

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

BEVERLY S. LEICHLITER,

Plaintiff,

vs.

THE DES MOINES REGISTER,

Defendant.

No. 4:08-cv-00065-JAJ

ORDER

This matter comes before the court pursuant to defendant's August 20, 2008, motion for summary judgment [dkt. 12]. Plaintiff resisted defendant's motion for summary judgment on September 29, 2008 [dkt. 17]. Defendant filed its reply brief on October 10, 2008 [dkt. 20]. On October 16, 2008, plaintiff filed a motion to strike defendant's reply brief [dkt. 21] and a motion to strike defendant's reply to plaintiff's statement of additional facts [dkt. 22]. As set forth below, defendant's motion for summary judgment [dkt. 12] is denied. Plaintiff's motions to strike [dkt. 21 and 22] are likewise denied.

I. SUMMARY OF THE ARGUMENTS

Plaintiff claims that the defendant violated both state and federal law by terminating her employment based on her age, gender, and in retaliation for her objecting to discriminatory actions. Defendant moves for summary judgment on plaintiff's claims, arguing that plaintiff should be judicially estopped from pursuing these claims because she failed to disclose them on her Chapter 13 Bankruptcy Petition, which was filed approximately two months after plaintiff's termination.

Plaintiff resists defendant's motion, arguing that she was unaware of the existence of her discrimination and retaliation claims against defendant at the time she filed bankruptcy, and that her failure to disclose this claim as part of her bankruptcy proceedings was inadvertent. Plaintiff has since amended her schedules to include these

claims in her bankruptcy proceeding. Plaintiff further claims that she received no unfair advantage by her failure to timely disclose these claims, and that no one was prejudiced by her failure to timely disclose.

II. FACTS TAKEN IN LIGHT MOST FAVORABLE TO PLAINTIFF

Plaintiff's employment with the defendant was terminated on September 28, 2006. Plaintiff's lawsuit claims that the defendant acted unlawfully when it terminated her employment.

On December 4, 2006, Plaintiff and her husband filed for Chapter 13 bankruptcy in the United States Bankruptcy Court for the Southern District of Iowa. Included in plaintiff's filings is a notice from her bankruptcy attorney, wherein her attorney certified to giving plaintiff notice on December 1, 2006 that any knowing and fraudulent concealment of assets or making of a false oath or statement under penalty of perjury, either orally or in writing, in connection with her bankruptcy case is subject to a fine, imprisonment, or both. Also on that date, plaintiff filed a Summary of Schedules, a Statistical Summary of Certain Liabilities and Related Data form, Schedules A through J, a declaration concerning her schedules, a Statement of Financial Affairs, and a proposed Chapter 13 Plan. Plaintiff did not list the claims she asserts in this lawsuit in the list of assets she filed with the bankruptcy court. Plaintiff "declare[d] under penalty of perjury" that she had read all of her schedules and that they were "true and correct to the best of [her] knowledge, information, and belief."

On or before February 12, 2007, while her bankruptcy case was pending, plaintiff filled out and signed a charge of discrimination with the Iowa Civil Rights Commission and the Equal Employment Opportunity Commission. That same day, the bankruptcy trustee filed an objection to the Initial Proposed Plan requesting that confirmation of the plan be denied as "not feasible" since "Plan payments alone will be insufficient to satisfy" even

the “mortgage arrearage claim on file herein” and “unsecured creditors will receive no dividend.”

On March 14, 2007, plaintiff filed a modified Chapter 13 plan that provided for a \$30 monthly increase for the fifty-seven remaining payments. Plaintiff’s employment attorney mailed her administrative charge to the Iowa Civil Rights Commission for filing that same day. The bankruptcy trustee and plaintiff’s creditors had until April 9, 2007 to file objections to her modified proposed plan. No objections were filed. On April 13, 2007, the bankruptcy trustee filed a notice to file an order confirming the modified proposed plan. On April 13, 2007, plaintiff’s modified proposed plan was confirmed.

