these motions to strike be denied. While denial of the motions to strike would not prevent the Trustee and Celia from renewing their arguments concerning preclusion at a later date, it is clear from the

pleadings that two of their theories of preclusion are inapplicable here. In the interest of judicial economy, the motion to strike will be denied with prejudice to the later assertion of the Trustee's and Celia's arguments concerning judicial estoppel and the "mend the hold" doctrine.

Judicial Estoppel

The doctrine of judicial estoppel requires that a party who has obtained a favorable judgment or settlement on the basis of a legal or factual ground in one lawsuit cannot repudiate that ground in a later lawsuit. Ogden Martin Systems of Indianapolis, Inc. v. Whiting Corp., 179 F.3d 523, 525 (7th Cir. 1999); McNamara v. City of Chicago, 138 F.3d 1219, 1225 (7th Cir.), cert. denied, 525 U.S. 981, 119 S.Ct. 444 (1998); Shearer v. Dunkley (In re Dunkley), 221 B.R. 207, 213 (Bankr. N.D. Ill. 1998). The doctrine is equitable in nature and is intended to protect courts from being manipulated by litigants who seek to prevail, twice, on opposite theories. Wilson v. Chrysler Corp., 172 F.3d 500, 504 (7th Cir. 1999). See also Ladd v. ITT Corp., 148 F.3d 753, 756 (7th Cir. 1998) (purpose of the doctrine " is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant").

Judicial estoppel precludes parties from abandoning positions taken in earlier litigation. Astor Chauffered Limousine Co. v. Runnfeldt Investment Corp., 910 F.2d 1540, 1547 (7th Cir. 1990). "The principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Id. "Once the first decision establishes a fact or claim in the litigant's favor, that should be as binding as if the decision had been adverse." Id. at 1548. "A party can argue inconsistent positions in the alternative, but once it has sold one to the court it cannot turn around and repudiate it in order to have a second victory . . ." Continental Illinois Corp. v. Commissioner of Internal Revenue, 998 F.2d 513, 518 (7th Cir. 1993), cert. denied, 510 U.S. 1041, 114 S.Ct. 685 (1994).

Importantly, judicial estoppel is to be employed with caution to prevent impinging on the truth-seeking function of the court. Levinson v. United States, 969 F.2d 260, 264 (7th Cir.), cert. denied, 506 U.S. 989, 113 S.Ct. 505 (1992). Although there is no precise formula guiding application of the doctrine, the Seventh Circuit has identified three prerequisites to its application: (1) the later position must be clearly

inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. Ogden Martin Systems, 179 F.3d at 527. Absent the limitation that a party may be estopped only if it has obtained a favorable judgment or settlement on the contention that it seeks to repudiate, the doctrine of judicial estoppel would be in conflict with Federal Rule of Bankruptcy Procedure 7008(a) and Federal Rule of Civil Procedure 8(e), which permit inconsistent pleadings. See McNamara, 138 F.3d at 1225.

Here it is argued that judicial estoppel is appropriately applied because Allred abandoned his forgery defense, only to reassert it once this bankruptcy case had been reopened. As the parties note, Allred first persuaded the State Court to deny Celia's motion to strike an amended answer that revised his theory of defense. A short while later, the bankruptcy case was reopened when Allred presented a motion to reopen containing allegations that the option was a valuable asset of the estate. Because the State Court litigation was stayed by the reopening of this case, Allred managed to buy time in which to gather new evidence to support a forgery defense. Adding to the possibility of gamesmanship and unfair advantage, Allred admits that he wanted to avoid the pending trial date in the State Court and that he lacked evidence essential to his forgery defense at the time he sought relief in the Bankruptcy Court.

Despite obvious maneuvering on Allred's part, this Court cannot agree that Allred's most recent change in litigating strategy has perpetrated a fraud on the judicial system. It is unfortunately not all that uncommon that litigants invoke a court's jurisdiction in order to avoid the effect of adverse developments in litigation in another forum. To remedy any inequity caused by forum shopping, courts may enter orders of remand. In bankruptcy cases, as appropriate, bankruptcy judges may modify the automatic stay. Importantly, though, the court's decision must take into account any newly asserted factors that support jurisdiction in the second forum. Sometimes forum shopping may bring an unanticipated benefit to parties whose interests were not represented in the forum where the litigation began.

Here, Allred and Celia appeared before the State Court for almost a year without raising the question of any relationship between their transactions with the Debtor and the Debtor's bankruptcy. As

the State Court commented at a status hearing of June 10, 1999, the interjection of bankruptcy issues raised new concerns that had not been made known to it.

When Allred came to the Bankruptcy Court, the self-serving nature of his motives was apparent from the ambiguities in his references to the option in his motion to reopen, and from the fact that Allred admittedly was resisting Celia's attempts to enforce the option in the State Court. Although this Court denied Celia's motion to modify that automatic stay with respect to the State Court litigation, it was never led to believe that Allred conceded that the option was valid. The decisions of this Court were based on its own assessment of the facts and issues, and not upon the premise that Allred would honor the option.

