

**H UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)	
)	
HORIZON WOMENS CARE)	
PROFESSIONAL LLC,)	
)	
Debtor.)	
<hr/>)	Case No. 13-28436 HRT
HORIZON WOMENS CARE)	Chapter 11
PROFESSIONAL LLC,)	
)	
Plaintiff,)	Adversary No. 14-01074
v.)	
)	
JUDY BAACK,)	
)	
Defendant.)	
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)	
)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

This case comes before the Court on the Motion for Summary Judgment filed by Defendant Judy Baack (“Baack”) on November 24, 2014 (docket #20), the Response thereto filed by Plaintiff Horizon Womens Care Professional, LLC (“Horizon”) on December 23, 2014 (docket #25), the Reply filed by Baack on January 5, 2015 (docket #28), and the Support Brief filed by Baack on January 6, 2015 (docket #29). The Court has reviewed the pleadings and the record and is now ready to rule.

I. Background

Horizon is a medical practice and, prior to 2006, Baack and Dr. Heidi Oster (“Oster”) were each 50% members of Horizon. In 2006, Baack lost her license to practice medicine, and she was terminated by Horizon in January 2007. In June 2007, Horizon and Oster filed suit in state court seeking a declaratory judgment that Horizon had properly terminated Baack’s employment “for cause” under an employment agreement between Horizon and Baack. The suit also involved Horizon’s and Oster’s claims under an operating agreement and a buy-sell agreement, and a counterclaim made by Baack against Oster for breach of a promissory note.

In February 2011, the trial court found Baack was properly terminated “for cause” under the employment agreement. The court also found in favor of Baack on her counterclaim for breach of a promissory note, and against Baack on Horizon’s claim for unjust enrichment based on Baack’s retention of \$160,000 in insurance proceeds. (Docket #20, Ex. F.) In June 2011, the

court also awarded Horizon and Oster their attorney fees with respect to the declaratory judgment claim under a prevailing party provision of the employment agreement. (Docket #20, Ex. I) (the “June 2011 Order”).

In May 2012, the Colorado Court of Appeals reversed the trial court on the declaratory judgment issue, finding Horizon did not have the option to terminate Baack “for cause” under the employment agreement because Baack suffered from a disability. The case was remanded with directions to: “(1) order Oster to pay Baack the full value (i.e., \$73,000) of Baack’s share in Horizon; (2) determine the amount of 2006 and 2007 profits, if any, to which Baack is entitled, in light of Horizon’s recovery of \$160,000 on its unjust enrichment claim and Baack’s August 2007 termination date; and (3) recalculate the judgment against Oster on the promissory note.” (Docket #20, Ex. A). In November 2012, Baack filed a Rule 60(b) motion asking the trial court to reverse the June 2011 Order regarding attorney fees (Docket #25, Ex. F).

At a status conference held on February 19, 2013, the trial court asked the parties to file position statements for it to consider when issuing its order on remand. After both parties filed position statements, and at their request, the trial court entered a remand order netting the judgments between the parties on March 6, 2013. (Docket #25, Ex. G) (the “Netting Order”). The Netting Order stated: “the sum of the awards results in judgment in favor of Dr. Baack and against Horizon and Dr. Oster, jointly and severally, in the amount of \$67,638.50, plus applicable rates of interest on each award until the time of satisfaction.” Also on March 6, 2013, the trial court denied the Rule 60(b) motion (docket #25, Ex. I) (the “60(b) Order”), which states in its entirety:

MOTION DENIED FOR REASONS STATED IN PLAINTIFFS' RESPONSE AND SURREPLY. MORE SPECIFICALLY, THE COURT FINDS THAT THE COURT [sic] JURISDICTION IS LIMITED TO THE ISSUES INCLUDED IN THE REMAND ORDER, DEFENDANT HAS WAIVED ITS RIGHT TO CONTEST THE COURT'S JUNE 21, 2011 AWARD OF COSTS AND ATTORNEY FEES BY FAILING TO RAISE THE ISSUE ON APPEAL, AND PLAINTIFF WAS THE PREVAILING PARTY ON THE BUYSELL AGREEMENT WHICH ALSO CONTAINS A PROVISION FOR THE AWARD OF COSTS AND ATTORNEY FEES TO THE PREVAILING PARTY.

