UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

CHARLES E. RENIEWICZ, Case No. 02-15986-MAM-13

Debtor.

CHARLES E. RENIEWICZ,
TERESA O. RENIEWICZ

Plaintiffs,

v. Adv. No. 03-1119

PRICE WILLIAMS ASSOCIATES, INC., GENERAL MOTORS ACCEPTANCE CORPORATION, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendants.

ORDER DENYING DEBTOR'S MOTION TO RECONSIDER, GRANTING GMAC'S SUMMARY JUDGMENT MOTION FOR A PERMANENT INJUNCTION, AND GRANTING DEBTOR'S MOTION TO AMEND HIS SCHEDULES TO ADD A LAWSUIT

Stephen L. Klimjack, Mobile, Alabama, Attorney for Charles and Teresa Reniewicz
Paul J. Spina, Birmingham, Alabama, Attorney for General Motors Acceptance Corporation

This matter is before the Court on the Reniewiczs' motion for reconsideration of the Court's order dismissing their adversary proceeding, General Motors Acceptance Corporation's ("GMAC") summary judgment motion for a permanent injunction enjoining the Reniewiczs from pursuing their lawsuit in state court, and Mr. Reniewicz's Rule 60 motion seeking to add the Reniewiczs' lawsuit against GMAC to his schedules. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to

enter a final order. For the reasons indicated below, the Court is denying the Reniewiczs' motion for reconsideration, granting GMAC's motion for summary judgment, and granting Mr. Reniewicz's motion to amend his schedules.

FACTS

The debtor, Charles Reniewicz, filed a chapter 13 bankruptcy case in this Court on October 21, 2002. Prior to filing his bankruptcy case, Mr. Reniewicz and his wife Teresa had filed a lawsuit against the defendants, GMAC and Price Williams Associates, Inc., on July 16, 2001 in the Circuit Court of Mobile County. However, Mr. Reniewicz did not list the lawsuit against the defendants as a potential asset in his bankruptcy schedules. His chapter 13 plan was confirmed with a 1% distribution to unsecured creditors.

Although Mr. Reniewicz did not list his lawsuit against the defendants on his schedules, he filed an adversary proceeding complaint against them in his bankruptcy case on May 11, 2003. The complaint, filed on behalf of Mr. Reniewicz and his wife, is the same lawsuit the Reniewiczs previously pursued in state court. GMAC filed a motion to dismiss the complaint under the doctrine of judicial estoppel based on Mr. Reniewicz's failure to list the lawsuit in his schedules. GMAC also filed an answer to the complaint and a counterclaim seeking an injunction preventing the Reniewiczs from pursuing their lawsuit in state court.

The Court held a hearing on GMAC's motion to dismiss on August 5, 2003. Mr. Reniewicz testified that he knew about the state court lawsuit when he filed his bankruptcy schedules but he did not realize it had been left off of his schedules. The two attorneys who represented Mr. Reniewicz in his bankruptcy case testified that the failure to list Mr. Reniewicz's lawsuit in his schedules was inadvertent and unintentional. Mr. Reniewicz's attorneys further testified that the bankruptcy filing was done on an emergency basis and the

schedules were copied from an earlier chapter 13 bankruptcy case filed by Mr. Reniewicz. GMAC did not argue that Mr. Reniewicz's failure to list the lawsuit was intentional. Instead, it argued that Mr. Reniewicz's failure to list the lawsuit on his schedules barred him from later pursuing the lawsuit under the decisions of the Eleventh Circuit Court of Appeals in *De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003) and *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002).

After the hearing of GMAC's motion to dismiss, the Court dismissed the Reniewiczs' complaint against GMAC on August 6, 2003. In its oral order, the Court stated that both the Eleventh Circuit Court of Appeals and the Alabama state courts have held that failure to list a lawsuit as an asset, even though subjectively inadvertent, will preclude a debtor from later pursuing the lawsuit if the bankruptcy plan is confirmed and creditors relied on the debtor's incomplete schedules to their detriment.

Subsequent to the Court's order dismissing the Reniewiczs' complaint, Mr. Reniewicz filed a Rule 60 motion to amend his schedules to add the lawsuit as an asset and a separate Rule 60 motion for reconsideration of the Court's order dismissing complaint. GMAC filed a motion for summary judgment on its counterclaim seeking an injunction to prevent the Reniewiczs from pursuing their lawsuit in state court.

LAW

A motion for reconsideration may be brought pursuant to Fed. R. Civ. P. 59(e) or 60(b).[1] *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689 (M.D. Fla. 1994). "If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b)." *Id.* at 694. Mr. Reniewicz filed his motion for reconsideration outside of Rule 59(e)'s ten day limit; therefore, the Court will consider it under Rule 60(b).