Even accepting the premise that Allred's changes in position constitute an affront to the judicial system, the prerequisites for application of judicial estoppel have not been met in this case. As already noted, the Seventh Circuit has directed that three factors should be considered. Ogden Martin Systems, 179 F.3d at 527.

First, there is no fundamental inconsistency in Allred's alternative allegations that the option is invalid either because it was forged or because he was deceived into signing it. Either defense denies any obligation to the holder of the option. Rather, the inconsistency arises from Allred's assertions that the bankruptcy estate has an interest in the option. Although one might infer from those averments that the option is valid, none of Allred's pleadings either here or in the State Court explicitly make such a statement.

Second, although the issue of the option's validity is common to this proceeding and to the State Court action, there are additional factual issues here due to Allred's allegations that Celia assigned her interest in the option to the Debtor. Allred raised the question of the assignment shortly before trial in the State Court litigation, but bankruptcy issues were not addressed in the State Court.

Finally and most importantly, since the State Court made no determination on the merits of Allred's defense that he was deceived into signing the Option Agreement, it cannot be said that Allred persuaded the State Court to adopt a position that the option was not a forgery. Although the State Court denied

Celia's motion to strike Allred's amended affirmative defenses, it is clear from the transcript that the State Court's ruling was at most a nonsubstantive order establishing the issues that would be tried. Celia argues that a ruling on a preliminary matter can support application of judicial estoppel, but the preliminary rulings in the cases she cites were followed by a final determination or judgment on the substantive issues involved. Here, the State Court proceedings never reached that point. Because Allred has not previously prevailed on a position inconsistent with his forgery defense, the doctrine of judicial estoppel is inapplicable here.

"Mend the Hold" Doctrine

The Trustee and Celia argue that in asserting a forgery defense, Allred is attempting to "mend the hold." The theory is that after he succeeded in avoiding the State Court litigation by persuading this Court to reopen the case, Allred realized that his legal maneuver had backfired, and that he could lose the Property. With the aim of repairing the potential damage to his position, Allred then raised the defense that the signature on the Option Agreement was a forgery.

The doctrine of "mend the hold" is a common law doctrine that limits the right of a party to a contract suit to change its litigating position. Harbor Ins. Co. v. Continental Bank Corp., 922 F.2d 357, 362 (7th Cir. 1990). Under the doctrine, in force in Illinois, a party cannot repudiate its position in litigation over a contract once the pleadings are complete. Horwitz-Matthew, Inc. v. City of Chicago, 78 F.3d 1248, 1252 (7th Cir. 1996).

The reason for not applying the doctrine at the pleadings stage is that a defendant may not have had a reasonable opportunity to formulate its defense. Id. If seen as a rule of procedure, there is a concern that application of the "mend the hold" doctrine would preclude alternative pleading under federal rules of civil procedure. See Harbor Ins. Co., 922 F.2d at 364-365; Apex Automotive Warehouse, L.P. v. WSR Corp. (In re Apex Automotive Warehouse, L.P.), 205 B.R. 547, 552 (Bankr. N.D. Ill. 1997). A reasonable view of the doctrine is that "if pretrial discovery or other sources of new information justify a change in a contract party's litigating position as a matter of fair procedure under the federal rules, that change should not be deemed a forbidden attempt to 'mend the hold.'" Harbor Ins. Co., 922 F.2d at 364.

The Seventh Circuit has instructed that the "mend the hold" doctrine, appropriately configured, can be seen as a corollary of the duty of good faith that the laws of many states, including Illinois, impose on parties to a contract. Harbor Ins. Co., 922 F.2d at 363. "A party who [contrives] a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith." Id. It is not clear that the doctrine of "mend the hold" applies outside the contract area. Id. at 365.[5]

Looking to this lawsuit by the Trustee, it is significant that the cause of action here is very different from the contract litigation between Allred and Celia in the State Court. To recover from Allred, the Trustee relies primarily on theories of fraudulent transfer and constructive or resulting trust. It would also appear that Celia's rights under the option could be of little or no significance if the Trustee succeeds in his argument that the sale of the Property to Allred was a fraudulent transfer.[6] Obviously, Celia would have had a strong argument for application of the "mend the hold" doctrine if Allred had attempted to revert to a forgery defense on the eve of trial in the State Court, but the interests of the Trustee and the bankruptcy estate have intervened, resulting in a new mix of legal and factual issues. Bearing in mind the truth-seeking function of this Court, and the fact that questions of Allred's and Celia's complicity with the Debtor were

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[5] At this juncture, the Court recognizes that a number of decisions have extended the "mend the hold" doctrine to situations where a position taken in prior dealings with a party to a contract is inconsistent with a position taken during litigation. See Herzog v. Leighton Holdings, Ltd. (In re Kids Creek Partners, L.P.), 233 B.R. 409, 421 (N.D. Ill. 1999); aff'd, 200 F.3d 1070 (7th Cir. 2000); Raffel v. Medallion Kitchens of Minnesota, Inc., No. 95 C 5374, 1996 WL 675787 at *4 (N.D. Ill. Nov. 20, 1996), aff'd on other grounds, 139 F.3d 1142 (7th Cir. 1998). Where, as happened in Kids Creek, 233 B.R. at 421, preclusion is also appropriate under other principles such as equitable estoppel, courts might hesitate before extending the "mend the hold" doctrine beyond its more established scope.

[6] Earlier in the case, the question of the validity of the option was probably more significant because of the Trustee's allegations under Code § 727(d) that the Debtor's discharge should be revoked. Now that the Trustee's revocation of discharge complaint has been dismissed as brought outside the time limit under Code § 727(e), it would seem that the question of the validity of the option impacts primarily on the Trustee's rights against Celia.

not before the State Court, at this point in the lawsuit before it, this Court will allow Allred some latitude in formulating his litigation strategy. Accordingly, the Court will not strike Allred's forgery defense as having been asserted in contravention of the "mend the hold" doctrine.

Equitable Estoppel

Finally, the Trustee argues that Allred should be equitably estopped from asserting his forgery defense. Again, the thrust of this argument is that when Allred moved for an order reopening this bankruptcy case, he represented that the option was a valuable asset of the estate. At that point in time, Allred's answer in the State Court litigation did not include a defense that the signature on the Option Agreement was a forgery. The Trustee contends that it was reasonable to rely on Allred's representations and not question the authenticity of the option. According to the Trustee, by relying on Allred's representations, he incurred fees and expenses that may never be recovered. Similarly, Celia complains that she has incurred substantial legal fees on account of the changes in Allred's theory as to the validity of the option.

Application of the doctrine of equitable estoppel prevents a party from benefitting from its own misrepresentations. Davis v. Illinois State Police Federal Credit Union (In re Davis), 244 B.R. 776, 794 (Bankr. N.D. Ill. 2000) (citing Black v. TIC Invest. Corp., 900 F.2d 112, 115 (7th Cir. 1990)). The traditional elements of the defense are: (1) misrepresentation by the party against whom estoppel is asserted; (2) reasonable reliance on the misrepresentation by the party asserting estoppel; and (3) detriment to the party asserting estoppel. FDIC v. Rayman, 117 F.3d 994, 1000 (7th Cir. 1997); Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.), 183 B.R. 812, 821 (Bankr. N.D. Ill. 1995).

At this point in time, there are numerous questions of fact as to whether the elements of equitable estoppel are present. For instance, while the Trustee suggests that Allred falsely represented that the option was valid, the record here contains no clear statement to that effect, and the Trustee has submitted no evidence that he was explicitly told that Allred had abandoned his forgery defense. Celia's equitable estoppel argument is no less problematical, since Allred alleges that she seeks to enforce rights under a

forged document. Since it has not been established that Allred's forgery defense is insufficient, preclusion conceivably would impede the truth-finding process here. Taking into account the unanswered questions concerning application of the doctrine, Allred's forgery defense will not be stricken on the basis of equitable estoppel.

CONCLUSION

For the reasons set forth above, the Court denies the motions by Trustee Glenn Heyman and Defendant Celia Dec to strike ¶ 20 and the fifth affirmative defense of Defendant Francis Ward Allred's answer.

ENTERED:

Date:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Chapter 7
WILLIAM DEC,	)	
	)	No. 91 B 20756
Debtor.	)	
	)	Honorable Susan Pierson Sonderby
	)	
GLENN R. HEYMAN, not individually but as trustee of the bankruptcy estate of William E. Dec, Debtor,	)	Adv. No. 99 A 01214
Plaintiff,	)	
v.	)	
WILLIAM DEC, FRANCIS WARD ALLRED, CELIA DEC and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS TRUSTEE U/T No. 10861300	)	
Defendants.	)	

ORDER

For the reasons set forth in this Court's memorandum opinion entered on this date, the Court denies the motions by Trustee Glenn Heyman and Defendant Celia Dec to strike ¶ 20 and the fifth affirmative defense of Defendant Francis Ward Allred's answer.

ENTERED:

Date:

SUSAN PIERSON SONDERBY
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WILLIAM DEC, Debtor.	Chapter 7 No. 91 B 20756 Honorable Susan Pierson Sonderby
GLENN R. HEYMAN, not individually but as trustee of the bankruptcy estate of William E. Dec, Debtor, Plaintiff, v. WILLIAM DEC, FRANCIS WARD ALLRED, CELIA DEC and AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS TRUSTEE U/T No. 10861300 Defendants.	Adv. No. 99 A 01214

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed copies of the attached **MEMORANDUM OPINION** and **ORDER** to the persons listed on the attached service list this 8th day of September, 2000.

Georgia Denico
Secretary

AO 72A
(Rev. 8/82)