On October 5, 2007 and October 8, 2007, plaintiff requested right-to-sue letters from the ICRC and the EEOC. On October 26, 2007, the ICRC issued a right-to-sue letter to plaintiff. The EEOC issued a right-to-sue letter on November 27, 2007. Plaintiff filed the instant lawsuit on January 17, 2008. Plaintiff’s Chapter 13 bankruptcy case is still pending. Plaintiff filed an amendment to her bankruptcy filings to reflect her employment-based claims on September 18, 2008.

III. CONCLUSIONS OF LAW

A. Summary Judgment Standard

Summary judgment is proper “if the pleadings, answers to interrogatories, 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.” Action v. City of Columbia, Mo., 436 F.3d 969, 975 (8th Cir. 2006) (quoting Fed. R. Civ. P. 56). In ruling on a motion for summary judgment, the court must view the evidence” in the light most favorable to the nonmoving party.” Sappington v. Skyjack, Inc., 512 F.3d 440, 445 (8th Cir. 2008) (quoting Dush v. Appleton Elec. Co., 124 F.3d 957, 962-63 (8th Cir. 1997)).

B. Judicial Estoppel in Bankruptcy Claims

The “doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation.” Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1142 (8th Cir. 1998). “A court invokes judicial estoppel when a party abuses the judicial forum or process by making a knowing representation to the court or perpetrating a fraud on the court. Stallings v. Hussman Corp., 447 F.3d 1041, 1047 (8th Cir. 2006) (citing Total Petroleum, Inc. v. Davis, 822 F.2d 734, 738 n.6 (8th Cir. 1987)). “Judicial estoppel prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second suit may not be the same as those in the first. Monterey Dev. Corp. v. Lawyer’s Title Ins. Corp., 4 F.3d 605, 609 (8th Cir. 1993).

Though not “reducible to any general formulation of principal,” three non-exhaustive factors are relevant in determining whether judicial estoppel is appropriate. Stallings, 447 F.3d at 1047 (citing New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)). The first factor is whether a party’s later position was clearly inconsistent with its earlier position. Id. The second factor is whether a party has persuaded a court to accept the earlier position. “Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity.” Id. The final factor is whether the party seeking to assert the inconsistent position would derive an unfair advantage or pose an unfair detriment on the opposing party if not estopped. Id.

“In the bankruptcy context, a party may be judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor’s schedules or disclosure statements.” Id. Such failure to list a claim in the “mandatory bankruptcy filings is tantamount to a representation that no such claim existed.” Id. (quoting In re Superior Crewboats, Inc., 374 F.3d 330, 335 (5th Cir. 2004)). See also

United States ex. Rel. Gebert v. Transport Admin. Servs., 260 F.3d 909, 918-19 (8th Cir. 2001). The second factor requires that the bankruptcy court have adopted the debtor's position, *e.g.*, issuing a "no asset" discharge or discharging debts initially but thereafter vacating and dismissing the debtor's bankruptcy upon learning that the debtor was concealing claims. Stallings, 447 F.3d at 1048. Under the third factor, the non-disclosure must not be inadvertent and must result in the debtor gaining an unfair advantage. Id. In elaborating on the final factor, the United States Court of Appeals for the Eighth Circuit has instructed:

Three examples illustrate the third factor. First, where a debtor files suit against a party, alleging that the party was responsible for the debtor filing bankruptcy, but failed to refer to the claim in any of its bankruptcy petitions, the debtor is judicially estopped from subsequently asserting the pre-petition claim that was not disclosed to the bankruptcy court. Payless Wholesale Distrib., Inc. v. Alberto Culver, Inc., 989 F.2d 570, 571 (1st Cir. 1993); see also Barger v. City of Cartersville, 348 F.3d 1289 (11th Cir. 2003) (prohibiting an employee who filed for bankruptcy because a demotion resulted in less pay from filing suit against her employer for violation of the FMLA because the employee failed to list the discrimination suit as an asset). The court will not allow the debtor to conceal its claims, get rid of its creditors "on the cheap" and start over with a "bundle of rights." Payless, 989 F.2d at 571. Because the debtor obtained judicial relief on the representation that no such claims existed, the debtor is prohibited from resurrecting such claims and obtaining relief on the opposite basis. Id.

