UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

NICOLE H. HYDE
STEVEN C. HYDE

CASE NO. 00-62764

Debtors

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Under consideration by the Court is a motion filed on December 20, 2002, by Nicole H. Hyde and Steven C. Hyde ("Debtors") seeking an order revesting in them certain causes of action now pending in New York State Supreme Court, County of Onondaga ("State Court"), which arose after the Debtors filed a petition pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Opposition to the Debtors' motion was filed on January 8, 2003, by Mark

W. Swimelar, Esq., chapter 13 trustee ("Trustee"). Opposition was also filed on January 16, 2003, on behalf of Sam Dell Dodge Corporation and James A. Dinicola, defendants in the State Court action ("Defendants").

The motion was argued on January 21, 2003, and March 18, 2003, at the Court's regular motion terms in Syracuse, New York. The Court afforded the parties an opportunity to file memoranda of law, and the matter was submitted for decision on April 18, 2003.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS

Debtors filed their petition for relief pursuant to chapter 13 of the Code on May 31, 2000. Debtors' chapter 13 plan ("Plan") was confirmed by Order of this Court on October 4, 2000. Under the terms of the Plan, Debtors were to make 60 monthly payments of $410, producing a dividend to unsecured creditors to be "no less than 1 percent." Paragraph 13 of the Order confirming the Plan provides:

> That all property of the estate, including any income, earnings or other property which may become a part of the estate during administration of the case, which property is not proposed or reasonably contemplated to be distributable to claimants under the Plan, shall revest in the Debtor(s), provided, however, that no property received by the Trustee for the purpose of distribution under the Plan shall revest in the Debtors(s) except to the extent

> that such property may be in excess of the amount needed to pay in full all allowed claims as provided in the Plan. Such property as may revest in the Debtor(s) shall so revest upon the approval of the Court and the Chapter 13 Trustee.

On March 19, 2002, Debtors commenced a personal injury action in State Court as a result of an automobile accident involving Debtor Nicole Hyde, which occurred on August 11, 2000, approximately one and a half months after the Debtors filed their petition and approximately one and a half months before their Plan was confirmed. Debtors' bankruptcy counsel, James Selbach, Esq. ("Selbach"), was only made aware of the lawsuit when he was asked to represent them in the pending State Court action.[1] After advising the Debtors of their obligation to inform the Court and the Trustee of the pending personal injury action, Selbach filed the motion which is now before this Court. Debtors request that the causes of action arising from the automobile accident be revested in them *nunc pro tunc* to August 11, 2000, the date of the accident.

The Trustee asserts that pursuant to Code § 1306(a) property acquired by the Debtors during the pendency of the chapter 13 case is property of the estate. According to the Trustee, however, the Debtors are not prevented from pursuing these causes of action since the Debtors remain in possession of property of the estate and, therefore, the motion is actually unnecessary.

The Defendants take the position that the doctrine of judicial estoppel[2] prevents the Debtors from pursuing the causes of action in State Court since the Debtors failed to amend their

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[1] Allegedly, the original personal injury attorney was unaware of the Debtors' pending bankruptcy case.

[2] "'The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001), quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.30, p. 134-62 (3d ed. 2000).

schedules to include the personal injury action. Debtors respond that their failure to amend their schedules was unintentional and inadvertent, and they should be allowed to continue in State Court.