Rule 60(b) provides in relevant part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). In their motion for reconsideration, the Reniewiczs do not cite to any of the 6 clauses enumerated in Rule 60(b) as authority for the Court to grant relief from its order dismissing their adversary proceeding. However, the Court reads the Reniewiczs' motion as seeking relief under either Rule 60(b)(1) based on "mistake, inadvertence . . . or excusable

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[1] Most of the Federal Rules of Civil Procedure are incorporated into the Federal Bankruptcy Rules of Procedure. Federal Rules 59(e) and 60(b) are incorporated into the Bankruptcy Rules and, with exceptions that do not apply in this case, they are identical to Bankruptcy Rules 9023(e) and 9024(b). Therefore, nonbankruptcy cases that interpret the rules are applicable.

neglect" or Rule 60(b)(6) based on "any other reason justifying relief . . . ." Fed. R. Civ. P. 60(b).

The Eleventh Circuit Court of Appeals "consistently has held that 60(b)(1) and (b)(6) are mutually exclusive." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). "Therefore, a court cannot grant relief under (b)(6) for any reason which the court could consider under (b)(1)." *Id.* (quoting *Solaroll Shade and Shutter Corp. v. Bio-Energy Sys., Inc.*803 F.2d 1130, 1133 (11th Cir. 1986). The Reniewicz's motion argues that the Court should reconsider its prior order based on either the attorneys' excusable neglect or because the Court misapplied the substantive law regarding judicial estoppel. The relief sought by the Reniewiczs "fits more naturally under 60(b)(1)" than it does under (b)(6); therefore, the Court finds that "relief under (b)(6) is unavailable" to the Reniewiczs. *Id.*

A.

To come within the first basis for Rule 60(b)(1) reconsideration, the Reniewiczs' attorneys' "excusable neglect" must have been a "litigation mistake[] that a party could not have protected against, such as the party's counsel acting without authority of the party to that party's detriment." *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996) (citing numerous other cases where attorneys improperly advised clients to the clients' detriment). However, the Eleventh Circuit Court of Appeals "has demonstrated its wariness of grants of Rule 60(b)(1) relief for excusable neglect based on claims of attorney error." *Cavaliere* at 1115. It has refused to grant relief for attorneys' excusable neglect "even though such a result 'appear[ed] to penalize innocent clients for the forgetfulness of their attorneys.'" *Id.*

Mr. Reniewicz and the two attorneys representing the Reniewiczs in their adversary proceeding against GMAC testified that the failure to list the Reniewiczs' lawsuit in Mr. Reniewicz's schedules was inadvertent. Mr. Reniewicz stated that he read over his signed schedules but did not realize that the lawsuit was not listed. The Reniewiczs' attorneys both stated that Mr. Reniewicz's bankruptcy was filed on an emergency basis and the schedules they filed on his behalf were copied from an earlier bankruptcy case filed by Mr. Reniewicz.

The Court does not believe that Mr. Reniewicz or his counsel acted with any real intent to impugn "the essential integrity of the judicial process," *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), which the judicial estoppel doctrine is meant to preclude. The omission of the lawsuit was a genuine error. Nevertheless, the Court recognizes that debtors' counsel must be particularly vigilant in this Circuit to list debtors' lawsuits in their schedules due to the extremely narrow construction of inadvertence propounded by the Court of Appeals. *Burnes* at 1287 (holding that a chapter 7 "'debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment'") (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999)); *De Leon* at 1291 (extending *Burnes'* holding to chapter 13 debtors).

This Court has previously expressed a different view of the judicial estoppel doctrine than the Court of Appeals. *See In re Griner*, 240 B.R. 432 (Bankr. S.D. Ala. 1999). It would appear to this Court that allowing a suit to go forward to a judgment would be appropriate if the plaintiff's recovery was limited to an amount no greater than creditor claim amounts. But the present judicial estoppel doctrine, as propounded by the Court of Appeals, punishes innocent creditors as well as the debtor. Therefore, if this Court were writing on a clean slate, it would adopt the reasoning of the judicial estoppel cases cited by the debtor. *See In re Haskett*, 2003

WL 22006308 (Bankr. N.D. Ala. 2003) (finding that despite *Burnes*' strong words, it merely advocates "a no harm, no foul approach" that allows courts to forgo the application of judicial estoppel if the debtor's nondisclosure makes no difference to the outcome of the bankruptcy case); *Kagan v. Bercu (In re Bercu)*, 293 B.R. 806, 811 (Bankr. M.D. Fla. 2003) (forgoing the application of judicial estoppel against an unsophisticated debtor who relied on her attorney to prepare the documents filed in her chapter 7 case); *In re Barger*, 279 B.R. 900, 907 (Bankr. N.D. Ga. 2002) (forgoing the application of judicial estoppel against a debtor where her attorney's failure to amend her schedules was inadvertent).

However, based upon the strict view of the doctrine that the Eleventh Circuit Court of Appeals seems to take, the Court concludes that it has to find that judicial estoppel applies in this case. The Court will not reconsider its order dismissing the Reniewiczs's adversary proceeding. The type of inadvertence argued by Mr. Reniewicz in not listing the lawsuit in his schedules is not recognized by the Court of Appeals as a basis to forgo the application of judicial estoppel.

B.

The second basis for Rule 60(b)(1) reconsideration argued by the Reniewiczs, misapplication of the substantive law of judicial estoppel, is denied for the same reasons stated by the Court in its analysis above. The inadvertence standard set out by the Eleventh Circuit Court of Appeals prevents the application of judicial estoppel in bankruptcy cases where the debtor failed to list a lawsuit as an asset "only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Burnes* at 1287. Mr. Reniewicz and both of his attorneys testified that they knew about the lawsuit. Further, the Reniewiczs' confirmed chapter 13 plan pays only 1% to unsecured creditors; therefore, Mr. Reniewicz did have a motive to conceal the lawsuit.

C.

Subsequent to the Court's order dismissing the Reniewiczs' compliant, GMAC filed a motion for summary judgment on its counterclaim seeking an injunction to prevent the Reniewiczs from pursuing their lawsuit in state court. The Court previously set out the standard for issuing a permanent injunction in *In re Griner*, 240 B.E. 432, 434 (Bankr. S.D. Ala. 1999). It found that "[t]o obtain a permanent injunction, the plaintiff must: (1) succeed on the merits of its claim; (2) show that the public interest will be served; (3) show that it will incur continuing irreparable harm without the protection of an injunction; and (4) show that the relative harm it would incur without the injunction outweighs any harm to the defendant." *Id.*

GMAC's counterclaim seeking an injunction against the Reniewiczs meets the permanent injunction standard because (1) GMAC succeeded on the merits of its judicial estoppel claim; (2) the public interest, in the form of judicial economy, is served by barring the Reniewiczs from pursuing the same lawsuit in state court that this Court has dismissed; (3) GMAC would suffer irreparable harm without the protection of an injunction issued by this Court because it would have to defend the Reniewiczs' lawsuit in state court for a second time; and (4) the relative harm GMAC would incur without the injunction outweighs the harm to the Reniewiczs because GMAC has no adequate remedy at law to prevent the Reniewiczs from continuing to pursue their lawsuit in state court. This result is supported by the two most recent judicial estoppel decisions issued by the Eleventh Circuit Court of Appeals. *De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003) (barring chapter 13 debtor from pursuing discrimination lawsuit); *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282 (11th Cir. 2002) (barring chapter 7 debtor from pursuing monetary portion of employment discrimination lawsuit).

D.

Mr. Reniewicz filed a separate Rule 60 motion seeking to add the lawsuit as an asset in his schedules. The Bankruptcy Rules, in general, allow a debtor to amend his schedules as a matter of course at any time before the case is closed. Fed. R. Bankr. P. 1009. Moreover, "courts generally have no discretion to deny a debtor his right to amend, unless evidence is shown of a debtor's bad faith or of prejudicial effect on creditors." *In re Haskett*, 2003 WL 22006308 (Bankr. N.D. Ala. 2003).

The Court finds that Mr. Reniewicz may amend his schedules as a matter of course under Fed. R. Bankr. P. 1009 to add the lawsuit against GMAC. However, the mere addition of the lawsuit to Mr. Reniewicz's schedules will not serve any meaningful purpose. The Reniewiczs' adversary proceeding complaint was dismissed by this Court based on the doctrine of judicial estoppel. Additionally, the Court is granting GMAC's summary judgment motion for a permanent injunction that prohibits the Reniewiczs from pursuing the lawsuit in state court. Mr. Reniewicz may list the lawsuit as an "asset," but it is not one because it has no value.

CONCLUSION

It is ORDERED that Charles and Teresa Reniewicz's motion for reconsideration of this Court's order dismissing their adversary proceeding against General Motors Acceptance Corporation is DENIED.

It is FURTHER ORDERED that General Motors Acceptance Corporation's summary judgment motion seeking a permanent injunction prohibiting the Reniewiczs from pursuing their lawsuit in state court is GRANTED and plaintiffs are enjoined from pursuing these claims in state court.

It is FURTHER ORDERED that Charles Reniewicz's Rule 60 motion seeking to add the lawsuit against General Motors Acceptance Corporation to his schedules is GRANTED.

Dated: September 19, 2003

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE