NOT FOR PUBLICATION (Docket Entry No. 27)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,	:	
Plaintiffs,	:	Civil No. 03-2796 (RBK)
v.	:	**OPINION**
FOODCRAFTERS DISTRIBUTION COMPANY, et al.,	:	
Defendants.	:	

KUGLER, United States District Judge:

This matter comes before the Court upon defendants' motion for summary judgment on the claims of intervenor-plaintiff Eileen Horner ("Horner"). Defendants argue that Horner's claims, which arise out of her former employment, are barred by judicial estoppel because Horner failed to disclose these claims in her voluntary October 2002 petition for Chapter 13 bankruptcy. Horner opposes summary judgment, arguing that she disclosed her claims to the Chapter 13 Trustee during a November 2002 meeting of creditors, and that the bankruptcy court was aware of her claims at the time her Chapter 13 plan was confirmed.

For the reasons expressed below, defendants' motion for summary judgment will be denied.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is only appropriate where the Court is satisfied "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." Fed. R. Civ. P. 56(c). An issue of material fact exists only if "the evidence is such that a reasonable jury could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

II. ANALYSIS

Judicial estoppel "should only be applied to avoid a miscarriage of justice," and is "not intended to eliminate all inconsistencies no matter how slight or inadvertent they might be." Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp., 337 F.3d 314, 319 (3d Cir. 2003). "Asserting inconsistent positions does not trigger the application of judicial estoppel unless 'intentional self-contradiction is . . . used as a means of obtaining unfair advantage.' Thus, the doctrine of judicial estoppel does not apply 'when the 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) (alteration in original) (citations omitted).

The Third Circuit has "identified certain criteria for

determining when seemingly inconsistent litigation stances justify application of [judicial estoppel]." Krystal, 337 F.3d at 319.

> First, the party to be estopped must have taken two positions that are irreconcilably inconsistent. Second, judicial estoppel is unwarranted unless the party changed his or her position "in bad faith - i.e., with intent to play fast and loose with the court." Finally, a district court may not employ judicial estoppel unless it is "tailored to address the harm identified" and no lesser sanction would adequately remedy the damage done by the litigant's misconduct.

Id. at 319-20 (alteration in original) (quoting Montrose Med. Group Participating Sav. Plan v. Bulger, 243 F.3d 773, 779-80 (3d Cir. 2001)).

Horner filed a Charge of Discrimination against the defendants with the EEOC on September 20, 2002. However, in her voluntary petition for Chapter 13 bankruptcy, signed October 10, 2002 and filed October 15, 2002, Horner declared under penalty of perjury that she had no "contingent or unliquidated claims of [any] nature." Horner did not file an amended disclosure in the bankruptcy court until June 11, 2004, after defendants' motion for summary judgment in the present case revealed her original omission. Defendants argue that these facts support application of judicial estoppel to the present case.

Horner, however, certifies that she did verbally inform the Standing Chapter 13 Trustee of her potential lawsuit against

the defendants during a meeting of the creditors on November 21, 2002. Further, Horner argues, the bankruptcy court was also made aware of her claims, as the order dated March 27, 2003 confirming her Chapter 13 plan makes reference to the "non-exempt proceeds of sexual harassment award, if any." That order, says Horner, is consistent with her understanding that "her claims in this case are part of the bankruptcy estate," and that the proceeds "would be used to pay any remaining debt of the bankruptcy in the event those proceeds were received prior to the completion of the bankruptcy plan."

A. Irreconcilably Inconsistent Positions

It is unclear whether "nondisclosure, standing alone, can support a finding that a plaintiff has asserted inconsistent positions within the meaning of the judicial-estoppel doctrine." See Ryan, 81 F.3d at 362 (expressly leaving question open); but see Krystal, 337 F.3d at 320-21 ("Krystal's Inconsistent Representations"). However, this Court need not reach the issue, because there is insufficient evidence in this case that Horner acted in bad faith.

B. Bad Faith

The Third Circuit has expressly declined to adopt "a rule that the requisite intent for judicial estoppel can be inferred from the mere fact of nondisclosure in a bankruptcy proceeding." See Ryan, 81 F.3d at 364-65. However, "a

rebuttable presumption of bad faith arises when averments in the pleadings demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose." Krystal, 337 F.3d at 321 (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 416-18 (3d Cir. 1988)).

