ORDERED.

**Dated: October 28, 2016**

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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| In re | ) | |
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| ADVANCED TELECOMMUNICATION NETWORK, INC., | ) | Case No. 6:03-bk-00299-KSJ |
| | ) | Chapter 11 |
| Debtor. | ) | |
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| ADVANCED TELECOMMUNICATION NETWORK, INC., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Adversary No. 6:05-ap-00006-KSJ |
| | ) | |
| FLASTER/GREENBURG, PC, and PETER R. SPIRGLE, | ) | |
| | ) | |
| Defendants. | ) | |

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants, Flaster Greenberg, P.C. and Peter Spirgle, years ago represented David and Daniel Allen, two former owners of the Debtor, Advanced Telecommunication Network, Inc., ("ATN"). The *current* owners of the Debtor for over a decade have sued the Allens in numerous courts repeatedly arguing that the Allens were the initial recipients of a multi-million dollar

fraudulent transfer. Now, in this adversary proceeding, the story has dramatically changed. Debtor now asserts that the Allens' attorneys (the Defendants) and not their clients were the initial transferees of this alleged fraudulent transfer.

Defendants understandably seek summary judgment[1] arguing that ATN is barred by the doctrine of judicial estoppel from belatedly changing their story according to the "exigencies of the moment." ATN argues judicial estoppel does not bar their new version of the facts raising two legal issues. First, ATN argues privity is required and does not exist because the prior litigation only involved Defendants' clients, and the law firm was not a party to the prior proceedings. Second, ATN argues there was a material change in the law with the Eleventh Circuit decision of *In re Harwell*[2] allowing them to raise this new argument at this late date. The Court finds that, even if privity is *not* required, Defendants have failed to demonstrate that they are entitled to summary judgment as a matter of law.

Federal Rule of Civil Procedure 56(a)[3] provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party must establish the right to summary judgment.[4] A "material" fact is one that "might affect the outcome of the suit under the governing law."[5] A "genuine" dispute means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[6] Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.[7] In determining

[1] Doc. No. 188. Plaintiff filed a Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. Doc. No. 192. Defendants replied. Doc. No. 194. Plaintiff filed a sur-reply. Doc. No. 203.
[2] *Martinez v. Hutton (In re Harwell)*, 628 F.3d 1312 (11th Cir. 2010).
[3] Fed. R. Civ. P. 56, made applicable to adversary proceedings by Fed. R. Bankr. P. 7056.
[4] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).
[6] *Anderson*, 477 U.S. at 248.
[7] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 10 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[8] So, the Court must determine whether genuine and material factual issues preclude the application of judicial estoppel.

Courts in the Eleventh Circuit have considered two factors when deciding whether to apply judicial estoppel. First, "the allegedly inconsistent positions [must have been] made under oath in a prior proceeding,"[9] and second, "[s]uch inconsistencies must be shown to have been calculated to make a mockery of the judicial system."[10] The United States Supreme Court explained courts may consider several other factors when examining judicial estoppel but noted this doctrine could not be reduced to any general formulation or principle.[11] The other factors the Supreme Court mentioned are:

> First, … a party's later position must be 'clearly inconsistent' with its earlier position; Second, … whether the party has succeeded in persuading a court to accept [the] earlier position, so that judicial acceptance of [the] inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'; [and third,] whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.[12]

Above all, the Court should give due consideration to all of the circumstances in a particular case because judicial estoppel is a flexible rule.[13] The Court's application of judicial estoppel is reviewed under an abuse of discretion standard,[14] and the doctrine is invoked at the Court's