Baack appealed the 60(b) Order in April 2013. At a status conference in this Court held on February 11, 2015, the parties advised oral argument in the appeal was scheduled to be held in the Colorado Court of Appeals on March 10, 2015. As this order was being drafted, Baack notified this Court (by way of Docket #170 in #13-28436) that the appeal had been decided by order of April 9, 2015 (the “April 9 Order”). In the April 9 Order, the Colorado Court of Appeals reversed the 60(b) Order and “remanded to the trial court with directions to vacate Oster’s and Horizon’s fee and costs award . . . and to award Baack a reasonable amount of attorney fees and costs incurred on appeal.”

In the summary judgment pleadings filed in this Court, the parties agree that in March 2013, at the time the state court issued the Netting Order and the 60(b) Order, the judgments amongst the three parties stood as follows:

- A. Baack owed Horizon approximately \$535,000 (interest included)
 - i. \$247,000 for unjust enrichment in connection with Baack's retention of insurance proceeds.
 - ii. \$288,000 in attorney's fees and costs.¹

- B. Oster owed Baack approximately \$523,000 (interest included)
 - i. \$249,131.23 for breach of the promissory note and a portion of the practice's value.
 - ii. \$274,000 in attorney's fees and costs.

- C. Horizon owed Baack approximately \$73,000 (interest included) for Baack's share of 2007 Horizon profits and for 2006 premium reimbursements.

(Docket #25, page 6, citing to Docket #20 Exhibits F, K, and L at page 3).²

On March 20, 2013, Horizon issued a check payable to Baack in the amount of \$62,111.18³ (Docket #20, Ex. L). On August 2, 2013, the trial court ordered Horizon to pay Baack an additional \$36,501.32 in attorney's fees and costs incurred after the June 2011 Order entered. (Docket #20, Ex. N).⁴

Horizon filed for Chapter 11 on November 4, 2013. In its schedules, Horizon listed Baack's claim as unsecured in the amount of \$36,000, and did not indicate it was disputed, contingent, or unliquidated. Baack filed a motion for relief from stay to continue the state court litigation on January 22, 2014. In the motion, Baack described herself as "an unsecured creditor in this matter and has the second largest claim: \$36,501.32 plus statutory post-judgment interest" for the judgment issued on August 2, 2013 in state court. She also noted she had a pending

¹ As noted, the April 9 Order has now reversed this award of fees and costs.

² These numbers are stated differently in Horizon's adversary complaint, which does not separate out the amounts owed to Baack by Oster and Horizon (see page 6 of complaint).

³ It is not clear from the record why this amount differed from the amount in the Netting Order.

⁴ The court also ordered Oster, individually, to pay Baack fees and costs related to the promissory note in the amount of \$1,358.

appeal (filed in April 2013), “of the determination that she owes over \$250,000 in attorney fees to Horizon and Oster” (made by the trial court in the June 2011 Order).

On February 10, 2014 (the day before the hearing on the relief from stay motion), Horizon filed this adversary proceeding, alleging claims under §§548, 502, 510, 547, 550, and 551. Horizon alleges the “transfer” to Baack to “net” the judgments in state court was fraudulent, because it benefitted Oster, and not Horizon. Horizon contends: “Horizon essentially offered to waive the \$535,000 that Baack owed it, and then paid Baack \$62,000, in order to satisfy Oster’s \$597,000 liability to Baack.” Complaint, page 6. The complaint also alleges a claim for equitable subordination based on Baack’s misappropriation of insurance proceeds in the amount of \$160,000.