Defendants contend that the facts of this case establish "knowledge of [the] claim and a motive to conceal that claim," as in Krystal and Oneida, such that bad faith may be inferred. Horner does not dispute defendants' assertion that she had enough information prior to confirmation to suggest that she might have a possible cause of action, and therefore that she had "knowledge" of the present claims under Krystal. However, Horner disputes the assertion that she had a motive to conceal those claims.

According to the defendants, the facts of the present case are analogous to those in Krystal, in which the Third Circuit found that the plaintiff had a motive to conceal its claims. Defendants argue that just as Krystal "had every reason to minimize its assets so that creditors would conclude they had no choice but to significantly compromise their claims and approve Krystal's reorganization," Krystal, 337 F.3d at 323, "Horner had every reason to attempt to conceal her claims against Defendants from her creditors and minimize her assets so that

creditors might be persuaded to allow her and her husband to settle debts for less than the unpaid balances." Defendants add that "Horner had every reason to keep the potential windfall from a verdict against Defendants in this case for herself." Finally, defendants argue, "there is no evidence in the record to suggest a good faith mistake by Horner."

Defendants are incorrect in their assertion that there is no evidence of good faith in the record. The record contains Horner's certification that she revealed the existence of a potential lawsuit to the Chapter 13 Trustee during the November 21, 2002 meeting of the creditors. Although defendants cite cases from other circuits in which disclosure to the bankruptcy trustee was held insufficient to escape judicial estoppel, see In re Superior Crewboats, Inc., 374 F.3d 330 (5th Cir. 2004); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001), those cases are distinguishable. In Superior Crewboats, there was evidence that the plaintiff lied to the trustee about the nature and value of her claims. See Superior Crewboats, 374 F.3d at 335. In Hamilton, the trustee refuted plaintiff's statement that he had informed the trustee of his claims. See Hamilton, 270 F.3d at 784. Further, the Ninth Circuit appears to apply a judicial estoppel rule that does not take a nondisclosing plaintiff's intent into account. See id. at 783 (stating that judicial estoppel applies where the claim was not raised in the

reorganization plan, debtor schedule, or disclosure statement, and where the bankruptcy court "accepted" the nondisclosure). Thus, Horner's disclosure to the Trustee is evidence of her good faith despite the cases cited by the defendants.

Further, the bankruptcy court's order of March 27, 2003, which accounts for the "non-exempt proceeds of sexual harassment award, if any," reveals that the bankruptcy court was also aware of Horner's claims at the time her Chapter 13 plan was confirmed. Evidence that a plaintiff disclosed potential claims outside the context of her debtor schedule or disclosure statement weighs against a finding that the plaintiff deliberately concealed those claims from the bankruptcy court, particularly where (as here) defendants have provided no evidence that the plaintiff actually derived any appreciable benefit from the nondisclosure. See Ryan, 81 F.3d at 363-64.

Because there is evidence here that both the Trustee and the bankruptcy court were aware of Horner's claims, there is evidence on the record of Horner's good faith. Therefore, this case is distinguishable from Krystal, in which no evidence of good faith was identified by the Third Circuit.

Even if the theoretical incentives identified by defendants——to settle debts for less than their unpaid balances and to keep a potential windfall verdict for oneself——are

somewhat probative of a motive to conceal, any rebuttable presumption of bad faith raised thereby, see Krystal, 337 F.3d at 321, is overcome in this case by Horner's evidence of good faith. Horner's failure to raise her claims at the confirmation hearing is likewise insufficient evidence of bad faith, where the record shows that both the bankruptcy court and the Trustee already knew about the claims at that time. Cf. Ryan, 81 F.3d at 357, 365 (holding that district court erred in finding bad faith, though plaintiff failed to file an amended disclosure statement even after filing the lawsuit at issue).

Because the record contains insufficient evidence of Horner's bad faith, defendants have not met the second element of judicial estoppel, and their motion for summary judgment must be denied.

III. CONCLUSION

For the reasons expressed above, defendants' motion for summary judgment will be denied. The accompanying Order shall enter today.

Dated: January 28, 2005

/s/ Robert B. Kugler
ROBERT B. KUGLER
United States District Judge