Second, when a debtor does not disclose potential claims against its creditors in the bankruptcy petition, the interests of both the creditors and the bankruptcy court are impaired. Coastal, 179 F.3d at 208. In Coastal, a week after filing a bankruptcy petition, a Chapter 11 debtor initiated an adversary proceeding against its largest unsecured creditor. Id. Shortly thereafter, the debtor executed sworn bankruptcy schedules,

not disclosing its potential \$10 million claim against the creditor. Id. The Fifth Circuit held that the debtor was judicially estopped from asserting its claims against the unsecured creditor. Id. at 208. “A 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.” Id. at 210 (emphasis in original).

Finally, a debtor who files his bankruptcy petition, subsequently receives a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), and then fails to amend his bankruptcy petition to add his lawsuit against his employer as a potential asset is estopped from bringing the lawsuit because the debtor “knew about the undisclosed claims and had a motive to conceal them from the bankruptcy court.” DeLeon v. Comcar Indus., Inc., 321 F.3d 1289, 1291 (11th Cir. 2003).

Id. The Eighth Circuit further noted:

Judicial estoppel does not apply when a debtor’s “prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court.” Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996) (internal citation omitted). “Although it may generally be reasonable to assume that a debtor who fails to disclose a substantial asset in bankruptcy proceedings gains an advantage,” the specific facts of a case may weigh against such an inference.” Id. at 363. A rule that the “requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding [would] unduly expand the reach of judicial estoppel in post-bankruptcy proceedings and would inevitably result in the preclusion of viable claims on the basis of inadvertent or good-faith inconsistencies.” Id. Careless or inadvertent disclosures are not the equivalent of deliberate manipulation. Id. Courts should apply the doctrine as an extraordinary remedy when a party’s inconsistent behavior will result in a miscarriage of justice. Id. at 365.

Id. at 1049.

Plaintiff denies that she has asserted two inconsistent positions because her bankruptcy case is still pending and she has now amended her filings to include the instant lawsuit. It is undisputed, however, that plaintiff's bankruptcy case was pending for nearly two years before she amended her schedules to include her employment-based claims.

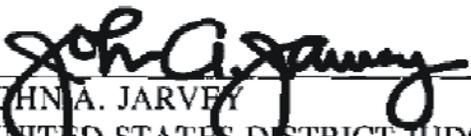
While the bankruptcy court confirmed plaintiff's repayment plan absent knowledge of her employment-based claims, the bankruptcy trustee and court are now on notice of this lawsuit and can reopen her bankruptcy case should she recover money in this lawsuit.

Under the third factor, plaintiff must derive an unfair advantage or defendant must otherwise suffer an unfair detriment if plaintiff is not estopped. Plaintiff's failure to disclose this lawsuit did not gain her any unfair advantage, nor did it impose an unfair detriment on the defendant. The defendant is not a creditor of the plaintiff. Judicial estoppel is only appropriate when a debtor's prior position was part of a scheme to mislead the court and defendant has produced ample argument, but no evidence to refute plaintiff's explanation, which must be credited for purposes of summary judgment, that her failure to disclose was anything other than careless inadvertence. "Careless or inadvertent disclosures are not the equivalent of deliberate manipulation." Stallings, 447 F.3d at 1049 (citing Ryan Operations, 81 F.3d at 363). Defendants have not demonstrated, as a matter of law, that a miscarriage of justice will result if plaintiff is not judicially estopped from pursuing this lawsuit. Summary judgment is denied. Upon the foregoing,

IT IS ORDERED

Defendant's motion for summary judgment [dkt. 12] is denied. Plaintiff's motions to strike [dkt. 21 and 22] are denied.

DATED this 14th day of November, 2008.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA