

278 A.D.2d 129, 718 N.Y.S.2d 39, 2000 N.Y. Slip Op. 11353
(Cite as: 278 A.D.2d 129, 718 N.Y.S.2d 39)

C

Supreme Court, Appellate Division, First Department, New York.

Robert David MORTON, et al.,
Plaintiffs–Respondents,

v.

Gilbert RIFKIN, Defendant–Appellant,
Gerald Berger, et al., Defendants.

Dec. 19, 2000.

Plaintiff's decedent and several of his solely owned corporations brought action against accountant and his firm for conversion and professional malpractice. The Supreme Court, New York County, [Carol Huff, J.](#), denied one defendant's motion to dismiss claims of corporate plaintiffs for failure to state a cause of action and lack of standing, and defendant appealed. The Supreme Court, Appellate Division, held that failure of decedent, and then successor estate, to list decedent's interest in corporations in either bankruptcy proceeding initiated by decedent, or in probate proceeding, did not judicially estop estate from claiming interest in corporations.

Affirmed.

West Headnotes

Bankruptcy 51 2154.1

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2154 Rights of Action by or on Behalf of Trustee or Debtor

51k2154.1 k. In general; standing.

Most Cited Cases

Estoppel 156 68(2)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(2) k. Claim inconsistent with previous claim or position in general. [Most Cited Cases](#)

Failure of estate's decedent, and then successor estate, to list decedent's interest in corporations in either bankruptcy proceeding initiated by decedent, or in probate proceeding, did not judicially estop estate from claiming interest in corporations, where bankruptcy proceeding was dismissed without a final determination; proceeding was instead dismissed to be continued in another setting, namely, the probate proceeding, bankruptcy court's approval of such transfer did not endorse, or otherwise address, estate's position regarding decedent's assets, and decedent's creditors were not prejudiced since they were aware of estate's malpractice lawsuit against accountant and his firm, which was corporations' sole asset.

*40 [David K. Fiveson](#), for Defendant–Appellant.

[LERNER, J.P.](#), [ANDRIAS, SAXE, BUCKLEY](#) and [FRIEDMAN, JJ.](#)

MEMORANDUM DECISION.

Order, Supreme Court, New York County (Carol Huff, J.), entered January 11, 1999, which, in an action commenced by plaintiff's decedent and several of his solely owned corporations against defendant-appellant accountant and his firm for conversion and professional malpractice, among other causes of action, denied defendant's motion to dismiss the claims of the corporate plaintiffs for failure to state a cause of action and lack of standing, unanimously affirmed, without costs.

Plaintiff estate's decedent, and then the estate itself upon succeeding the decedent, did not list the decedent's interest in plaintiff corporations in either the bankruptcy proceeding initiated by the de-

278 A.D.2d 129, 718 N.Y.S.2d 39, 2000 N.Y. Slip Op. 11353
(Cite as: 278 A.D.2d 129, 718 N.Y.S.2d 39)

cedent, or in the probate proceeding. The estate, however, is not judicially estopped from claiming an interest in the corporations since the bankruptcy proceeding was dismissed without a final determination (see, *Koch v. National Basketball Assn.*, 245 A.D.2d 230, 666 N.Y.S.2d 630; *McIntosh Bldrs. v. Ball*, 264 A.D.2d 869, 870, 695 N.Y.S.2d 196). Instead, the bankruptcy proceeding here “was dismissed to be continued in another setting, i.e., the probate proceeding”, and the bankruptcy court's approval of this “transfer” did not endorse, or otherwise address, the estate's position regarding the decedent's assets (see, *Manhattan Ave. Dev. Corp. v. Meit*, 224 A.D.2d 191, 637 N.Y.S.2d 134, *lv. denied* 88 N.Y.2d 803, 645 N.Y.S.2d 445, 668 N.E.2d 416).

Here, the decedent's creditors were aware of the instant lawsuit which is the sole asset of plaintiff's corporations, so they were not prejudiced by this failure to list this asset (see, *Guarino v. Guarino*, 211 A.D.2d 463, 620 N.Y.S.2d 394).

N.Y.A.D. 1 Dept.,2000.

Morton v. Rifkin

278 A.D.2d 129, 718 N.Y.S.2d 39, 2000 N.Y. Slip Op. 11353

END OF DOCUMENT