UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DARRYL ADOLPH WILLIAMS
LISA B. WILLIAMS Case No. 03-14301-MAM-13

Debtors

ORDER CONDITIONALLY DENYING MOTION TO DISALLOW CLAIMS AND CONDITIONALLY GRANTING MOTION FOR LEAVE TO AMEND SCHEDULES

R. Scott Hetrick, Attorney for CSX Transportation, Mobile, AL
Terrie S. Owens, Attorney for Debtors, Mobile, AL[1]

This case is before the Court on the motion of CSX Transportation, Inc., for an order prohibiting the debtors from amending their bankruptcy schedules to add a claim and prohibiting the debtors from pursuing a lawsuit against CSX. The debtors have filed a countervailing motion seeking to add a claim to their schedules. This Court has jurisdiction to hear these matters pursuant to 28 U.S.C.§ § 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. §157(b)(2) and the Court has authority to enter a final order. For the reasons indicated below, the Court is conditionally denying the motion to disallow claims and conditionally granting the motion for leave to amend schedules. However, the result of debtors' amendment of their schedules will not result in value to the debtors themselves because the claim has no value, unless the case can be reconverted to chapter 7 and a chapter 7 trustee asserts the claim on behalf of the creditors.

[1] Ms. Owens is presently counsel for the debtors. She was not counsel for them earlier in the case.

FACTS

Mr. and Mrs. Williams are debtors in this court. Mr. Williams had worked for CSX Transportation, Inc. prior to filing his bankruptcy case. Early in 2003, he was terminated from his position as trainmaster for CSX. On February 28, 2003, he filed a claim of race discrimination against CSX with the Equal Employment Opportunity Commission. On July 30, 2003, Mr and Mrs. Williams filed a chapter 7 bankruptcy case. On September 3, 2003, the EEOC sent Mr. Williams a "right to sue" letter. On October 17, 2003, Mr. and Mrs. Williams converted their case to one under chapter 13 of the Bankruptcy Code. On December 1, 2003, Mr. Williams filed a lawsuit in federal District Court against CSX. On February 3, 2004, the Court confirmed Mr. and Mrs. Williams' chapter 13 plan. It proposes a 23% payout to unsecured creditors. The debtors' schedules list claims against the debtors of approximately $22,000. The lawsuit claims damages well in excess of that sum.

The debtors' schedules have never listed a claim against CSX. Only when CSX's counsel raised the judicial estoppel argument in the federal court suit and filed a motion to disallow claim did debtors file their motion for leave to amend. Mr. Williams and his wife testified that they knew they were signing their petition, schedules, and statement of financial affairs under penalty of perjury. They just did not know that they had to disclose the lawsuit. They testified that their attorney did not ask them about lawsuits. There were other errors in the schedules as well, such as no disclosure of Mrs. Williams' employment income and no disclosure that the debtors had been in prior bankruptcies, but the debtors did not find and correct those errors either. The debtors testified that they did not intend to hide the claim against CSX, they just did

not know they had to disclose it. The Williams would amend their plan to pay all creditors in full from any recovery.

LAW

CSX has filed a motion seeking to have the court prohibit any amendment to the debtors' schedules and to prohibit the Williams from pursuing their federal court suit. The Williams have moved to amend their schedules to include the CSX claim. CSX has the burden of proving that the debtors should not be able to amend their schedules. The Williams have the burden of proving that the claim should be allowed to be added. CSX has met its burden of proving that the claim should not be added, at least as it pertains to the debtors receiving any value from the claim. However, to the extent that the claim may have value to creditors, the Williams have proven that the claim should be allowed to be added.

I.

Judicial estoppel is an equitable doctrine that precludes a party from "asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *Barger v. City of Cartersville, Ga.*, 348 F.3d 1289, 1293 (11th Cir. 2003) (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1284 (11th Cir. 2002)). The doctrine's purpose is to protect the integrity of the court process. *Id.* The Eleventh Circuit has established that the applicability of judicial estoppel largely turns on two factors. *See De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003); *Burnes*, 291 F.3d at 1285; *Barger*, 348 F.3d at 1293-94; *Parker v. Wendy's International, Inc.*, 365 F.3d 1268 (11th Cir. 2004). The first factor is whether inconsistent positions were taken under oath. *Burnes*, 348 F.3d at 1285 (citing *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302 (11th Cir. 2001), cert. granted and judgment

vacated, 537 U.S. 1085, 123 S. Ct. 718, 154 L. Ed. 2d 629 (2002)). The second factor is whether the inconsistencies were calculated to make a mockery of the judicial system. *Id.*

In this case, inconsistent positions were taken by the debtors. The debtors submitted their schedules and statement of financial affairs under oath to the bankruptcy court, swearing under penalty of perjury that they were true and correct. Neither the debtors' schedules nor their statement of financial affairs listed a claim or potential lawsuit against CSX. However, Mr. Williams had already filed his racial discrimination claim with the EEOC when the debtors filed their bankruptcy petition. Then after filing for bankruptcy, Mr. Williams filed the lawsuit in federal court against CSX, seeking substantial damages. Since the Williams's sworn schedules and statement of financial affairs listed no claim against CSX and Mr. Williams in fact filed a lawsuit against CSX, the Williams have taken inconsistent positions, at least one of them taken under oath. Therefore, the first factor is satisfied.

The second factor is whether the inconsistencies were calculated to make a mockery of the judicial system. This factor is based on intent. Intent, for purposes of judicial estoppel, is a purposeful contradiction, not simple error or inadvertence. *Barger*, 348 F.3d at 1294. Mr. and Mrs. Williams both testified that they had no intention of concealing the CSX claim. They testified that they just did not know they had to disclose the lawsuit and their attorney never informed them that they had to disclose it. However, the Eleventh Circuit has concluded that a debtor's failure to disclose claims can be construed as unintentional only when "the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Burnes*, 291 F.3d at 1287 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999)). This two-prong test, allowing intent to be inferred, has consistently been used by the Eleventh Circuit to

determine whether judicial estoppel applies to preclude an undisclosed lawsuit. *See Burnes*, 291 F.3d at 1287; *Barger*, 348 F.3d at 1296; *DeLeon*, 321 F.3d at 1291. Applying this test, it is clear that the debtors had knowledge of their claim against CSX since Mr. Williams had filed his claim with the EEOC before he and his wife filed for bankruptcy. Additionally, he filed his lawsuit two months before the confirmation of their Chapter 13 plan. This proves the debtors knew of their claim against CSX before filing for bankruptcy and before confirmation.

Because the debtors had knowledge, the issue becomes whether the debtors had a motive to conceal the claim. Omitting the discrimination claim (which seeks damages of more than $300,000.00) from the schedule of assets would have benefitted the debtors because, by omitting the claim, they could keep any proceeds for themselves and not have them become part of the bankruptcy estate. Furthermore, the Court and the creditors relied on their lack of assets when the Court confirmed the Williams's 23% plan. The debtors knew there was a lawsuit. Their plan should have reflected that, and offered to pay to creditors any excess over their exemptions. Since the debtors are paying their unsecured creditors only 23% of their debts, the debtors list debts of roughly $22,000, and the suit seeks damages substantially greater than the total of debtors listed debts, the Court finds the debtors had a motive to conceal the claim. Factor two is therefore satisfied. Accordingly, judicial estoppel applies, and the debtors are precluded from deriving any value from the lawsuit.

II.

However, because the lawsuit against CSX has potential value to the estate, the debtors could elect to reconvert their case to Chapter 7, which would allow the Chapter 7 trustee to pursue the lawsuit against CSX on behalf of the creditors. *In re Parker*, 365 F.3d 1268 (11th

Cir. 2004). Because the trustee has never taken an inconsistent position under oath with regard to this claim, he would not be judicially estopped from pursuing it. *Id.* The debtors' misconduct would not taint or burden the trustee. *Id.*

If reconverted to Chapter 7, the claim would pass from the Chapter 13 trustee to the Chapter 7 trustee. The conversion would not have any effect on the filing date, the commencement of the case, or the order for relief. 11 U.S.C. § 348(a). Section 348 also states that "property of the estate in the converted cases shall consist of property of the estate, as of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." *See id.* at 348(f)(1)(A). This suit is such an asset. The Code fictionally sets the filing of the CSX suit as the date the Williams filed for bankruptcy, July 30, 2003. Therefore the trustee takes the lawsuit without the debtors' taint. To the trustee, the suit is an asset that is not listed, of which he has no knowledge. Accordingly, the judicial estoppel test is not met with respect to the trustee, and he is not prevented from pursuing the claim.

In general, a prepetition cause of action in a Chapter 7 bankruptcy is property of the bankruptcy estate, and only the trustee has standing to pursue it. *Id.* (citing *Barger,* 348 F.3d at 1292). Section 541 of the Bankruptcy Code provides that the bankruptcy estate includes "all legal or equitable interest[s] of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. Such property includes causes of action belonging to the debtor at the commencement of the bankruptcy case. *Barger,* 348 F.3d at 1292. "Thus, a trustee, as the representative of the bankruptcy estate, is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate." *Parker,* 365 F.3d at 1272; *see also* 11 U.S.C. § 323; *Barger,* 348 F.3d at 1292.

When an asset becomes part of the bankruptcy estate, all the debtor's rights in the asset are terminated unless the trustee abandons the asset to the debtor pursuant to § 544 of the Code. *Parker*, 365 F.3d at 1272; *see also* 11 U.S.C. § 554. All assets that are not abandoned remain property of the bankruptcy estate. Id. "Failure to list an interest on a bankruptcy schedule leaves that interest in the bankruptcy estate." *Parker*, 365 F.3d at 1272 (citations omitted). Therefore, if the debtors elect to reconvert their case to Chapter 7, the lawsuit against CSX would be property of the estate which the Chapter 7 trustee could pursue if he decides the suit would benefit the creditors. Accordingly, although the debtors cannot pursue the CSX lawsuit, amendment of their schedules to include the claim is still appropriate to allow the trustee to pursue the claim on behalf of the creditors if the Court allows them to reconvert their case to Chapter 7.

Therefore, the debtors motion for leave to amend schedules is CONDITIONALLY GRANTED and CSX's motion to disallow claim is CONDITIONALLY DENIED if the debtors elect to convert their case to one under Chapter 7 and the court allows the conversion. A hearing on whether or not the case should be converted to Chapter 7 will be held on November 17, 2004, at 10:30 a.m. in Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, Alabama 36602.

Dated: October 26, 2004

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE