IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Linda Davis,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 14 L 10514
	)	
Ashley Butler,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Judicial estoppel cuts off a plaintiff's personal-injury claim if the plaintiff failed to list the claim as an asset in a Chapter 13 bankruptcy that existed at the time of the injury. A determination of a plaintiff's intent or inadvertence is best left to a bankruptcy judge but only after the trustee's determination of how to account for the newly discovered asset. As a result, the defendant's summary judgment motion is entered and continued and the plaintiff is ordered to contact the bankruptcy trustee as instructed below.

FACTS

On September 24, 2012, Linda Davis filed a voluntary petition for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois. That court later confirmed Davis's Chapter 13 bankruptcy plan. On February 27, 2014, Davis and Ashley Butler were involved in an automobile accident. On May 12, 2014, Davis made her final bankruptcy payment. During the pendency of the bankruptcy, it was discovered that Davis had been making payments for bills she did not incur and that she had overpaid $901.19. This error allegedly delayed the discharge of the bankruptcy approximately two-and-one-half months. Regardless, on August 22, 2014, Davis obtained a $12,169.27 discharge of her debts and the bankruptcy court closed her case.

On October 9, 2014, Davis filed her complaint in this lawsuit arising from the February 27, 2014 accident with Butler. Davis alleges that she sought treatment from March 1 through June 7, 2014 for back and abdomen injuries. Davis, however, never disclosed her inchoate personal-injury claim during her bankruptcy. To be clear, the vehicle collision had not yet occurred at the time Davis filed her initial asset disclosure with bankruptcy court but, after it did occur, Davis at no time before her bankruptcy discharge sought to amend her payment plan based on her potential personal-injury claim.

ANALYSIS

The Code of Civil Procedure authorizes summary judgment, "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. A defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law – the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Alternatively, a defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action – the so-called "Celotex test." *See Resurrection Home Health Services v. Shannon*, 2012 IL App (1st) 111605, ¶ 20, *citing Celotex Corp. v. Catrett*, 447 U.S. 317, 323 (1986).

The purpose of a summary judgment proceeding is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed.*, 202 Ill. 2d 414, 421, 432 (2002). If the party seeking summary judgment presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001).

Butler seeks to dismiss Davis's complaint based on the doctrine of judicial estoppel. That doctrine provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. *See Gambino v. Boulevard Mortg. Corp.*, 398 Ill. App. 3d 21, 59 (1st Dist. 2009). The doctrine's purpose is to promote the truth and protect the integrity of the court system by prohibiting litigants from deliberately shifting positions to suit the exigencies of the moment. *Id.* at 59-60. The Illinois Supreme Court has laid out five elements that are generally required for the doctrine of judicial estoppel to apply: "[T]he party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intending for trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it." *People v. Caballero*, 206 Ill. 2d 65, 80, (2002), *quoting People v. Coffin*, 305 Ill. App. 3d 595, 598 (1st Dist. 1999). Davis argues that Butler has failed to establish three of the required elements of judicial estoppel: that she took factually inconsistent positions in the two proceedings, that she obtained a benefit from the bankruptcy proceeding, and that she intended for the bankruptcy court to accept the truth of the facts alleged. These issues are addressed in turn.

Davis asserts that judicial estoppel is inappropriate because she never took two inconsistent positions in the two proceedings. Davis claims that her two positions are not inconsistent because the accident occurred after she filed for Chapter 13 bankruptcy in September 2012. According to Davis, she had no personal-injury claim and, therefore, her disclosures were entirely truthful. Davis argues further that since the accident did not occur until February 2014 and she never modified her bankruptcy plan, she never actually took inconsistent positions in the two judicial proceedings.

Butler, on the other hand, claims that Davis had a continuing duty to disclose claims as assets during the pendency of a bankruptcy proceeding. Butler argues that by failing to disclose her personal-injury claim arising from an accident that occurred during the pendency of her bankruptcy proceeding, Davis took an inconsistent position. For the reasons discussed below, this court agrees with Butler that Davis had a continuing duty to disclose any and all claims arising during the pendency of her bankruptcy proceedings.