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[8] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007).
[9] *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting *Salomon Smith Barney, Inc. v. Harvey M.D.*, 260 F.3d 1302, 1308 (11th Cir. 2001), *vacated on other grounds*, 537 U.S. 7085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002)) (internal quotation marks omitted). The Eleventh Circuit is clarifying the doctrine of judicial estoppel with its recent decision to rehear *Slater en* banc. *See* Note 18 and accompanying text. The Eleventh Circuit may revisit the *Burnes* case but at this time, *Burnes* is still good law.
[10] *Id.*
[11] *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1815, 149 L. Ed. 2d 968 (2001).
[12] *Id.* at 750-51 (internal citations omitted).
[13] *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344 (11th Cir. 2006).
[14] *Burnes*, 291 F.3d at 1284 (11th Cir. 2002) (citing *Talavera v. School Bd. of Palm Beach Cnty.*, 129 F.3d 1214, 1216 (11th Cir. 1997)).

discretion.[15] Judicial estoppel issues are intensely factual and rarely are subject to resolution by summary judgment.

ATN here takes an inconsistent position from its sworn position in prior litigation—they previously argued the Allens were the initial transferees of a fraudulent transfer; they now argue the Defendants were the initial transferees. ATN argues these diametrically contrary positions are irrelevant because the Defendants, the Allens' lawyers, were not party to the prior litigation and the privity needed to invoke the doctrine of judicial estoppel does not exist. ATN cites to an older Fifth Circuit Court of Appeals case holding judicial estoppel may only be invoked by parties involved in the prior proceeding[16] arguing that, because the Eleventh Circuit has yet to rule *en banc* that privity is **not** required to invoke judicial estoppel, the Fifth Circuit's statement of the law controls.[17]

The Eleventh Circuit Court of Appeals has expressly stated (although not *en banc*) that a party invoking judicial estoppel need not have been a party in the prior proceeding.[18] As Judge Tjoflat discussed in his concurring opinion in *Slater*, the doctrine of judicial estoppel in this circuit is confused.[19] Just recently, the Eleventh Circuit Court of Appeals vacated its prior order and decided to rehear the *Slater* case *en banc*, perhaps to finally settle whether privity is required to argue judicial estoppel.[20] Until the Eleventh Circuit rules, this Court can only guess at the resolution.

But, if privity is not a requirement, ATN still must show that in taking the obvious opposite position who was the "initial transferee" in prior litigation and now was not "calculated

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[15] *Id.* at 1285.
[16] *Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968).
[17] *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1210 (11th Cir. 1981) (noting "[t]he decisions of the former Fifth Circuit, adopted as precedent by the Eleventh Circuit, will, of course, be subject to the power of the Eleventh Circuit sitting *en banc* to overrule any such decision").
[18] *Slater v. U.S. Steel Corp.*, 820 F.3d 1193, 1195 (11th Cir. 2016).
[19] *Slater*, 820 F.3d at 1231.

to make a mockery of the judicial system." On this point, a factual issue exists precluding summary judgment. The remaining dispute is one of "intent."[21] If there exists a question of material fact whether a party had the motive and intent to manipulate the judicial system, then a court should deny summary judgment on judicial estoppel grounds.[22]

ATN argues that the Eleventh Circuit's decision of *Harwell* altered when a law firm is liable under Section 550 of the Bankruptcy Code and when ATN could assert a sufficient "change in the law" to justify these new allegations who is the initial transferee of the alleged fraudulent transfer. Was ATN just changing its arguments to find a deeper pocket? Or, instead, is ATN judicially estopped from changing its position because it made a mockery of the judicial system? This is an issue best left for the trial. A factual issue exists as to ATN's intent precluding summary judgment.

Accordingly, it is

**ORDERED:**

1. Defendants' Motion for Summary Judgment (Doc. No. 188) is **DENIED.**
2. The discovery deadline is extended till **December 14, 2016**.
3. The dispositive motion deadline is extended till **January 27, 2017**.
4. The next pretrial conference is set for **March 7, 2017, at 2:45 p.m.,** in Courtroom A, 400 West Washington Street, Orlando, FL 32801.

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Attorney, Dennis Waggoner, is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

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[20] The Eleventh Circuit case number is 12-15548.
[21] *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1275 (11th Cir. 2010).
[22] *Ajaka*, 453 F.3d at 1346.