

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-80575-WRS
Chapter 13

GLORIA GERDINE,

Debtor.

GLORIA GERDINE,

Plaintiff,

v.

Adv. Pro. No. 03-8025-WRS

PHIL ALAN SMITH,

Defendant.

MEMORANDUM DECISION

This Adversary Proceeding comes before the Court upon stipulated facts. This matter was called for a pretrial conference on February 10, 2004. At that time, the parties agreed that there were no facts in dispute and that the Court could take this matter under advisement upon its record. The Court will treat this Adversary Proceeding as having come before it on cross motions for summary judgment.

I. Facts

Plaintiff Gloria Gerdine (“Gerdine”) filed a petition in bankruptcy in this Court on April 16, 2003, pursuant to Chapter 13 of the Bankruptcy Code. At that time, she owned a residence in Randolph County, Alabama, which was subject to a mortgage in favor of Defendant Phil Alan Smith (“Smith”). The complaint alleges that the balance of that mortgage is \$21,864.00, as of the date of the petition. In addition, Gerdine owns a 1991 Nissan 240 SX. Smith holds a security interest in the

automobile securing an indebtedness in the amount of \$3,446.00. Gerdine alleges in Schedule B that the automobile is worth \$600.00.

Gerdine filed a Chapter 13 Plan at the same time she filed her petition in bankruptcy. (Doc. 2). She amended her plan on September 9, 2003 (Doc. 14) and the Court confirmed the amended plan on September 12, 2003. (Docs. 15, 17). The plan provides for payment of the indebtedness secured by the mortgage upon the residence, contingent upon the resolution of this proceeding; however, no provision is made for payment on the indebtedness secured by the automobile.

Defendant filed a Chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Alabama, Eastern Division, on May 9, 2002, under Case No. 02-41572. Smith did not list his interest in the property in Randolph County (by virtue of the mortgage in his favor) or his security interest in the Nissan in his bankruptcy schedules. Moreover, these debts owed by Gerdine to Smith are a species of personal property and were not reflected on Smith's schedules. Smith's Chapter 13 bankruptcy case was dismissed on January 7, 2003.

II. Discussion

The question presented is whether Smith's failure to schedule the indebtedness owed to him by Gerdine in his bankruptcy proceeding bars him from making a claim in the present case. While the parties have stipulated to the facts, neither has filed a brief, leaving the Court to conduct its own legal research, unaided by the parties. Based upon its analysis of the legal issues, the Court finds that the doctrine of judicial estoppel does not preclude Smith from advancing his claims here. The Court will, by way of a separate order, dismiss the Plaintiff's complaint.

Gerdine contends that the doctrine of judicial estoppel precludes Smith from making a claim in

this bankruptcy proceeding because he failed to schedule the debts owed by her to him in his bankruptcy case. The doctrine of judicial estoppel is an equitable doctrine which is applied to prevent a party from taking inconsistent positions before different courts. Barger v. City of Cartersville, Georgia, 348 F.3d 1289, 1293 (11th Cir. 2003); DeLeon v. Comcar Industries, Inc., 321 F.3d 1289, 1291 (11th Cir. 2003); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002). The basic fact pattern in these three cases is as follows. A debtor who has a cause of action against another party files bankruptcy. In bankruptcy, the debtor is required to file schedules which list all of his property, including any claims or causes of action. The schedules are signed by the debtor under the penalties for perjury. However, the debtor fails to list the cause of action. Later, the debtor brings suit on his cause of action. The defendant then seeks to bar the claim on the grounds that the debtor has taken inconsistent positions in the two courts. These cases typically turn on the facts and circumstances surrounding the nondisclosure of the cause of action.

The Burnes case is a typical application of the doctrine of judicial estoppel. In Burnes, a debtor brought suit for employment discrimination against his employer six months after he filed his petition in bankruptcy. The Court examined the surrounding facts and circumstances and found that there was “sufficient evidence from which to infer intentional manipulation by [the debtor].” Burnes, 291 F.3d at 1287-88.

In the case at bar, Smith owns vested property interests: (1) a mortgage on Gerdine’s residence and (2) a security interest in her automobile. Even if Smith willfully failed to disclose these property interests, they do not cease to exist. The purpose of the doctrine of judicial estoppel is to prevent manipulation of the legal system. It bars a litigant from asserting inconsistent positions. The

doctrine is not so powerful that it would result in the forfeiture of a vested property interest upon a debtor's failure to disclose it in a bankruptcy case. Gerdine has not cited the Court to any authority for the proposition that the failure to disclose a property interest causes a forfeiture of the property interest, nor has the Court found any such authority.

The Court is concerned about the implications of the claim advanced by Gerdine in this proceeding. Schedules and Statements filed in bankruptcy proceedings should be as accurate as is reasonably possible. A variety of civil and criminal penalties may be imposed against one who files false bankruptcy schedules. One who has knowledge that bankruptcy schedules are inaccurate should bring the matter to the Trustee's attention. It does not appear that that has been done in this case. The Court will send copies of this Memorandum Decision and the Court's Judgment to Marvis Willingham, the Trustee in Smith's bankruptcy case, as well as to the Court.¹

Gerdine has a second and potentially more serious problem with her claim. She does not allege that she has evidence of any intentional wrongdoing on the part of Smith. In Burnes, the Eleventh Circuit stated that "the doctrine of judicial estoppel applies in situations involving intentional contradictions, not simple error or inadvertence." Burnes, 291 F.3d at 1286 (citing American Nat. Bank of Jacksonville v. Federal Deposit Ins. Corp., 710 F.2d 1528, 1536 (11th Cir. 1983)). Because there is no evidence of intentional wrongdoing on the part of Smith, judicial estoppel does not apply in this instance.

¹ This referral should not be construed as a finding by this Court that Smith has done anything wrong. At this point in time, this Court is doing nothing more than noting an inconsistency and bringing it to the attention of the appropriate officials in the Northern District of Alabama for such action as they may find is appropriate.

In sum, the Plaintiff's complaint will be dismissed for two reasons. First, the doctrine of judicial estoppel is designed to prevent a litigant from maintaining inconsistent positions in different courts. The doctrine does not operate in a way that would cause a forfeiture of a vested property interest simply because the property interest was not disclosed in a prior bankruptcy proceeding. Second, there is no claim that Smith's conduct was in any way culpable or wrongful. As Gerdine has not shown that Smith's misstatement in his bankruptcy proceeding was intentional, she does not prevail here. The Court will enter judgment by way of a separate document.

Done this 16th day of March, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

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