The bankruptcy statute defines property interests that become part of the debtor's estate as only those legal or equitable interests the debtor has, "as of the commencement of the case." 11 U.S.C.A. § 541(a)(1). This language suggests that only property interests that the debtor possessed at the time of filing bankruptcy, excluding after-acquired assets, become part of the estate. This conclusion is true for Chapter 7 cases. *See In re Holstein*, 321 B.R. 229, 235 (Bankr. N.D. Ill. 2005); *In re Carousel Int'l Corp.*, 89 F.3d 359, 362 (7th Cir. 1996); *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993); *In re Taronji*, 174 B.R. 964, 969 (Bankr. N.D. Ill. 1994). In other words, in Chapter 7 cases, there is a continuing duty to disclose only legal or equitable interests that the debtor possessed at the time of filing.

In contrast, the statutory language governing Chapter 13 filings expands the definition of property interests to include, "all property of the kind specified in [section 541] that the debtor acquires after the commencement of the case but before the case in closed, dismissed, or converted." 11 U.S.C.A. § 1306(a)(1). Since Davis filed for Chapter 13 bankruptcy, and potential legal claims are a kind of interest specified under section 541, her personal-injury claim arising from an accident that occurred during the pendency of her bankruptcy belongs to the bankruptcy estate and, therefore, should have been disclosed. For purposes of defining property of the estate, it is of no consequence why Davis's bankruptcy plan was still pending at the time of her accident, only that it was. By failing to disclose this claim as an asset during her bankruptcy proceeding and bringing her claim only after the bankruptcy court discharged her debts, Davis took two factually inconsistent positions in two judicial proceedings. That conclusion satisfies the first three elements required for judicial estoppel to apply.

This court will next address the fifth requirement and save the fourth for last. Judicial estoppel cannot be appropriately applied unless Davis gained some benefit from the nondisclosure of her personal injury claim. She argues that she received no benefit. Rather, she repaid her debts as required by the bankruptcy plan and, in fact, overpaid, delaying the discharge of the bankruptcy. Butler points out, however, that Davis benefitted from her unmodified bankruptcy plan. One of the reasons ongoing disclosure is required in Chapter 13 proceedings, "is so that creditors can object to, or seek modification of, a confirmed plan." *Seymour v. Collins*, 2014 IL App (2d) 140100, ¶34, *appeal allowed*, 23 N.E.3d 1207 (Ill. 2015). According to Butler, a debtor's failure to disclose the existence of a pending personal-injury action confers a benefit on the debtor by preventing creditors from objecting to or modifying the plan. This leads to an additional benefit by permitting a debtor to discharge debts without disclosing potential personal-injury claims to creditors. *See Shoup v. Gore*, 2014 IL App (4th) 130911, ¶ 17, *citing Berge v. Mader*, 2011 IL App (1st) 103778, ¶ 14. Here, Davis received a benefit when the bankruptcy court discharged debts in the amount of $12,169.27 without payment. Had Davis disclosed her personal-injury claim as an asset, her bankruptcy plan may likely have been amended to award creditors any monetary gains from this suit. For this reason, Davis benefited from her nondisclosure.

The court must now address the fourth element – whether Davis intentionally or inadvertently failed to disclose her personal-injury claim. In *Berge*, the First District found that, "of the five elements that must exist for Illinois courts to impose judicial estoppel, a finding of 'bad faith' surrounding a nondisclosure is not one of them." 2011 IL App (1st) 103778, ¶ 6. *Berge*, however, does not use the requirements from the Supreme Court's decision in *Caballero*, but applies the five judicial-estoppel requirements relied on in the First District's opinion in *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 851 (1st Dist. 1994). *Ceres Terminals* replaces the intent requirement with the requirement that the two positions, "must be given under oath." *See id.* The Supreme Court has, however, never explicitly required that the statements be made under oath for purposes of judicial estoppel and has instead used the broader requirement of showing intent to deceive. Other appellate districts have picked up on this and are viewing statements made under oath as evidence of intent. *See Seymour*, 2014 IL App (2d) 140100. In *Seymour*, following the Supreme Court's lead, the Second District found that a woman's disclosure of financial changes in her favor and subsequent nondisclosure of her personal injury claim in bankruptcy court sufficiently established her intent to deceive, therefore, a statement under oath was unnecessary. *Id.* ¶ 30. (As noted above, *Seymour* is pending before the Supreme Court.)

As in *Seymour*, Davis never actually made inconsistent statements under oath because the trustee never amended the bankruptcy plan after its initial confirmation. As a result, whether judicial estoppel would apply in this case could

rest entirely on whether *Seymour* is affirmed or reversed. Rather than guess what Supreme Court will decide in *Seymour*, it is prudent to wait for that decision.

If *Seymour* is affirmed, questions remain whether Davis's nondisclosure was intentional or inadvertent and who is in the best position to make that determination. While this court has the authority to order an evidentiary hearing as to Davis's intent, recent Seventh Circuit decisions have suggested that reopening the bankruptcy case is the better course of action. As discussed in *Rainey v. United Parcel Service, Inc.*, reopening the bankruptcy proceedings would postpone the finding of intentionality and actually serve the interests of the parties harmed by the nondisclosure – the creditors. "[A]s long as the bankruptcy proceedings are ongoing . . . a Chapter 13 debtor can inform the trustee of previously undisclosed legal claims, and unless the trustee elects to abandon that property, the debtor may litigate the claims on behalf of the estate and for the benefit of the creditors without court approval." 466 Fed.App'x, 542, 544 (7th Cir. 2012). Even if the debtor's nondisclosure were intentional, barring the debtor from bringing claims, "would undermine the interests of his creditors." *Id.* at 545.

In *Metrou v. M.A. Mortenson Co.*, the Seventh Circuit recently held that, once a bankruptcy is reopened, "[t]he Trustee is entitled to pursue this litigation as an asset of the estate in bankruptcy. Whether or not [the debtor] should have disclosed the claim in the bankruptcy does not matter to a suit maintained by the Trustee, who not even arguably culpable for any misconduct." 781 F.3d 357, 360 (7th Cir. 2015) (concerning a Chapter 7 filing). The court went on to say that the question of the debtor's intentions in failing to disclose the claim is more appropriately addressed to the bankruptcy judge, "who can decide (if the Trustee prevails in this tort suit) what disposition to make of any proceeds that remain after paying counsel and the creditors." *Id.* at 360.

The course of action recommended by the Seventh Circuit makes the most sense here. Regardless of whether Davis intentionally deceived the court, her creditors will equally be hurt if she is permitted to bring this claim herself or if she is judicially estopped. The only way her creditors will escape injury is if Davis reopens her Chapter 13 bankruptcy and allows the trustee to modify the discharge order to indicate that any recovery Davis obtains in this litigation up to $12,169.27 goes to her creditors with any surplus to her. (Unlike a Chapter 7 trustee, a Chapter 11 or 13 trustee is not authorized to prosecute personal-injury claims.) If Davis wins at trial or settles for more than the discharge sum and there is a surplus, the bankruptcy court is at liberty to hold an evidentiary hearing, make a finding on Davis's intent, and dispose of the surplus accordingly. In other words, if Davis is found to have acted inadvertently, she could be awarded the surplus, if not, the surplus could be returned to Butler or awarded to the creditors as a bonus. *See Metrou*, ¶ 11.

CONCLUSION

For the above reasons, it is ordered that:

1. Butler's summary judgment motion is entered and continued;
2. Davis is ordered to contact her bankruptcy trustee to report the existence of this lawsuit as an asset in her discharged Chapter 13 bankruptcy; and
3. this matter will return on September 11, 2015 at 9:30 a.m. in Room 2209 for case management for Davis to report to the court on the potential modification of the discharge petition and for potential ruling on Butler's summary judgment motion.

John H. Ehrlich, Circuit Court Judge

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