

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA**

In Re

ROOSEVELT KITT, JR., AND
MARY KITT aka MARY T. KITT, aka MARY
TAYLOR KITT, aka MARY R. KITT aka
MARY TAYLOR,

Case No. 03-17091

Debtors.

MARY TAYLOR and
ROOSEVELT KITT,

Plaintiffs,

v.

Adv. No. 04-1034

GULF COAST RECOVERY SERVICES
& STORAGE, INC., DEBIS FINANCIAL
SERVICES, INC., DEFENDANT "A",
DEFENDANT "B", DEFENDANT "C",
DEFENDANT "D", DEFENDANT "E", &
DEFENDANT "F",

Defendants,

ORDER

James M. Orr, Jr., counsel for Debtors
Ivan Parker, counsel for Debtors
Melissa M. Lindquist-King and C. Lee Reeves, counsel for Debis Financial
Services, Inc.
S. Wesley Pipes and Norton W. Brooker, counsel for Bayou Enterprises, Inc. dba
Gulf Coast Recovery

This matter is before the Court on the motion to dismiss filed by defendant Debis
Financial Services, Inc. (hereinafter "Debis"), the joinder in the motion to dismiss filed by

defendants Bayou Enterprises, dba Gulf Coast Recovery (hereinafter “Gulf Coast”), and the motion of Gulf Coast to consider the motion to dismiss as a motion for summary judgment. The motion to dismiss was argued before the Court and taken under submission. Memorandum of law have been provided to the Court by the movants and by the Chapter 13 Trustee.

Facts: Procedural Background

The debtors, Roosevelt and Mary Kitt, hereinafter sometimes referred to as Debtors, filed a Chapter 13 petition with the Court on December 4, 2003. On January 15, 2004, through different counsel, the Debtors filed suit against Debis and Gulf Coast in the Circuit Court of Mobile County, Alabama, Case Number CV-04-00122, for an alleged assault that took place during a repossession of an automobile which had occurred in the early morning hours of December 4, 2003 and prior to the filing of the Chapter 13 petition.

The Court set the Debtors’ case for a first meeting of creditors and confirmation hearing on January 22, 2004, but it was rescheduled and held on February 5, 2004. The Court entered an order on February 18, 2004, confirming the plan submitted by the Debtors.

Debis filed a timely removal of the Mobile County Circuit Court case to the Bankruptcy Court and promptly filed a motion to dismiss the action. Debtors, through their state court counsel, filed an objection to dismissal of the removed case. Gulf Coast filed motions for joinder in the removal and for dismissal of the state court action on March 26, 2004. The parties argued these matters before the Court on April 27, 2004. Subsequent to the hearing, Gulf Coast filed its motion to consider its Rule 12 motion as a summary judgment on April 27, 2004. Along with said motion Gulf Coast filed an affidavit asserting that the attempted repossession giving rise to the cause of action took place in the early morning hours of December 4, 2003. The Debtors

have not contested the affidavit, nor have they filed any response to the motion. The Court will construe the motions to dismiss as a motion for judgment on the pleadings pursuant to Bankruptcy Rule 7012(c) as to Debis. As to Gulf Coast, the Court will treat its motion as one for summary judgment as provided in Rule 7056.

Conclusions of Law

This Court has jurisdiction under 28 U.S.C. § 1334 (b) and the Bankruptcy Court is the proper court in which to file the removal pursuant to the Federal Rules of Bankruptcy Procedure 9027. The prepetition causes of action of Debtors against Debis and Gulf Coast are part of the bankruptcy estate and as such, relate to a case filed under Title 11. As an asset of the estate, pursuant to 28 U.S.C. § 1334 (b), the provisions of 28 U.S.C. § 1452 have been met and the state case can be removed to this Court. The Court has jurisdiction under 28 U.S.C. § 157, § 1334 and the Order of Reference of the District Court. Under Federal Rule of Civil Procedure 56 (as adopted by Bankruptcy Rule 7056), summary judgment is proper if the moving party shows that no genuine issue of material fact exists, and that the movant is entitled to judgment as a matter of law. The responding party must set out “specific facts establishing the existence of a genuine issue of material fact, mere allegations or denials of the movant’s pleadings are insufficient.” *In re Wolfson*, 139 B.R. 279, 281 (Bankr. S.D.N.Y. 1992), *aff’d* 152 B.R. 830 (S.D.N.Y. 1993).

Debis and Gulf Coast have filed a motion to dismiss based on the theory that the Debtors’ claims for monetary damages in the removed action are barred by the doctrine of judicial estoppel due to the failure of Debtors to disclose in their schedules the existence of their claims

against Debis and Gulf Coast¹.

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.” See *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1284 (11th Cir. 2002). The doctrine exists “to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment” *Id.* quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 1814, 149 L.Ed. 2d 968 (2001)

The applicability of judicial estoppel largely turns on two factors. *Id.* First, a party’s allegedly inconsistent positions must have been “made under oath in a prior proceeding.” *Id.* (quoting *Salomon Smith Barney v. Harvey*, 260 F.3d 1302, 1308 (11th Cir. 2001), cert. granted and judgment vacated, 537 U.S. 1085, 123 S.Ct. 718, 154 L.Ed. 2d 629 (2002)). Second, the “inconsistencies must be shown to have been calculated to make a mockery of the judicial system.” *Id.* (quoting *Salomon Smith Barney, Inc.* 260 F.3d at 1308). “[T]hese two enumerated factors are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine.” *Id.* 1286

Barger v. City of Cartersville, GA, 348 F.3d 1289, 1293-94 (11th Cir. 2003).

The doctrine of judicial estoppel clearly applies to debtors in Chapter 13 cases. *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

. . . the rule established in *Burnes v. Pemco Aeroplex, Inc.*, 291 F.2d 1282 (11th Cir. 2002), that judicial estoppel bars a plaintiff from asserting claims previously undisclosed to the bankruptcy court where plaintiff both knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court, applies equally to Chapter 13 cases.

¹ Initially the Court considered whether the Eleventh Circuit’s holding in *Parker v. Wendy’s Intern., Inc.* 365 F.2d 1268 (11th Cir. 2004) is applicable to the present case. In *Parker*, the Eleventh Circuit held that the judicial estoppel doctrine did not apply to the Chapter 7 trustee who stepped into the debtor’s shoes in pursuing an employment discrimination case that the debtor had not listed in her bankruptcy schedules. The present case is a Chapter 13 proceeding, and the Chapter 13 Trustee has not intervened or been added as a party to the removed case. Therefore, the issue presented in *Parker* is not before the Court.

In this case, the Debtors filed their Chapter 13 bankruptcy petition in a matter of hours of the attempted repossession of Debtors' automobile, which is the basis for the cause of action alleged in the Debtors' complaint filed in the state court. The Debtors failed to disclose the cause of action when they filed their Chapter 13 petition. Considering the sequence of the events surrounding the attempted repossession and the timing of the filing of the Chapter 13 petition, it is not unreasonable to consider that failing to list a cause of action may have been inadvertent.

The purpose of the doctrine of judicial estoppel is to prevent parties from making a "mockery of justice by inconsistent pleadings." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002). "The doctrine of judicial estoppel applies in situations involving intentional contradictions, not simple error or inadvertence." *Id.* at 1286. In *Burnes*, the Eleventh Circuit adopted the holding in the case of *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999), and stated 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. The Eleventh Circuit has used this test in determining whether judicial estoppel applies to preclude an undisclosed lawsuit. *See, Barger*, 348 F.3d at 1295; *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289, 1291 (11th Cir. 2003).

While the initial failure to disclose may have been inadvertent, considering the timing of the events, the failure of the Debtors to amend their petition so as to disclose the lawsuit is not. The Bankruptcy Code imposes upon debtors an express affirmative duty to disclose all assets, including contingent and unliquidated claims. *See* 11 U.S.C. § 521 (1) ("a debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities . . ."). In this case, the Debtors filed suit in the Circuit Court of Mobile County on January 15, 2004, more

than a month after the filing of their Chapter 13 petition. The Court held Debtors' confirmation hearing on February 5, 2004 and entered an order confirming the plan February 18. From the time the Debtors first learned that they had potential causes of action (which led to the filing of a suit), they were under a duty to amend their schedules. Rather than doing so, they continued to proceed with their lawsuit. The application for removal was filed on February 25, 2004 and a motion to dismiss was filed by Debis on March 3, 2004. Instead of amending the schedules, the Debtors filed on March 23, 2004 an amendment to the complaint which had been removed to the Bankruptcy Court and an objection to the motion to dismiss. The objection to the motion to dismiss stated that Debtors were not aware at the time they filed Chapter 13 that they had a viable claim for personal injuries against Debis. The objection further stated that the Debtors first visited their attorney's office on December 11 at which time they were told that the attorney would conduct the necessary research in order to determine whether they had a claim. This resulted in the suit being filed on January 15, 2004. The objection further indicated that the Debtors did not intend to dishonor the Court by failing to disclose said information. Gulf Coast filed its motion for joinder and removal in the motion to dismiss on March 26, 2004. Still, the Debtors failed to amend their schedules or to seek to amend their plan which had previously been confirmed by the Court to include their claims against Debis and Gulf Coast. From the time the Debtors first learned that they had a cause of action against Debis and Gulf Coast, they could have filed an amendment to the schedules and to the plan to account for the asset.

Debtors now seek to avoid the application or judicial estoppel by claiming that the failure to disclose was inadvertent. However, this does not appear to be a case of mere inadvertence. Prior to confirmation, the Debtors had enough information regarding the cause of action and

could have disclosed it, but failed to do so. The Debtors knew of the causes of action for damages and that if they were successful, it could have a significant impact on their ability to repay their unsecured creditors more than the 8% that was offered through their plan. There is no question that the Debtors failed in their duty to disclose.

With respect to the second prong, Debtors have not submitted any pleadings to the Court with respect to whether or not they had a motive to conceal the pending lawsuit from the Bankruptcy Court. Considering that their plan provided only an 8% distribution to unsecured creditors, the lawsuit was an asset that could potentially increase the distribution to creditors. By failing to disclose this to the Court, unsecured creditors would be prejudiced in the event that the Debtors were successful in their lawsuit seeking monetary damages. The Debtors would have benefitted by concealing the lawsuit. The Debtors' amendment to the bankruptcy schedules was only submitted after confirmation and after removal from the state court and the filing of a motion to dismiss.

The success of our bankruptcy laws requires a debtor's full honest disclosure. Allowing [plaintiff] to back up, reopen the bankruptcy case and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. *Burnes*, 291 F.3d at 1288.

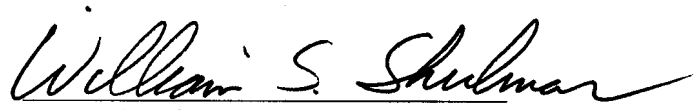
The Debtors in this case certainly knew about their cause of action prior to the confirmation hearing and possessed a motive to conceal it because it would mean paying the unsecured creditors less. As stated in the case of *DeLeon*, "we can infer from the record his intent 'to make a mockery of the judiciary system'" by filing inconsistent pleadings. *DeLeon*, 321 F.3d at 1292 (quoting *Burnes*, 291 F.3d at 1285-87).

It is clear from the cases that the Eleventh Circuit has narrowly construed inadvertence

and has required debtors and counsel for debtors to be particularly careful in the preparation of their schedules. Based on the analysis of the cases referred to in this opinion, this Court holds that the doctrine of judicial estoppel should be applied in this case.

Now therefore, it is ORDERED that the motion of Debis, which the Court has treated as a motion for judgment on the pleadings is hereby GRANTED in favor of Debis and against the Debtors; that the motion of Gulf Coast for summary judgment is hereby GRANTED in favor of Gulf coast and against the Debtors; and the adversary case is hereby DISMISSED with prejudice.

Dated: September 7, 2004


WILLIAM S. SHULMAN
CHIEF U.S. BANKRUPTCY JUDGE