This Court granted relief from stay on February 14, 2014 for the parties to proceed with the state court litigation (docket #72). On September 2, 2014, Horizon filed its Chapter 11 Plan of Reorganization. Baack objected to the plan on October 2, 2014, and also filed proof of claim #4 in the amount of \$339,698. Horizon did not object to the proof of claim. Baack then moved for a claims estimation hearing. At the status conference on February 11, 2015, Horizon advised that Oster, as a member, manager, and creditor of Horizon, would be submitting a liquidating plan of reorganization.⁵

In her motion for summary judgment, Baack argues Horizon is attempting to undo the state court proceedings by way of its adversary proceeding, because throughout the state court litigation, Horizon maintained there was no distinction between Oster and Horizon since Oster was the only member of Horizon when Baack was terminated. In fact, Horizon asserted in the state court documents: “None of the claims or defenses in this litigation was pursued on an individual basis by Oster” (docket #20, page 3) (citing to Ex. G). The parties ultimately requested the judgments to be netted for enforcement and collection purposes, which the state court did in its Netting Order. According to Baack, since the payment to Baack was tendered as an undisputed amount owed to Baack jointly and severally by Oster and Horizon, pursuant to a state court order, under the doctrines of collateral and judicial estoppel Horizon cannot now allege that payment was fraudulent. Further, Baack argues, Horizon’s claim must fail on the merits, because Baack was not an insider of Horizon and, assuming Oster was the insider, Horizon received reasonably equivalent value for the transfer at issue, citing *In re Adam Aircraft Indus.*, 493 B.R. 834, 845 (Bankr. D. Colo. 2013) (holding a transfer reducing a creditor’s claim against a debtor is for reasonably equivalent value).

In its response, Horizon argues that neither collateral estoppel or judicial estoppel applies. Horizon acknowledges Baack was a member of Horizon until August 13, 2007 (citing

⁵ The plan and disclosure statement were filed on March 5, 2015. Both Baack and the U.S. Trustee have filed objections to the plan.

the state court order at Ex. E to docket #25) and does not dispute Baack has not been an insider since 2007. Rather, it argues Horizon never should have made the transfer to Baack because it benefitted Oster, as an insider under an employment agreement. Horizon now seeks to avoid and recover that transfer “for the benefit of its creditors.”

II. Discussion

Summary judgment is appropriate when the materials submitted to the court demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Kaiser-Francis Oil Co. v. Producer’s Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989); *National Dev. Servs., Inc. v. Denbleyker (In re Denbleyker)*, 251 B.R. 891, 894 (Bankr. D. Colo. 2000). See also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When applying this standard, the court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.* 475 U.S. 574, 587–88; *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir.1991). The movant bears the initial burden of establishing that summary judgment is appropriate. *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir.2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

A. Collateral Estoppel

In Baack’s motion for summary judgment, she argues Horizon cannot collaterally attack the Netting Order, citing *In re Tsamasfyros*, 940 F.2d 605, 608 (10th Cir. 1991) (a state court’s calculation of damages may not be collaterally attacked in the bankruptcy court). Baack notes that if Horizon wanted to contest the Netting Order, it could have challenged it in state court, but did not do so. A Colorado court’s final decision on an issue litigated and decided precludes relitigation of that issue in subsequent actions. *In re Sutherland- Minor*, 345 B.R. 348, 353 (Bankr. D. Colo. 2006).

In response, Horizon first claims Baack has waived the affirmative defense of collateral estoppel by not raising it in her answer. Horizon then argues the issue before the state court is not identical to the issue raised here, because “Horizon seeks to reverse the effect of a net judgment entered by the district court for enforcement and collection purposes . . . and to prevent harm to its creditors.”

The Court first finds Baack has not waived her collateral estoppel affirmative defense. A party may raise a collateral estoppel defense for the first time in a summary judgment motion that is geared towards preserving judicial resources by preventing the relitigation of stale claims. *Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 84–85 (Colo. 1999); *Dave Peterson Elec. Inc v. Beach Mt. Builders*, 167 P.3d 175, 176 (Colo. Ct. App. 2007). Further, the affirmative defenses asserted in Baack’s answer (judicial estoppel, equitable estoppel, waiver,

failure to timely appeal) put Horizon on notice that collateral estoppel could be raised. *See id.* at 177 (noting that other party was not prejudiced when similar defenses were raised in the answer to the complaint).

Collateral estoppel, sometimes referred to as issue preclusion, precludes relitigation of an issue litigated and decided in a previous proceeding. *See In re Flanders*, 517 B.R. 245, 258 (Bankr. D. Colo. 2014) (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982)). Generally, collateral estoppel precludes parties to a previous action from relitigating issues of fact or law actually litigated and determined by a valid and final judgment. Restatement (Second) of Judgments § 27 (1982). Rules for application of preclusion principles are determined by the law of the forum in which the prior judgment was rendered. *Flanders*, 517 B.R. at 258 (citing *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985)).

Here, the prior judgment was rendered by a state court in Colorado. In Colorado, collateral estoppel bars relitigation of an issue if: (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding; (2) The party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding; (3) There was a final judgment on the merits in the prior proceeding; (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *Bebo Construction*, 990 P.2d at 85.

Baack argues the issues sought to be precluded are the amount and party against whom judgment entered. Baack contends that all claims in Horizon's adversary complaint are barred by the doctrine of collateral estoppel, because (1) the Netting Order declared the judgment for Baack to be jointly and severally owed by Oster and Horizon; and (2) the \$160,000 in insurance proceeds (which was the damages component of Horizon's unjust enrichment claim against Baack), was already accounted for in the Netting Order. Therefore, Horizon's fraudulent transfer, preference, equitable subordination, and disallowance claims all fail as a matter of law because they are barred by collateral estoppel.

Regarding the first element of collateral estoppel, while Horizon claims "the state court never determined and was never called upon to determine that Horizon and Oster were jointly and severally liable to Baack," the Court notes the state court order did specifically provide that the judgment was entered against Horizon and Oster "jointly and severally." Thus, arguably the issue of joint and several liability was determined in the state court proceeding. Regarding the second element, Horizon was indisputably a party to the prior proceeding. However, the Court finds the third element of collateral estoppel is not met because it is unclear from the record, and neither party argued, whether the Netting Order is a final judgment on the merits in the prior proceeding.

In *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005), the Colorado Supreme Court held that “for purposes of issue preclusion, a judgment that is still pending on appeal is not final.” *Id.* at 141. The Colorado Supreme Court most recently cited *Rantz* with approval in *Bristol Bay Prod., LLC v. Lampack*, 312 P.3d 1155, 1158 (Colo. 2013) (issue preclusion only applies once a decision is final), and the Colorado bankruptcy court also has recognized *Rantz*’s finality requirement. See *In re Vickery*, 2011 WL 4963136 at *12 (Bankr. D. Colo. 2011)(“ Finality, therefore, requires ‘an opportunity for review before a judgment can be considered final Pronouncing a judgment to be final while it is still pending on appeal would negate that requirement.’”); *In re Flanders*, 517 B.R. at 259 (“According to *Rantz* . . . a judgment is final, for purposes of issue preclusion, if it is ‘sufficiently firm’ in the sense that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review. . . .[*Rantz*] held that the requirement that there was ‘an opportunity for review,’ means that a judgment is not final for purposes of issue preclusion while an appeal is pending.”).

From the record before this Court, it appears that the Netting Order entered on the same day as the 60(b) Order: March 6, 2013 (docket #25, Ex. G and I). The Netting Order is stamped with file ID 49948686, and the 60(b) Order is stamped with file ID 49946633.⁶ Baack appealed the 60(b) Order; thus, at the time her motion for summary judgment was filed, the 60(b) Order was not a final judgment on the merits in the prior proceeding under *Rantz*.⁷ While technically the Netting Order may not have been on appeal,⁸ that order was entered on the same day and appears subject to revision, especially considering the outcome of Baack’s appeal of the 60(b) Order. In fact, in Baack’s opening appellate brief, which she attached as an exhibit to her motion for summary judgment, she states: “Dr. Baack respectfully requests this Court to relieve Dr. Baack from the ancillary fee award, *and direct the trial court to calculate a new net judgment in favor of Dr. Baack.*” Docket #20, Exhibit O. (Emphasis added). Baack also recognizes the interrelatedness of the two orders in her reply in support of summary judgment: “The court in the State Suit was called upon to enter a joint and several net judgment when it requested . . . and received position statements before entry of a *final remand order.*” (Docket #28, page 3) (emphasis added).

⁶ To further complicate matters, an amended order was entered later that same day, with file stamp #50445284 (Docket #20, Ex. K). The amended order corrects a date that interest was to be calculated from on the promissory note claim.

⁷ In the April 9 Order, the Colorado Court of Appeals reversed the 60(b) Order. It is unclear at this juncture whether Horizon and Oster will appeal that ruling to the Colorado Supreme Court. Additionally, the trial court has not yet had time to consider the April 9 Order and enter a complying order on remand. Therefore, the 60(b) Order, and possibly the Netting Order, are still not final orders.

⁸ The notice of appeal is not included in the record before this Court.

This Court cannot rule in favor of Baack on summary judgment on the collateral estoppel issue. It appears Baack is relying on the Netting Order as being a final order for purposes of issue preclusion here, but on appeal in state court, she has asked for that same order to be revised, and it will be revised on further remand pursuant to the April 9 Order. Thus, regardless of how this Court decides any other elements of collateral estoppel, it cannot determine at this juncture that there is a final judgment on the merits in the prior proceeding, as required in Colorado. Therefore Baack has not met her burden on summary judgment on the collateral estoppel issue.⁹

B. Judicial Estoppel

Baack also contends Horizon is judicially estopped from alleging that any transfer based on the Netting Order, which Horizon “requested, calculated, and threatened sanctions if not accepted,” was fraudulent, citing *New Hampshire v. Maine*, 532 U.S. 742 (2001) (“the purpose of judicial estoppel is to protect the integrity of the judicial process, prohibiting parties from deliberately changing positions according to the exigencies of the moment”). Baack notes that in the state court, Horizon and Oster asserted they were “one and the same” and it was “impossible to distinguish” them; claimed Oster did not participate in the suit individually, and asked for entry of a net judgment against Horizon and Oster. Accepting these positions, the state court entered a net judgment against Horizon and Oster, jointly and severally, and Horizon cannot now assume a contrary position.

In response, Horizon asserts Baack cannot meet at least four of the five elements of judicial estoppel, citing *Estate of Burford v. Burford*, 935 P.2d 943, 949 (Colo. Ct. App. 1997). Horizon argues that the position taken in state court was Oster’s and not Horizon’s, because it was Oster who argued attorney fees were incurred by both Horizon and Oster and “it was impossible to distinguish between the work done on behalf of Oster and that done on behalf of Horizon.” Horizon states “it never took the position that it is liable to Baack for Oster’s personal debt.” Horizon also contends the elements of judicial estoppel are not met because there is no evidence of an intentional effort to mislead either this Court or the state court.

⁹ Additionally, the Court notes that in its complaint, Horizon asserted claims for fraudulent transfer, preference, avoidance, disallowance, and equitable subordination. The claims for disallowance and equitable subordination are technically premature, rather than barred by collateral estoppel, because at the time of the complaint’s filing, Baack had not filed a proof of claim. Further, the issue of reasonably equivalent value is generally a factual issue rather than one determined on summary judgment. *In re Newman*, 183 B.R. 239 (Bkrtcy.D.Kan.,1995).

While neither party makes a distinction, the elements of judicial estoppel differ slightly under Colorado and federal law. In *In re Riazuddin*, 363 B.R. 177 (10th Cir. BAP 2007), the Tenth Circuit Bankruptcy Appellate Panel noted as follows:

The Tenth Circuit recently adopted the doctrine of judicial estoppel in *Johnson v. Lindon City Corp.* The court noted that it had been reluctant to apply this doctrine in past cases, however, it felt constrained to follow the Supreme Court's decision in *New Hampshire v. Maine* which, in the Tenth Circuit's view, had "altered the legal landscape." The Tenth Circuit defined judicial estoppel as follows: "[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." While observing that there can be no precise formula, the Tenth Circuit approved of the following three factors from the *New Hampshire* case as useful tools to analyze when the doctrine should be applied: (1) the party's later position is clearly inconsistent with his earlier position; (2) the party has succeeded in persuading a court to accept the earlier position, so as to create the perception that either the first or second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if he were not estopped.

In re Riazuddin, 363 B.R. at 185 (internal citations omitted).

Under Colorado law, the elements of judicial estoppel include: (1) the two positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the positions must have been successful in maintaining the first position and must have received some benefit in the first proceeding; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent—that is, the truth of one position must necessarily preclude the truth of the other. *Estate of Burford v. Burford*, 935 P.2d at 949.

While the elements are similar, an "intentional effort to mislead the court" is an element of judicial estoppel under Colorado law but it is not specifically stated as a element under Tenth Circuit law. Thus, Horizon's argument that it never intended to mislead the court does not necessarily preclude this Court from finding Horizon is judicially estopped in this proceeding. See *Anderson v. Seven Falls Co.*, 2014 WL 553486 at *5 (D. Colo. 2014) ("Colorado law has a higher standard than is applied in federal law, requiring proof of an 'intentional effort to mislead' which Ms. Davies contends is lacking here. This argument is specious. Ms. Davies elected to file her complaint in federal court. Bankruptcy is, of course, solely a federal court matter. The interests and processes sought to be protected in this matter are federal court interests."). See

also *Eastman v. Union Pacific R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (applying federal judicial estoppel principles in a bankruptcy matter). Similarly, here Horizon is seeking relief under a federal cause of action.

The purpose of judicial estoppel is “to protect the integrity of the judicial process, prohibiting parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. at 750. In other words, judicial estoppel prevents parties from “playing fast and loose with the courts.” *Id.* Because the rule is intended to prevent “improper use of judicial machinery,” judicial estoppel “is an equitable doctrine invoked by a court at its discretion.” *Id.* (internal citations omitted).

The Court finds Horizon’s statement “Horizon never took the position that it is liable for Oster’s debt,” to be disingenuous. Horizon requested, and agreed to, a state court order entering a judgment against Horizon and Oster, jointly and severally, in the amount of \$67,638.50. Horizon’s position now, that it is not jointly and severally liable with Oster, is clearly inconsistent with its earlier position in state court. Further, Horizon persuaded the state court to accept that position, by specifically requesting that judgment to be entered. Thus, Baack has shown that (1) the party’s later position is clearly inconsistent with its earlier position; and (2) the party has succeeded in persuading a court to accept the earlier position. Therefore the application of judicial estoppel in this case depends on whether (3) there is an appearance that either this Court or the state court was misled; and (4) the party would derive an unfair advantage or impose an unfair detriment on the opposing party if it were not estopped. *Eastman v. Union Pacific*, 493 F.3d at 1156.

The Court cannot say at this juncture that Horizon’s inconsistent positions give an appearance of misleading this Court or the state Court. The Court observes that this adversary proceeding was brought on the eve of the relief from stay hearing where Baack sought to pursue her appeal in state court. While prior to the bankruptcy the parties had essentially settled their claims for \$62,000, Horizon now seeks to recover over half a million dollars from Baack in this adversary action, and Baack asserted a similarly large amount (\$339,698) in her proof of claim, based on her anticipated reversal, on appeal, of the attorney fee award. With the April 9 Order, Baack has succeeded on that appeal, but at the time she asserted her proof of claim, that reversal was speculative. Both parties thus exercised their right to plead and argue inconsistent theories. See *Estate of Burford*, 935 P.2d at 948 (Courts should exercise care in the application of judicial estoppel so as not to curtail or infringe upon the right and the accepted practice of a litigant to plead and argue inconsistent and alternate theories) (citing *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982)).

Additionally, the Court cannot conclude Horizon would derive an unfair advantage or impose an unfair detriment on Baack if it were not estopped. In this case, both sides complain that the other is attempting to “undo” state court litigation in this bankruptcy proceeding; Horizon by way of the adversary proceeding, and Baack by way of the state court appeal. It does

not appear that Horizon will receive an unfair advantage over Baack if judicial estoppel is not applied in this bankruptcy case.

On summary judgment, the Court must examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *See Wright v. Southwestern Bell*, 925 F.2d at 1292. Additionally, the law in this Circuit dictates that judicial estoppel should be applied in only the ‘narrowest of circumstances.’ *See Riazuddin* at 185, n. 40 (citing *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005)). Therefore, the Court declines, in its discretion, to apply judicial estoppel against Horizon at this point in the proceeding on summary judgment.

C. *Rooker Feldman*

Finally, in her support brief (docket #29), Baack argues Horizon’s claims are barred by the *Rooker Feldman* doctrine. *See Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (*Rooker Feldman* doctrine applies to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments). That doctrine prevents “a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party’s claim that the state judgment itself violates the loser’s federal rights.” *In re Armstrong*, 294 B.R. 344, 357 (10th Cir. BAP 2003).

The Court is not convinced *Rooker Feldman* applies in this case for two reasons. First, Horizon does not really fit the mold of a “state court loser” (although it is now on the losing side of the April 9 Order). Baack recognizes this herself in her motion for summary judgment, where she contends that Horizon has not suffered any injury or damage with respect to any transfer to Baack stemming from the state suit. (Docket #20, page 15). Second, it is unclear in this Circuit whether application of the *Rooker Feldman* doctrine requires the underlying judgment to be final. *See Lambeth v. Miller*, 363 Fed. Appx. 565, 567 (10th Cir. 2010) (“This court held in *Guttman*, 446 F.3d at 1031, that *Rooker Feldman* only applies where there is a final judgment. *But see Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006) . . . holding that the state court judgment need not be final for *Rooker Feldman* to apply”).¹⁰

¹⁰ In *Guttman v. Khalsa*, 446 F.3d 1027, 1032 (10th Cir.2006), the Court described “finality” in the context of a *Rooker–Feldman* analysis: (1) when the highest state court in which review is available has affirmed the judgment below and nothing is left to be resolved; (2) if the state action has reached a point where neither party seeks further action; or (3) if the state court proceedings have finally resolved all the federal questions in the litigation, but state law or purely factual questions (whether great or small) remain to be litigated.

See also In re Flanders, 517 B.R. at 256 (noting that a limited remand resolved the federal questions involved and there was no longer any ability for review or reversal of those issues).

Baack contends that by bringing this adversary proceeding, Horizon is simply seeking to undo a state court order, as Horizon freely admits: “the relief Horizon seeks in the present action will not cause an unfair detriment to Baack – the parties, including Baack, would be placed in the positions they would have occupied but for Oster’s and Baack’s agreement to net the judgments among all parties.” (Docket #25, page 9). As noted previously, both sides are attempting to refocus many years of state litigation through the prism of bankruptcy. To a certain extent, some reposituring is allowable (for example, when determining the interests of creditors of the estate), but this Court cannot waive a wand and put either party back to where they started. To the extent the state appellate court has done that by the April 9 Order, the parties will need to again refocus their efforts in the state trial court to obtain a final order in that litigation.

For all the foregoing reasons, it is

ORDERED that Baack’s motion for summary judgment is DENIED.

Dated this 17th day of April, 2015.

BY THE COURT:



Howard R. Tallman, Judge
United States Bankruptcy Court