DISCUSSION

"It is well settled that a debtor's failure to list a legal claim as an asset in his or her bankruptcy proceeding causes the claim to remain the property of the bankruptcy estate and precludes the debtor from pursuing the claim on his or her own behalf." *George Strokes Electrical and Plumbing, Inc. v. Dye,* 240 A.D.2d 919, 920 (N.Y. App. Div. 1997) (citation omitted); *see also Weitz v. Lewin*, 251 A.D.2d 402 (N.Y. App. Div. 1998) (finding that "plaintiffs lacked standing to sue because they failed to properly list on their bankruptcy petition the present claims regarding assets about which they knew or should have known when their bankruptcy petition was filed (citations omitted)."); *Pinto v. Ancona,* 262 A.D.2d 472, 473 (N.Y. App. Div. 1999) (finding that plaintiff lacked the capacity to sue the defendant because his causes of action, which he failed to disclose in his petition, vested in the bankruptcy trustee); *Compton v. Depuy Orthopaedics, Inc.*, 2002 WL 1046698 at *1 (D. Mass. 2002) (granting defendants' motion for summary judgment dismissing plaintiff's complaint based on judicial estoppel due to her failure to disclose her interests in the district court action to the bankruptcy court); *Chandler v. Samford Univ.*, 35 F.Supp. 2d 861, 863 (N.D. Ala. 1999) (discussing the applicability of the doctrine of judicial estoppel and the fact that "[c]ourts of various jurisdictions have held that a debtor's assertion of legal claims not disclosed in earlier bankruptcy proceedings constitutes an assumption of inconsistent positions" (citations omitted)).

The five cases cited above, three of which were relied on by Defendants in support of their position, involved chapter 7 debtors who failed to list pending litigation in their schedules and statement of financial affairs.[3] The courts refused to permit those debtors to seek recovery in the pending litigation for their own personal benefit. As the court in *Dye* pointed out, the claim remained property of the estate despite the fact that the plaintiff/debtor was found to lack standing to continue the lawsuit. Thus, the fact that a chapter 7 debtor is found to lack standing does not necessarily bar the trustee in the bankruptcy case from suing in a representative capacity on behalf of the debtor's estate. *See Pinto,* 262 A.D.2d at 473.

There is a distinction to be drawn, however, between a chapter 7 debtor and a chapter 13 debtor, as was discussed by the court in *Murray v. Board of Educ. of City of New York*, 248 B.R. 484 (S.D.N.Y. 2000). In *Murray* the defendants initially argued that the chapter 13 debtor lacked standing to continue with the lawsuit in district court since she had failed to list it in her schedules and statement of financial affairs. The district court, relying on *Olick v. Parker & Parsley Petroleum Co.,* 145 F.3d 513 (2d Cir. 1998), concluded that the chapter 13 debtor retained standing to maintain the lawsuit despite her failure to list it as an asset in her schedules. *Murray*, 248 B.R. at 486.

With respect to the defendants' argument in *Murray* that the debtor was judicially estopped from pursuing her claims because of her failure to disclose them as assets in her schedules, the district court indicated that in the absence of a showing that the plaintiff had acted

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[3] *Chandler* involved a debtor that had filed a chapter 13 petition. Her case was converted to chapter 7 a month after she filed a charge with the Equal Employment Opportunity Commission against her former employer. She failed to amend her schedules and received a discharge in the "no asset case." "[P]laintiff's counsel attempted to amend the 1996-97 bankruptcy proceeding to reflect this information, but the trustee expressed no interest in re-opening the matter." *Chandler*, 35 F. Supp. 2d at 863.

in bad faith or with the intent to mislead the court, defendants' argument was without merit. *Id.* at 487. In addition, the district court commented that the defendants' argument that the plaintiff should not profit at the expense of her creditors was illogical. *Id.* The district court pointed out that the bankruptcy court's order provided that the proceeds of any settlement or jury award in the lawsuit would be made available to the chapter 13 trustee for distribution to the debtor's creditors. *Id.*

The cases discussed above all focused on debtors that were involved in litigation or were aware of the potential for litigation when they filed their bankruptcy petitions. Such was not the case in *Donato v. Metropolitan Life Ins. Co.*, 230 B.R. 418 (N.D. Cal. 1999). In that case, the debtor filed a chapter 13 petition on October 2, 1997. Four days later on October 6, 1997, she was terminated from her employment with Metropolitan Life. She filed a complaint against her former employer on December 11, 1997, with the California Department of Fair Employment and Housing, alleging wrongful termination, discrimination and related claims. *Id.* at 420. On March 16, 1998, she filed a complaint against Metropolitan Life with the United States Equal Employment Opportunity Commission. Finally, on May 26, 1998, she commenced an action in district court asserting various causes of action. *Id.* In the interim, on March 20, 1998, she had amended her income and expense schedules in her bankruptcy case but failed to amend her schedules to reflect the pending litigation.

The defendant sought judgment on the pleadings, arguing that the debtor lacked standing and was judicially estopped from continuing with the litigation given the fact that she had failed to list it as an asset in her bankruptcy petition. Like *Murray*, the court in *Donato* was persuaded by the reasoning of *Olick*, quoting the Second Circuit for the premise that "'the reality of a filing under Chapter 13 is that the debtors are the true representatives of the estate and should be given

the broad latitude essential to control the progress of their case.'" *Id.* at 425, quoting *Olick*, 145 F.3d at 515. Accordingly, the court in *Donato* concluded that the debtor had "concurrent standing with the chapter 13 trustee to litigate her causes of action against MetLife." *Id.*

On the issue of judicial estoppel, the court in *Donato* distinguished several cases cited by the defendant in which the plaintiff/debtor would have received a windfall if the litigation had been allowed to proceed and the plaintiff/debtor had prevailed. *See Donato*. 230 B.R. at 424, citing, e.g., *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993). The court in *Donato* pointed out that allowing the debtor to proceed with the litigation would not result in a windfall to her because her plan provided for 100% dividend to all of her creditors. *See Donato,* 230 B.R. at 424.

Unlike the situation discussed in the above-referenced cases, with the exception of *Donato,* the causes of action in which the Debtors now seek to be revested did not exist at the time the Debtors consulted Selbach in connection with the filing of their bankruptcy petition. The Defendants, other than suggesting that the Debtors should have known that they were required to amend their schedules once they commenced their lawsuit based on their prior bankruptcy filings,[4] have provided no credible evidence to substantiate their argument that the Debtors' failure to amend their schedules was not inadvertent.[5] Accordingly, Defendants contend

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[4] Debtors had previously filed a chapter 13 petition on February 9, 1998, which was dismissed on May 1, 2000. Debtor Nicole Hyde also admitted to having filed a chapter 7 proceeding individually in May of 1990 under her maiden name of Cyr for which she received a discharge on January 31, 1991. *See* Exhibit A, attached to Affirmation of Mark J. Halpin Esq., sworn to on March 14, 2003.

[5] This Court notes that the district court in *Murray*, in *dicta*, commented that even if the defendants had been able to establish that the plaintiff's failure to include the lawsuit on her schedules of assets was not inadvertent, it would have been irrelevant in the chapter 13 context. *Murray*, 248 B.R. at 486. This Court makes no finding in this regard.

that the Debtors' failure to amend their schedules was not inadvertent. The Court is not persuaded by this argument. Despite having previously filed a chapter 13 petition, the Court finds it reasonable to believe that the Debtors were unaware that they were required to amend their schedules following the automobile accident in August 2000 to reflect the potential for litigation or to reflect the fact that they commenced litigation in March of 2002. Certainly, if it had been the Debtors' intent to conceal the litigation, they would not have approached their bankruptcy attorney to handle the State Court action. There is no indication that the Debtors have deliberately manipulated the courts for their own personal benefit. In fact, it is their motion that is now before the Court; not a motion in State Court by the Defendants seeking dismissal of the complaint. Under these circumstances, the Court concludes that judicial estoppel is inapplicable.

Furthermore, based on the Second Circuit's decision in *Olick*, as well as those of *Murray* and *Donato*, it is clear that the Debtors have standing to pursue their lawsuit in State Court. Under the terms of the Plan, however, any monies received in settlement or in the context of a trial shall revest in the Debtors only after the Trustee has paid the allowed claims in full.

Based on the foregoing, it is hereby

ORDERED that the Debtors have standing to pursue the litigation in the State Court; it is further

ORDERED that the proceeds from any settlement or jury verdict in favor of the Debtors in the State Court action shall be paid initially to the Trustee; and finally it is

ORDERED that any surplus from the proceeds, after payment of the Debtors' unsecured creditors in full by the Trustee, shall vest in the Debtors.

Dated at Utica, New York

this 30th day of July 2003

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge