**Great Decision on Judicial Estoppel**

In a lengthy decision addressing a challenge to its order reopening the debtor’s chapter 13 case, a Bankruptcy Court for the District of South Carolina found that the debtor had no duty under the Bankruptcy Code or Rules to disclose a lawsuit that accrued and was filed post-confirmation. In the face of the claim by the Defendants in the state personal injury lawsuit that the lawsuit was subject to dismissal on the basis of judicial estoppel, the court stated, “[w]ithout such a duty or knowledge that one existed, Debtor cannot be found to have acted intentionally to mislead this Court.” *In re Boyd*, No. 13-2924 (Bankr. S.C. July 17, 2020).

The debtor’s plan was confirmed on July 25, 2013. In June, 2017, the debtor was seriously injured in a drunk-driving accident caused by Roy Bolyn who was driving a vehicle entrusted to him by his employer, Thompson Construction Group. One year later, the debtor filed a personal injury lawsuit against Bolyn and Thompson (Defendants) in state court. Shortly thereafter, the debtor completed his plan payments, paying 90% of the debts owed to unsecured creditors. He received his discharge in September, 2018.

During the course of the state lawsuit, the Defendants filed a motion for summary judgment arguing that because the debtor failed to disclose the pending lawsuit in his bankruptcy, he should be judicially estopped from pursuing the action in state court. In response, the debtor moved to reopen his bankruptcy in order to supplement his schedules to show the value of the lawsuit as $6,000,000, and claim it as exempt. He also applied to employ his personal injury attorney. The bankruptcy court granted the motions, and the Defendants moved for reconsideration.

In a hearing on the motion for reconsideration, the debtor maintained that he was unaware of any obligation to disclose the lawsuit. The trustee testified that debtors in the district do not typically disclose all assets acquired post-confirmation, that had the debtor disclosed the lawsuit she would not have sought to prosecute it as estate property, nor would she have opposed his exemption claim. Furthermore, she asserted that because the unsecured creditors recovered 90% in the bankruptcy, administering the asset would have wasteful and she would have abandoned the asset.

Observing that the Defendants had no interest in any of the assets of the bankruptcy estate and that they came to the court as “proverbial strangers” to the case, the bankruptcy court began with the issue of whether the Defendants had standing to challenge the orders at issue. In bankruptcy, to have standing, the moving party must be a “party in interest.” This requires a “pecuniary interest” “directly affected” by the bankruptcy proceedings. In addition, for constitutional standing, the party must have suffered an “injury in fact,” “traceable to conduct at issue,” which is likely to be “redressed by a favorable decision.”

The court noted that the Defendants’ sole complaint was that, if the debtor is permitted to reopen his bankruptcy case and supplement his schedules to include the lawsuit, their judicial estoppel defense would fail in state court. The court found, therefore, that the Defendants’ injury for standing purposes had legs only to the extent their judicial estoppel claim had validity.

Judicial estoppel is an equitable doctrine under which a party is prevented from asserting a position which is “clearly inconsistent” with an earlier position upon which the court relied. In the current context, judicial estoppel would apply if: 1) the debtor’s failure to disclose his lawsuit was tantamount to a statement of nonexistence of that lawsuit in his bankruptcy case, 2) filing of the lawsuit was a position that was inconsistent with the nondisclosure, and 3) the court relied on the earlier position. Additionally, for judicial estoppel to apply, the debtor must have intentionally misled the court. The Defendants argued that the debtor’s failure to disclose his lawsuit was a bad faith attempt to mislead the court into believing that no such suit existed and thereby reap a benefit.

**Debtor’s Duty of Disclosure**

The court began its analysis by examining whether the debtor had a duty under the Code or bankruptcy rules to disclose the lawsuit which accrued and was filed post-confirmation. It found that he did not. Section 541(a)(7) provides that estate property includes “any interest in property that the estate acquires after the commencement of the case[.]” Notwithstanding the broad language of this provision, the court found that it refers to property acquired by the estate through what is already estate property. It does not refer to property acquired by the debtor post-confirmation.

Section 1306(a), however, expands the property of the chapter 13 estate to include post-petition property acquired by the debtor. The court found that under Fourth Circuit precedent, that section renders the lawsuit property of the bankruptcy estate. Section 1306, however, has no disclosure requirement. For that, the court looked to the debtor’s duties under section 521. That section mandates that a debtor reveal all prepetition assets, including potential causes of action. Bankruptcy Rule 1007 mandates that the debtor make those disclosures within 14 days of filing for bankruptcy. Rule 1007(h) requires disclosure when a debtor acquires specified property within 180 days of filing for bankruptcy. Based on these provisions, the court found that the debtor had no duty to disclose the lawsuit in this case. Nor were there any provisions in the debtor’s plan or in any court orders that imposed such duty.

The absence of a duty to disclose was fortified by the court’s examination of the disposition of estate property post-confirmation under the Code and as dealt with throughout various districts in the Fourth Circuit. While section 1327 creates a presumption that estate property revests in the debtor post-confirmation, the district where this case was filed has opted out of that presumption and retains the property in the estate. The district specifies, however that the debtor takes possession of the property and is responsible for maintaining its value. The court reasoned that the district left treatment of post-confirmation property to the debtor except to the extent the court orders otherwise. As a practical matter, the court found, “[a]n expectation that a debtor amend schedules for every change in income and assets would be impractical and overly burdensome on the debtor.”

The court acknowledged the line of cases in which debtors were found to have a “continuing duty of disclosure” extending to assets acquired post-confirmation, but found those cases wrongly decided. Though the court agreed that there is a continuing duty to disclose prepetition assets, as found by *Martineau v. Wier*, 934 F.3d 385 (4th Cir. 2019), that duty does not extend to post-confirmation assets unless that duty is specified in the Code, by the plan provisions, or court order. The court distinguished the oft-cited case of *In re Coastal Plains*, 179 F.3d 197 (5th Cir. 1999), a chapter 11 case in which the debtor failed to disclose a prepetition cause of action. That case turned on the fact that the creditors relied on disclosure of such information when they made decisions as to their conduct in the case.

Here, the cause of action arose three years after the petition and could not have been the basis for any reliance by the creditors at the early stages of the bankruptcy. Additionally, the trustee assured the court that it is not typical for debtors to disclose post-confirmation lawsuits, that she would not have objected to the debtor’s exemption, and that she would have abandoned the asset. All these facts pointed to the absence of any prejudice to the creditors by reason of the debtor’s non-disclosure.

Because the court found that the “Debtor did not have a duty to disclose the Lawsuit or to amend his schedules to reflect a cause of action which accrued nearly three years after Debtor confirmed his chapter 13 plan,” it found that the debtor’s failure to do so could not constitute a representation upon which the court relied. The court added that it “declines to read into the statute or rules a duty that does not exist, particularly where the duty is being asserted to prejudice a seriously injured debtor and may result in a windfall to the alleged liable parties.”

**Motion to Reconsider Reopen Order**

The court applied these findings to the Defendants’ motion for reconsideration beginning with the order permitting the debtor to reopen his bankruptcy and amend his schedules. The court framed the issue of the Defendants’ standing as “dependent on the potential effect the reopening of the case and disclosure of the Lawsuit **may** have on their judicial estoppel defense in the Lawsuit, upon which they base a **hope** for a summary escape from liability without a decision on the merits.” Relying on *Martineau v. Wier*, 934 F.3d 385 (4th Cir. 2019), the court found the issue of whether the debtor acted in bad faith for purposes of the judicial estoppel inquiry, was relevant to the reconsideration motion. Based on its earlier findings that the debtor had no duty to disclose, no reason to believe that he should disclose the lawsuit, and that there was no prejudice to any party resulting from the non-disclosure, the court found no bad faith.

Furthermore, the Defendants failed to demonstrate the type of injury necessary to establish standing. “[T]he Court agrees with the majority of cases addressing this issue [of judicial estoppel] which have found that such a purported pecuniary interest is too remote, too hypothetical, and too speculative to establish standing.” “The majority of courts that have addressed the issue have held that defendants in a nonbankruptcy lawsuit do not have standing as a party in interest to challenge a motion to reopen a bankruptcy case to permit the disclosure of a previously undisclosed cause of action, even if that litigant has asserted a judicial estoppel defense in the non-bankruptcy lawsuit.”

Finally, the court noted that defendants in a lawsuit who are not parties to the bankruptcy, generally lack standing to challenge a motion to reopen even if their defense to the non-bankruptcy lawsuit rests on judicial estoppel. The Defendants’ reliance on *In re Ingram*, 531 B.R. 121 (Bankr. D.S.C. 2015), was ill-placed as the issue of standing was specifically not addressed in that case.

**Merits**

Having concluded that the Defendants lacked standing to challenge the order to reopen, the court nonetheless addressed the merits of their arguments. Under Rule 59(e), a motion to reconsider may be sustained “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.”

The Defendants argued that the order to reopen constituted a manifest injustice because they did not receive notice of the motion to reopen. In the face of the Defendants’ denial of receipt, the debtor presented a certificate of service indicating that he had served the motion to reopen on the Defendants and that the documents were properly addressed and stamped. The court noted that there was no specific service requirement for motions to reopen and that the debtor complied with local rules regarding notice of such motions. Moreover, Rule 9006(e) creates a presumption that service done by mail was received by the intended recipient. The court rejected the Defendants’ contention that they lacked notice.

The Defendants next argued that the court’s decision to reopen was clear error because the debtor did not sustain his burden of proving the appropriateness of the motion, the reopening would not benefit any creditors, and it would lead to unjust benefit to the debtor. The court disagreed. Reopening is governed by section 350(b) which provides that “[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” A bankruptcy court has broad discretion to reopen a case. In light of the facts that no party to the bankruptcy case objected, the trustee affirmatively approved, the debtor acted at all times in good faith, and the case was reopened to administer an asset, the court found ample reason to justify reopening. As a final thumb in the eye of the Defendants, the court stated that their accusation that the debtor had tricked the court constituted a separate reason to reopen.

Contrary to the Defendants’ arguments, the court found, among other things, that in *In re Ingram*, 531 B.R. 121 (Bankr. D.S.C. 2015), did not hold that benefit to creditors was a necessary condition to reopening. Rather, the court in *Ingram* found that where the debtor specifically sought to reopen in order to pay more to creditors by reason of a lawsuit, and where the applicable commitment period had passed, the purpose of reopening was rendered futile.

**Objection to Exemption**

The Defendants objected to the debtor’s claimed exemption citing, in part, the fact that some of the potential recovery (i.e. lost wages) might not be subject to South Carolina’s exemptions. The court reiterated that the Defendants lacked standing to raise this issue as the exemption or lack thereof would have no bearing on the state lawsuit. Moreover, section 522 and Rule 4003 provide that, in the absence of timely objection by interested parties, property claimed as exempt will be deemed exempt. The Defendants offered no evidence at the hearing challenging the exemption as required by an objecting party under Rule 4003. In any case, *Law v. Siegel,* 571 U.S. 415 (2014), would prohibit taxing an exemption even if the Defendants had been successful in their bid to show the debtor’s conduct was in bad faith.

**Employment of Personal Injury Counsel**

In the final mop-up, the court addressed the Defendants’ objection to the debtor’s *nunc pro tunc* employment of their personal injury attorney under section 327, with the reminder that the Defendants lacked standing to bring the motion. Stating that the motion was a “blatant attempt to weaken or delay the prosecution of the Lawsuit,” the court found that the debtor had right under *Wilson v. Dollar General, Corp.*, 717 F.3d 337 (4th Cir. 2013), Bankruptcy Rule 6009 and Fed. R. Civ. P. 17(a), to hire a lawyer to prosecute the case and that, because the lawsuit was exempt and/or abandoned, it was no longer part of the bankruptcy estate.

The court closed the case and set the debtor free “to prosecute the Lawsuit in his name and for his benefit.”